



**Kokwo v Akokor (Environment and Land Miscellaneous Application
12 of 2022) [2022] KEELC 12678 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12678 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 12 OF 2022
FO NYAGAKA, J
SEPTEMBER 28, 2022**

BETWEEN

SOLOMON PKIACH KOKWO APPLICANT

AND

VERONICA C AKOKOR RESPONDENT

RULING

1. The applicant herein, Solomon Pkiach Kokwo, filed in this court a Notice of Motion dated June 21, 2021. The motion was brought under article 159(2) (d) of *Constitution*, section 79 of the *Civil Procedure Act*, chapter 21 of the Laws of Kenya and order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provisions of law. He sought in three prayers, namely,
 - (1) That the honourable court be pleased to enlarge time within which the applicant should file an appeal to this court against the ruling of the Principal Magistrate's Court at Kapenguria which was read on March 8th, 2022 in Kapenguria PMC Land Case No 5 of 2020.
 - (2) That the time within which the appeal should be filed be fixed by the court.
 - (3) That the costs do abide the result of the intended appeal.
2. The application was based on four (4) grounds which are that the applicant was aggrieved by the decision of the trial magistrate which dismissed his suit for want of prosecution; there was delay and a breakdown in communication between the advocate who had been requested to hold brief when the ruling was delivered and the advocates on record; the application was brought without undue delay; and no prejudice which cannot be remedied by costs would be suffered by the respondent in case the application is allowed.
3. The application was supported by the affidavit of Isaac Ndarwa Kiarie, learned counsel for the applicant, which was sworn on June 21, 2022. In it the learned counsel whose law firm was in conduct



of the suit in the lower court stated how he instructed counsel, one Mr Moraisi Kaosa to hold brief on March 08, 2022 in Kapenguria PMC Land Case No 5B of 2020 (sic). The said suit was due for ruling on that date, Mr Kaosa took the ruling but forgot to get back to the instructing counsel who due to pressure of work also failed to follow up on the feedback. He annexed a copy of the ruling as INK 1. He emphasized that the application was for dismissal was in relation to the period of the Covid-19 pandemic and the court ought to have considered in favourably in light of the obtaining circumstances. He annexed a copy of the Draft Memorandum of Appeal as INK 3 and pleaded for the court to allow the application since no prejudice would be occasioned to the respondent if it was allowed.

4. The application was opposed. It too was opposed through a replying Affidavit sworn by learned counsel. It was sworn on June 24, 2022 and filed on June 27, 2022. In it he deponed that the application was misconceived, bad in law and an abuse of the due process of the law; applicant was indolent; in speeding up litigation of matters, article 159(2b) provides that justice shall not be delayed; the applicant filed Kapenguria PMC Land Case No 5 of 2020 on February 6, 2020 and went into holiday (sic) for 2 years until when he was woken up by the respondent's application dated December 3, 2021 to dismiss the suit for want of prosecution; the applicant did not have sufficient reasons to convince the court as to why he did not prosecute his case and hence its dismissal; ruling in the suit was to be delivered on March 8, 2022 and was promptly so done; learned counsel who held brief had not sworn an affidavit to confirm that the applicant's advocates requested him to hold brief on the material date and that he forgot to get back to him; it was the duty of the applicant's advocate to follow up to know what transpired in court and not counsel who held brief; it was more than 3 months since the delivery of the ruling and the applicant had not explained the delay in bringing the instant application; the applicant had not applied for proceedings and neither had he attached a copy of the intended appeal for this court to consider; and the trial court considered the fact that the plaintiff still was not ready to proceed with the hearing and instead prayed for time for a matter in Kitale to be determined.
5. At the end of the time fixed for the responses, parties were required to file written submissions to be considered in disposing of the matter. The applicant filed his on July 4, 2022 while the respondent filed hers on July 6, 2022. The applicant basically urged this court in the submissions to consider the history of the matter, which he gave briefly. He stated that after the plaintiff filed the suit under reference in the lower court in Kapenguria court, the respondent filed a miscellaneous application over the same subject matter in the Kitale Environment and Land Court in ELC Misc Appl No 7 of 2020 (OS). The applicant challenged it by way of a preliminary objection which was yet to be determined as at the time of the determination of the application that gave rise to the impugned ruling of March 8, 2022. He stated that jurisdiction to extend time by the court was discretionary and that the court would be required to consider three issues. These were whether there was unreasonable delay in bringing the application, whether the delay was explained, and whether the respondent's hands were clean. Regarding delay, he explained that two months was not a long period of time given the fact of communication breakdown between the learned counsel. On this he relied on the case of *Vishva Stone Suppliers Limited v RSR Stone* [2006] Limited [2020] eKLR where the Court of Appeal considered the period of more than a year and two months and an additional of three months of certified delay as not unreasonably long. About the explanation for the delay, he submitted that he had given the same which he attributed to communication breakdown between learned counsel who held brief on the material date and the instructing law firm. Regarding unclean hands, the applicant submitted that the fact of the respondent instituting parallel proceedings in the ELC to those of the impugned trial court matter was in itself uncalled for hence the respondent did not come to court with clean hands.
6. The respondent submitted that the application was merely intended to delay the fair process of the court and that the applicant had not told the court how he was aggrieved by the trial court's decision sought to be appealed from. He stated further that a period of two years of non-prosecution of the



lower court matter was long enough to warrant the orders sought to be appealed from. He then stated that Mr Kaosa, learned counsel who was said to have held brief on the material date had not sworn an affidavit to confirm that he was instructed to hold brief and that he failed to inform the applicant's counsel. Furthermore, he submitted that it was not the duty of Mr Kaosa to inform the applicant's counsel on the outcome of the case but counsel ought to have acted diligently. He then repeated the contents of the Relying Affidavit. Curiously, he submitted that even at the time of the delivery of the ruling the applicant was not ready to prosecute his case.

