



Yeri v Registrar of Titles Mombasa & 2 others; Gao Yu International Company Limited & 4 others (Interested Parties) (Environment and Land Constitutional Petition 11 of 2013) [2022] KEELC 3618 (KLR) (12 August 2022) (Ruling)

Neutral citation: [2022] KEELC 3618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 11 OF 2013**

MAO ODENY, J

AUGUST 12, 2022

**THE CONSTITUTION OF KENYA PROTECTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS OF TH INDIVIDUAL PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF ARTICLES 20[1] AND ARTICLE 22 OF THE CONSTITUTION

AND

**IN THE MATTER OF ARTICLE 40[1], [2], 48 AND
ARTICLE 23[1] [3] OF THE CONSTITUTION**

IN THE MATTER OF THE LANDS TITLES ACT CAP 282

AND

IN THE MATTER OF LANDS ACT OF 2012

AND

IN THE MATTER OF LANDS TITLES NO. 641 AND 642 MAMBRUI, KILIFI COUNTY

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

BETWEEN

JOSEPH KASENA YERI PETITIONER

AND

REGISTRAR OF TITLES MOMBASA 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT



AND

GAO YU INTERNATIONAL COMPANY LIMITED INTERESTED PARTY
GOLDEN SEA MAMBRUI LIMITED INTERESTED PARTY
GOLDEN BEACH MAMBRUI INTERESTED PARTY
AMINA SAID ABDALLA INTERESTED PARTY
SWALEH SAID INTERESTED PARTY

RULING

1. This ruling is in respect of a Notice of Motion dated January 19, 2021 by the Petitioner seeking the following orders: -
 - a) Spent
 - b) Spent
 - c) That leave be granted to the Petitioner/applicant to appeal the decision/judgment of the Honourable Court (Hon JO Olola) dated November 5, 2020 and in the alternative be allowed to file a Notice of Appeal out of time.
 - d) This Honourable Court be pleased to stay any or all further proceedings herein pending appeal to Court of Appeal.
 - e) That costs of this application be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Petitioner/Applicant's Submissions

3. The Petitioner relied on the grounds on the face of the application together with the supporting affidavit of Joseph Kasena Yeri whereby he deponed that the Petition was declared res judicata the Case No 59 of 1994 filed by the 2nd and 3rd Interested Parties and this court proceeded to dismiss the same on November 5, 2020 in the absence of all the parties herein.
4. The Applicant stated that he only became aware of the impugned Judgment after lapse of time within which an appeal can be filed. It was the Applicants case that the reason for the delay in filing the appeal was due to the demise of his advocate on record, Mr Gunga of the firm of Gunga and Company Advocates.
5. Counsel submitted that the right to extend time to file an appeal out of time is discretionary and guaranteed under Rule 4 of the Court of Appeal Rules as it was held the case of *Vishva Stone Suppliers Company Limited v RSR Stone* [2006] Limited [2020] eKLR. Counsel further submitted that the unfavourable circumstances were beyond the Petitioners control hence should not prejudice the Petitioner's right to a fair hearing guaranteed under Article 50 of the *Constitution* and that Article 159 (2) (d) of the *Constitution* provides that justice should be administered without undue regard to technicalities.
6. Counsel relied on the cases of *Joseph Gitai Gachau & another v Pioneer Holdings [A] Limited & 2 others* quoted in *Josephine Koki Raymond v Philomena Kanini Maingi, personal representative of*



Maingi Musila Mutava{deceased} and another [2018] eKLR; and Damji Pragji Mandavia v Sara Lee Household & Body Care Limited, NBI Civil App No 345 of 2004, and submitted that the that the Petitioner's intended appeal raises arguable issues hence the orders sought herein should be allowed as prayed.

