



Full Gospel Church of Kenya v Kamau & 2 others (Miscellaneous Application E25 of 2023) [2024] KEELC 493 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEELC 493 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
MISCELLANEOUS APPLICATION E25 OF 2023**

**AA OMOLLO, J
FEBRUARY 5, 2024**

BETWEEN

FULL GOSPEL CHURCH OF KENYA APPLICANT

AND

JOHN KIRUBI KAMAU 1ST RESPONDENT

JOHN MWANGI KIMANI 2ND RESPONDENT

PAUL NDUNGU KIIRU 3RD RESPONDENT

RULING

1. This ruling is in respect to the Applicant’s Notice of Motion application dated 11th May, 2023. The said application is expressed to be brought under Sections 79G and 95 of the *Civil Procedure Act* and Order 51 (1) of the Civil Procedure Rules.
2. The application seeks the following orders:
 - a. That the Honorable court be pleased to grant leave and extend time to the Applicants to file appeal out of time with respect ruling delivered on 23rd March, 2023 in Nakuru CM. Land Dispute No. 1 of 2000; Full Gospel Church of Kenya Vs John Kirubi & 2 Others.
 - b. That costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn by Julius Ndegwa Peter and Francis Kimiti Macharia. The Supporting affidavit is sworn on 11th May, 2023.



Factual Background.

4. The application came before court on 30th May, 2023 in the presence of the counsels for the Applicant and the Respondents'. The counsel for the Respondents' informed the court that he had already filed a response to the application.
5. The court directed that the application shall be heard by way of written submissions and Respondents' were also granted leave to file a supplementary affidavit.
6. On 21st June, 2023 parties confirmed having filed submissions and the application reserved for ruling.

Applicant's Contention.

7. The Supporting Affidavit is deposed by Julius Ndegwa Peter and Francis Kimiti Macharia. They state that they are representatives of the Applicant.
8. It is their deposition that the present application is filed pursuant to a ruling delivered on 23rd March, 2023 in Nakuru CM. Land Dispute No. 1 of 2000; Full Gospel Church of Kenya Vs John Kirubi & 2 Others.
9. They depose that on 14th February, 2005, the court adopted the Bahati Land Dispute Tribunal Award vide Land Dispute No, 2 of 1999 and gave the Applicant land parcel No Bahati/Kabatini Block 1/1405 and which award they sought to enforce vide Notice of Motion application dated 29th October, 2021.
10. It is their deposition that the ruling delivered in Nakuru Chief Magistrate. Land Dispute No 1 of 2000 was in favour of the Respondents' which ruling they only learnt about on 2nd May, 2023 upon being advised by their advocate on record. They depose that they are aggrieved by the said ruling hence the need to appeal against the same.
11. They further depose that their Advocate had been away from office attending to a personal matter for two weeks hence the delay and is the reason why they learnt about the ruling in Nakuru Chief Magistrate Land Dispute No 1 of 2000 late in the day.
12. They depose that they are aggrieved and dissatisfied with the court's decision and now wish to Appeal against the said decision but since the Appeal is being filed out of time, it is mandatory that leave must be sought and obtained first before filing an Appeal out of time.
13. They contend that their intended Appeal as can be seen from the Draft Memorandum of Appeal, is an arguable one, has a serious triable issue both in law and fact, has prima facie high chances of success and they stand to suffer substantial loss and irreparable harm if the orders sought are not issued.
14. They further contend that no prejudice whatsoever or at all shall be occasioned to the Respondents' upon the grant of leave and extension of time sought as well as the stay of execution pending hearing and determination of the intended Appeal.
15. It is also their contention that that the period of delay is not unreasonable. They contend that the chances of the Appeal succeeding if the application is granted and the resources of the parties all put into consideration work in favour of granting the instant application.
16. They contend that it is in the interest of orderly administration of justice and fairness that the orders sought herein be granted and the grant of the said orders will not prejudice the Respondents' or make them suffer any hardship.
17. They end their deposition by beseeching the Honourable Court to grant the orders sought.



Respondents' Response.

