



**Kimatu (Suing on behalf of the Estate of John Kimatu – Deceased) v Kithinji & 4 others
(Miscellaneous Application 5 of 2022) [2022] KEELC 2548 (KLR) (13 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2548 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
MISCELLANEOUS APPLICATION 5 OF 2022**

**CK NZILI, J
JULY 13, 2022**

BETWEEN

**RAEL KAMBURA KIMATU (SUING ON BEHALF OF THE ESTATE OF JOHN
KIMATU – DECEASED) APPLICANT**

AND

**FERDINARD KITHINJI 1ST RESPONDENT
JULIUS KINYUA 2ND RESPONDENT
MISCHECK MATHETA KABERIA 3RD RESPONDENT
THE DISTRICT LAND ADJUDICATION OFFICER 4TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT**

RULING

1. The application before the court is the one dated December 27, 2021 seeking for leave to file an appeal out of time. It is supported by a sworn affidavit of Rael Kambura Kimatu. The grounds given are that judgment at the lower court was delivered on March 15, 2021 following which the applicant made an application for review dated March 31, 2021 which was dismissed by a ruling delivered on August 2, 2021.
2. The applicant states she has an arguable appeal with high chances of success, and stands to lose her land given there is new and important evidence which her lawyers then on record failed or neglected to call during the hearing.
3. The application is opposed by the 3rd respondent through a replying affidavit sworn on March 4, 2022. The grounds are that the applicant failed to appeal against the judgment and instead sought for review on the basis that the 4th respondent possessed a report over the subject land which apparently was prepared after the ruling. That the application is brought ten months after the judgment was delivered.



- That no explanation has been given for the inordinate delay in not filing the appeal within 30 days. That he is the registered owner of the suit land which has a complete residential building. That it is not true he was putting up new buildings thereon since he has been in occupation from 2016 after he bought the land from the 1st respondent.
4. That no fraud or illegality over the acquisition had been raised or material produced to show that he was occupying the applicant's land hence the trial court was right to decline the prayer for removal of the land from its current location. That if at all the applicant has any problem with the process of adjudication that resulted in the registration of his land, she would have challenged the same through the adjudication internal processes. That the applicant was yet to pay costs and was out to prolong unnecessary litigation.
 5. Through oral submissions, counsel for the applicant relied entirely on the application while Mr. Nkunja counsel for the respondent submitted the applicant must give good reasons why the appeal was not filed on time for the court to exercise discretion in her favour. Counsel relied on the case law of *Leo Sila Mutiso vs Rose Hellen Wangari* Civil Application No. 255 of 1997 (unreported). Counsel reiterated no sufficient reasons for the delay which he termed inordinately long had been given. Counsel insisted the alleged appeal stood no chances of success since the issue revolved around an alleged superimposition of the land on the applicant's parcel yet no survey reports had been produced before the trial court to demonstrate the 3rd respondent's land was on top of the applicant's parcel.
 6. Counsel for the applicant in reply submitted the explanation for the delay had been given in paragraphs 10 & 11 of the supporting affidavit. About the chances of success of the intended appeal, counsel submitted the draft memorandum of appeal had various grounds which the trial court had failed to consider especially the shifting of the land from the sheet map. Counsel therefore urged this court to exercise its discretion and allow the application.
 7. This court is being asked to exercise its discretion under Order 42 Rule 6 *Civil Procedure Rules* as read together with Section 799 of the *Civil Procedure Act*.
 8. It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court.
 9. The Supreme Court in *Nicholas Kiptoo Korir Salat vs IEBC & 7 others* (2014) eKLR, settled the principles applicable as follows; that an extension of time is not a right of a party but an equitable remedy only available to a deserving party which has the burden to lay a basis to the satisfaction of the court; the discretion is a consideration on a case to case basis; reasonable reasons for the delay should be explained to the satisfaction of the court; whether there will be any prejudice to be suffered by the respondents if the extension is granted; whether there has been inordinate delay in filing the application and the public interest in extending time.
 10. The applicant's main ground in this application is that she initially sought for the review of the judgment after the surveyor's report was prepared which application was dismissed on August 2, 2021. Between August 2, 2021 and February 8, 2022 the applicant has not explained why she did not file the application at all. Assuming the delay was caused by the typing of the proceedings, again there is no indication when the letter dated August 3, 2021 was received by the court registry and more importantly when the proceedings and ruling was collected by the applicant from the registry.
 11. Coming to the issue of the right to appeal the applicant states she lost her case out of a mistake and or neglect by her then lawyers to avail crucial evidence. The applicant filed an amended plaint dated February 29, 2020 seeking for a permanent injunction against the respondents over L.R Amwathi/ Maua/5202 and an order directing the District land registrar and land surveyor Igembe to correct