Issues, Analysis and Determination

7. I have carefully considered the application, the affidavit in opposition, the statutory and case law cited. I have also taken into account the submissions on record. I am of the view that the following are the issues for determination herein:
 - a. Whether the application dated June 21, 2019 has merits
 - b. Who to bear the costs of the application and final orders
8. I now begin the analysis of the matter before me.
 - a. Whether the application dated June 21, 2019 has merits
9. First of all, while enlargement of time to file an appeal is a procedure provided in the law, its application follows the principles of equity. Extension of time is not an automatic right for a party, even though it be constitutional. One has to demonstrate deserving circumstances. When handing an application for extension of time, the court exercises discretion. That is to be done judiciously and not in a capricious manner. The discretion is wide. But the applicant bears the onus of explaining to the satisfaction of the court the reasons for the delay.
 1. In order for an applicant to succeed in an application for extension of time to file an appeal from a judgment or ruling of the trial court, he has to fulfil a number of conditions. These must not necessarily be exhausted as a laundry of all. Be that as it may, the Supreme Court summarized them in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. In it the court stated as follows:

“Under-lying principles that a court should consider in exercise of such discretion:

 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and



7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

11. Since the principles are succinctly clear, I now proceed to apply them to the facts of the instant case. Many factors come into play when a party prays for such orders in a court of law. For instance, he ought to have been vigilant, exercised good faith and come to court with clean hands, and many others. Thus, any delay, however small has to be explained sufficiently. Where the delay is not on the part of the applicant he will be freely granted the orders sought.
12. In the instant case, the applicant stated that the reason for the delay in lodging the appeal in time. He stated through his learned counsel that he gave another counsel to hold his brief but the counsel acting as the agent in taking the ruling subsequently did not update him and it escaped the memory of the instructing counsel until it was late in the day. Here is a case where learned counsel is owing to a mistake on his part on oath. The respondent through learned counsel was not convinced that this was sufficient and that the advocate who was instructed to hold brief should have also sworn and affidavit to demonstrate those circumstances. Much as I agree with counsel that an affidavit by the counsel who held brief would explain deeper his failure to communicate, there is, in my humble finding, enough evidence on oath that there was communication breakdown between the applicant’s lawyers and the one whom they instructed to hold brief to take the ruling on the material date. There is no doubt from the clear indication in the ruling annexed to the application as INK 3 that it was delivered *ex parte*. What is not clear from there is whether the delivered on time or on a different date than it was initially scheduled. There were no proceedings relating to the prior dates, for instance, when the application leading to the dismissal of the suit was argued, to show how the date of March 8, 2022 was taken. With this doubt in the mind of the court, I would give benefit to the applicant and agree with him that there was communication breakdown, which was sufficiently explained. Thus, the explanation for the delay vis-à-vis the conduct of the applicant are in tandem to the facts that a court could positively consider.
13. Regarding the period of delay, an appeal therefrom should have been preferred within thirty (30) days of the date of ruling, which should have been by April 7, 2022. However, the application was brought on June 21, 2022. This was about two months and 14 days after the expiry of time. It was upon the applicant to give clear and cogent explanation for the delay, even if it was a day. As the Supreme Court stated in the Nicholas Salat case cited above extension of time is not a right for a party: once sought, it has to be properly explained. In the instant case, the applicant explained that there was communication breakdown between his learned counsel and the one who held their brief. The court cannot speculate as to what may have triggered the end of the communication breakdown: it is not explained. Be that as it may, the court finds that the period of two months and a fortnight is not inordinate delay in the circumstances.
14. Learned counsel for the respondent contended that the applicant did not demonstrate to the court how the appeal was meritorious or arguable. He stated that the Draft Memorandum of Appeal was not annexed to the application so as to enable the court form an opinion on the merits of the intended appeal. He also stated that the trial court rightly pointed out in its finding that the applicant was not intent on proceeding with the hearing but keen on awaiting the outcome of the Kitale ELC miscellaneous matter. On the last issue, it is this court’s view that it is a matter for consideration on merits during the hearing of the intended appeal. About the lack of the Draft Memorandum of Appeal, this court finds the argument lacking in substance because the draft memorandum was annexed to the supporting affidavit as INK 3.

b. Who to bear the costs of the application and final orders



15. The final issue to consider is what orders to issue and who to bear the costs of the application. I have found that the application all the issues in the application was meritorious. The same is hereby allowed. Costs follow the event ordinarily. However, since the applicant, though successful, occasion the application to be brought, he shall pay costs of the application.
16. Thus, the appeal shall be filed within fourteen (14) days and the Memorandum of Appeal served as prescribed by law. The Record of Appeal shall be filed within sixty (60) days of filing of the appeal and served. The intended appeal shall be fixed for mention for further directions before this court within 30 days of the preparation and service of the Memorandum of Appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 28TH DAY OF SEPTEMBER, 2022.

HON DR IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