1st, 2nd and 3rd Interested Parties Submissions

7. Counsel submitted on the principles that guide a court in considering an application for extension of time within which to appeal under Rule 4 of the Court of Appeal Rules or Section 7 of the Appellate Jurisdiction Act and relied on the cases of Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR who cited with approval the case of Loise Chemutai Ngurule & Another v. Winfred Leshwari Kimung'en & 2 Others (2015) eKLR, Stanley Kaboro Mwangi & 2 others v Kanyamwi Trading Company Limited (2015) eKLR, Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231 and Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR.
8. Counsel identified three issues for determination by the court as follows: -
 - a) Whether the Application has been brought without undue delay;
 - b) Whether there was reasonable reason for delay; and
 - c) Whether there will be any prejudice suffered by the Respondents if the extension is granted
9. On the first issue whether the application has been brought without undue delay, counsel submitted that Rule 75(20) of the Court of Appeal Rules provides that a Notice of Appeal to the Court of Appeal ought to be lodged within 14 days of the delivery of the impugned decision, therefore the Applicant ought to have filed a notice of appeal by November 20, 2020 and that the delay of 82 days from the date of judgment and 67 days from the is inordinate. Counsel relied on the Court of Appeal case of George Kagima Kariuki & 2 others v George M Gichimu & 2 others [2014] eKLR where the court held that the law does not set out any minimum or maximum period of delay and that delay should be explained.
10. It was counsel's further submitted that the Applicant has not given any sufficient reason for the inordinate delay in filing this application. Further counsel submitted that it is not factually correct to claim that the judgment was delivered in the absence of the parties as the record shows that the Applicant was present together with his counsel and relied on the case of County Executive of Kisumu v County Government of Kisumu & 8 other [2017] eKLR citing Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No 16 of 2014.
11. Further that the Petitioner stated that Mr Gunga passed away on December 27, 2020 which was after the statutory timeline for lodging a Notice of Appeal had lapsed. The Petitioner alluded to the demise of his former advocate which counsel submitted that the same did not in any way affect the timelines since time had already lapsed by the time the advocate passed on.
12. On the issue whether that Applicant has an arguable appeal, counsel submitted that the Petitioner's application was filed without a draft Notice of Appeal and a draft Memorandum of Appeal, hence it does not present an arguable ground of appeal as he has not placed sufficient material before this Honourable Court to determine whether the intended appeal is arguable and relied on the case of Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No 227 of 2015.
13. It was counsel's submission that the Petitioner's grievance is with a decision delivered in 1994 and has since tried to reverse that decision by filing the following multiple suits:-



- a) HCCC No 135 of 1993- where he sought the cancellation of the Certificate of Ownership issued to the 4th Interested Party.
 - b) JR No 135 of 2013- where he challenged the allocation of the suit properties on grounds that the properties were not surveyed where he again abandoned the suit.
 - c) Malindi ELC No 114 of 2013 filed against the 2nd and 3rd Interested Parties. He also abandoned this suit and lodged this instant petition being ELC No 11 of the 2013
14. Counsel submitted that the intended appeal has no chances of success and submitted that litigation must have finality and relied on the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2007] eKLR.
15. On the issue as to whether there will be prejudice suffered by the Respondents if the orders sought are granted, counsel submitted that the Respondents have made developments on the suit property and are in the process of putting up commercial developments thereon hence they are likely to suffer prejudice if the application is allowed.

Analysis And Determination

16. Rule 75 of the *Court of Appeal Rules* stipulates that a Notice of Appeal should be filed within 14 days from the date of the decision.

75. Notice of appeal

- (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
- (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

17. Similarly, Section 7 of the *Appellate Jurisdiction Act* gives this court power to extend time to file an appeal. That Section reads: -

Section. 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

18. In the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 (*supra*) the court held as follows: -

It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”



19. This was reiterated further in the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No 190 of 2019 where the court held that: -
- “Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”
20. The power to extend time within which an appeal should be filed is discretionary and it is incumbent upon the Applicant to satisfactorily convince the court why the discretion should be exercised in his favour.
21. Coming to the current case, it is on record that the judgment the Applicant intends to appeal against was delivered on 5th November 202 therefore the time within which a Notice of Appeal was to be filed lapsed on November 20, 2020 and this application was filed on January 26, 2021.
22. An Applicant must explain the reason for the delay in filing the Notice of Appeal as there is no mathematically set down what amounts to inordinate delay as 4 days or 3 days might amount to inordinate delay while 4 or 5 years might not be considered to amount to inordinate delay. These depends on the circumstances of each case and the plausible explanation given.
23. The reason given by the Applicant is that the judgment was delivered in the absence of both his counsel and himself but from the court record it shows that on the particular date, Mr Shujaa counsel holding brief for the late Mr Gunga counsel for the Petitioner was present in Court whereby the Court recorded that judgment was delivered in open court in the presence of all parties. This reason is therefore not plausible as it is based on falsehood.
24. The Petitioner further contends that the delay was occasioned by the demise of his then advocate which is also not factually correct as the Petitioner indicated that his advocate passed on December 27, 2020 long after the time had lapsed and long before he decided to file the present application.
25. I find that the Petitioner has not sufficiently explained the delay in filing the Notice of Appeal and has treated the court to a circus of half-truths which works against his bid to have the court to exercise its discretion in his favour.
26. As regards the chances of success of the Intended Appeal, the Petitioner contends that it has an arguable appeal but he did not annex a draft Memorandum of Appeal for the court to determine whether the Petitioner’s. In the circumstances I do not find that the Applicant has satisfied the court to exercise its discretion in his favour.
27. Finally, the Applicant had sought for stay of the proceedings and any orders thereof but did not address this limb of the application. In the absence of any pending appeal no stay orders can arise as it would be stay pending what as was held in the case of *Board of Governors, Moi High School Kabarak & Another v Malcolm Bell*. The court in this case held that the principle objective is to preserve the subject matter of an appeal whereby the Applicant must satisfy the Court that the Intended Appeal is arguable and not frivolous, and that unless the stay order sought is granted, the appeal or Intended Appeal would be rendered nugatory. I find that the prayer for stay is superfluous as there is no subsisting appeal.



28. The upshot is that the application dated January 19, 2021 is hereby dismissed with costs to the Interested Parties.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF AUGUST, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