- the map and remove the 3rd respondents parcel No. Amwathi/Maua/6580 from her land so that its measurements tallies with the title deed to the extent of 0.10 acres.
12. The record of the lower court shows the applicant did avail any expert witness or report in support of her allegations over fraud and collusion against the respondents.
 13. In its judgment the trial court held the applicant had failed to call a government surveyor or private surveyor to resurvey the two parcels of land and confirm the sizes hence was unable to prove a case against the respondents.
 14. Instead of appealing the said judgment, the applicant opted to file an application for the review of the judgment, leave to call the 4th respondent for cross examination and present all the records over the two parcels of land. The applicant urged the court to find there was no scene visit to ascertain the boundaries. She now blames her erstwhile advocates for occasioning her injustice which should not be visited upon her.
 15. She further relied on a report by the District Land Adjudication & Settlement Officer (DLASO) Igembe which report she maintains was new and crucial evidence. The 3rd respondent opposed the application particularly on the alleged new evidence maintaining that it had been procured without his involvement and was likely to open a pandora's box leading to undesirable results.
 16. This court in determining whether or not to extend time must consider all the parameters bearing in mind that a party has a constitutional right to be heard on merits while at the same time balancing with the interests of the opposite party who should not be prejudiced.
 17. In this matter the applicant appears to have sought to look for fresh evidence after losing her claim and which fresh evidence was allegedly procured without involving the 3rd respondent.
 18. Additionally, the applicant opted to seek for review. After losing the application for review she now reverts to this court seeking for leave to appeal not against the application for review which was dismissed on August 2, 2021 but not the judgment made on March 15, 2021.
 19. Looking at the draft memorandum of appeal the blame by the appellant has been placed on the 3rd respondent. The trial court made a definite finding that the appellant had failed to call the 3rd respondent to substantiate the report in order to prove her case. The trial court made a finding that there was no land surveyors report before the court since the land was already falling under The Land Registration Act and not the Land Adjudication Act. The applicant's intended appeal is against the respondents among them the 3rd respondent. The applicant has not told this court if she has a surveyor's report which has definite findings in her favour and perhaps which evidence would be crucial to her appeal.
 20. The 3rd respondent has strongly stated he would be highly prejudiced by the attempts to reopen the case when the applicant failed to procure evidence before filing the suit and now wants to file an appeal after losing an application for review.
 21. In my view a party coming to court must be clear on what he wants and make choices knowing each choice has legal consequences.
 22. The applicant opted for review and not an appeal. She has a result prejudiced the respondents. There is nothing to explain the lapse of close to six months between August 2, 2021 and February 2022, when this application was filed.



23. Further there it is in the interest of justice and also public interest that the right of a successful party must be balanced with those of an unsuccessful party costs were ordered to be paid but there is nothing to show that the applicant complied with that order.
24. This court has also to consider that notwithstanding the inordinate delay of justice can still be done to the parties.
25. In absence of new and concrete expert report and evidence at the possession of the applicant, I find that the justice of the matter requires that I disallow the application with costs to the respondents. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 13TH DAY OF JULY, 2022

In presence of:

Gikonyo for applicant

Kaberia for 3rd respondent

HON. C.K. NZILI

ELC JUDGE

