



Maina v Muga Auctioneers General Merchants & another (Miscellaneous Application E001 of 2022) [2022] KEELC 15537 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
MISCELLANEOUS APPLICATION E001 OF 2022
LN GACHERU, J
DECEMBER 20, 2022**

BETWEEN

PATRICK WAWERU MAINA APPLICANT

AND

MUGA AUCTIONEERS GENERAL MERCHANTS 1ST RESPONDENT

HOUSE FINANCE COMPANY LTD 2ND RESPONDENT

RULING

1. Leave to file an appeal out of time from the orders of the Chief Magistrate Court at Murang'a in Civil Suit No 12 of 2019, issued on November 30, 2021;
2. An injunction to issue prohibiting the respondents from selling land Parcel LOC 11/Maragi/7963 (the suit property, pending the determination of this application.
3. The application was premised on the grounds that the applicant was dissatisfied with the ruling of the Chief Magistrate in Murang'a CC No 12 of 2019, who dismissed the application dated November 11, 2019. The applicant states that the appeal has a high chance of success, and that the delay in filing the said appeal was not intentional, but was due to the applicant's advocates having been overloaded with work. The application was supported by the applicant's affidavit.
4. The respondents did not file any response to the application.
5. The matter was canvassed through written submissions. The applicant through TM Njoroge Advocates filed his submissions in support of the application on August 27, 2022, which have been considered.
6. The respondent's too did not file written submissions in the matter.



7. The applicant prays for leave to file an appeal out of time on the grounds that his advocate was overwhelmed with work following the ruling of the Chief Magistrate. He states that the delay in filing the appeal on time was not intentional but due to factors beyond his control.

8. The application was erroneously made under rule 4 of the *Court of Appeal Rules* 2010. The application ought to have been made under section 79G of the *Civil Procedure Act*, which provides for the time of filing appeals from subordinate courts and subsequent extension thereof. It states:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

9. Extension of time is a matter of discretion, and the law gives court's jurisdiction to extend time upon application. The law allows for such applications to be made even when the time for doing so has already lapsed. (See *Paul Njage Njeru v Karija Mugambi* (2021) eKLR).

10. Furthermore, the Supreme Court in the case of *Nicholas Korir arap Salat v IEBC and 7 Others* (2014) eKLR, enunciated the principles applicable in an application for leave to appeal out of time. The court stated as follows:

“The underlying principles a court should consider in exercise of such discretion include:

1. Extension of time is not a right of any 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 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 respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

11. The discretion to extend time must be exercised within the established principles of the law and the factors to be considered when determining an application seeking leave to file an appeal out of time were discussed in the case of *Omar Shurie v Marian Yafar* Civil Application No 107 of 2020. These factors being:

- i. The length of delay;
- ii. The reason of delay;
- iii. The chances of the appeal succeeding if the application is granted;



- iv. The degree of prejudice to the respondent if the application is granted.

The Length of Delay.

12. It is not in dispute that the Chief Magistrate delivered his ruling on November 30, 2021, and that the applicant filed the present application for leave to file an appeal out of time on January 19, 2022. This is a period of 50 days or 20 days over the allowed limit. The court finds that this is not inordinate, but the court will still have to consider the reason for the delay before making a determination.

Reason for The Delay

13. The applicant in his supporting affidavit avers that the reason for the delay is due to an overwhelming workload on his advocate following the delivery of the ruling. The applicant further states that the delay was inadvertent. Lastly, the applicant states that the court dismissed his case at the trial Magistrate's Court without any cogent reason, and that the appeal has a high chance of success due to the unassailable grounds in the application.
14. In the instance where an advocate is to blame for the delay, the circumstances behind that delay must be carefully scrutinized. The Court of Appeal in *Itute Ingu & another v Isumael Mwakavi Mwendwa* [1994] eKLR, faced with similar circumstances where the mistake of an advocate was the basis on which an application to file an appeal out of time, stated as follows:

“What I understood the applicants to be telling me by citing this case is that the error by their advocate should not be a bar to my exercising my discretion in their favour. Since the amendment to this court's rule 4, the discretion of the court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is *bona fide*, can entitle an applicant to the exercise of the court's discretion in his favour. But before doing so, the court must, of necessity, examine the nature or quality of the mistake or mistakes.”

(See *Rupa Savings & Credit Cooperative Society v Violet Shidogo* [2022] eKLR)

15. The question therefore is whether the mistake of the advocate in this case is reasonable or *bona fide* and has it been explained to the satisfaction of the court. The court has given due consideration to this reason and finds that the applicant has been vague in his averment and the explanation is not satisfactory.
16. In the present application for enlargement of time, this court is called to exercise its judicial discretion and in doing so avoid injustice or hardship, inadvertence, or excusable mistake or error. This court's discretion is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. To this end, courts have repeatedly emphasized that mistakes of counsel not amounting to *bona fide* mistakes are punishable as professional negligence.
17. In *Edney Adaka Ismail vs Equity Bank Limited* [2014] eKLR, the court similarly declined to exercise its discretion simply because the applicant claimed a mistake of counsel. The court stated:

“It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by costsHowever, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court”.



18. It is up to the applicant to prosecute his or her case. In the present case, the applicant failed to follow up with their Advocates on their preparation of his appeal, if he intended to file one. In summary, litigation belongs to a party and not the counsel. Having perused the file, this court notes that there is no affidavit on record from the applicant's advocate to corroborate the claims that their workload hindered them from filing the appeal on time.
19. With regard to prayer No 2, the matter is *res judicata* having been determined in the ruling dated November 30, 2021.
20. Having now carefully considered the instant notice of motion application dated January 18, 2022, the court finds it devoid of any merit and the same is dismissed entirely with no orders as to costs since the respondent did not file any response.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 20TH DAY OF DECEMBER 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of

Absent - Applicant

Absent - Respondent

Joel Njonjo – Court Assistant.