18. In response to the application, the Respondents' filed a replying affidavit on 29th May, 2023. It is sworn by Koome Gitonga, Advocate of the High Court of Kenya. He deposes that he has instructions from the Respondents' and has personal conduct of the matter hence competent to swear the affidavit.
19. He deposes that the Applicant vide an application dated 29th October, 2021 prayed for among other orders that the Land Registrar Nakuru be authorized to transfer parcel title number Bahati/Kabatini Block 1/1405 in its favour.
20. He deposes that the ruling in this matter was delivered on 23rd March, 2023 by Honourable B. Ochieng against the Applicant who was then granted 28 days to Appeal.
21. He deposes that section 79G of the *Civil Procedure Act* provides that 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.
22. It is his deposition that the Applicant however did not file a Notice of Appeal or Memorandum of Appeal within the stipulated time despite being aware of the ruling.
23. He deposes that a notice was circulated through the public notice board and the Applicant has not shown any evidence that it was not indolent nor has it shown that indeed it followed up on the judgment.
24. It is his deposition that the reasons given for the delay are rather vague and are not sufficient to warrant the court's discretion in the Applicant's favour. He deposes that extension of time is an equitable remedy reserved for a deserving Applicant and since the Applicant has failed to demonstrate a good and sufficient cause for not filing the Appeal in time, the same ought not be granted.
25. He deposes that the grounds as appearing in the draft Memorandum of Appeal are not arguable for the following reasons:
 - a) that it is common knowledge that court orders ought to be executed within a period of 12 years which in the instant case was not done, neither did the intended Appeal produce any evidence to demonstrate why the same was not acted upon and if at all the same was served upon the District Land Registrar's office.
 - b) that no attempt was made to seek an extension of the validity of the court orders,
 - c) that the instant Appeal flies in the face of the inherent jurisdiction of the court to the extent that it fundamentally curtails or attempts to curtail the general functioning of the court,
 - d) that it is very apparent that no evidence was tendered to demonstrate the contemptuous non-compliance by the Respondents',
 - e) that it is prudent to note that indeed the Appellant did not at any given point table crucial documents that emanated from the higher courts that limited the scope of powers and or the discretion of the Trial Magistrate in handling the matter,
 - f) that contrary to the assertion that the principles of stare decisis were not complied with, a cursory look at the ruling confirms otherwise,
 - g) that no attempt has been made to demonstrate how the Honourable Court acted ultra vires to its mandate ably found in Article 169 of *the Constitution* as well as the *Magistrates' Courts Act*.



26. He deposes that it is not enough to claim substantial loss without any documentary proof. He also deposes that noting the matter is about land, any loss emanating thereto can adequately be compensated by an award of damages.
27. It is his deposition that the instant application dismally falls short of meeting the legal threshold required for grant of leave and extension of time to file an Appeal. He deposes that the parties are bound by their pleadings and since no orders for stay of execution have been prayed for in the application, there is no basis for the grant of stay of any order.
28. He deposes that it is trite law that one cannot stay a negative order. He ends his deposition by describing the instant application as misconceived, defective, incompetent, lacks merit and is an abuse of the court process and ought to be dismissed with costs.

Issues for Determination.

29. The Applicant filed its submissions on 19th June, 2023. It submits that it is not dispute that a party who is aggrieved by a decision of a subordinate court has a right to Appeal to the High Court save that the same should be done within 30 days. It submits that in the present case, delay occasioned in filing the appeal within the statutory 30-day period was not deliberate but owing to factors beyond the Applicant's control.
30. It submits that whilst counsel for the Respondents' has annexed that a notice was placed in the court's notice board notifying all members of the pending rulings and the date when they shall be delivered, failure on its part to note the same was not deliberate and it was an oversight on its part.
31. The Applicant also submits that while the said notice may have been placed in the said notice board, there is no evidence that the same was served upon their law firm i.e. through their office email as it is the custom. The Applicant submits that, it only learned about the said ruling upon making an inquiry on the same on 2nd May, 2023 in the court's registry which time the days for filing the appeal herein had lapsed.
32. It is the Applicant's submission that equally as at the time, it's counsel was away from office attending to an urgent personal matter for a period of 2 weeks during which time counsel had no knowledge that the ruling for the aforesaid matter had been delivered and it prays for court's indulgence on the same and the Applicant should not be penalized for counsel's conduct as the same was not deliberate.
33. The Applicant relies on the judicial decision of Charles N. Ngugi Vs ASL Credit Limited [2022] eKLR where the court adopted the holding of Thuita Mwangi Vs Kenya Airways Ltd [2003] eKLR.
34. The Applicant submits that it is worth noting that the delay was not so inordinate to warrant the court to exercise its discretion and allow the application herein. It submits that upon having knowledge that the ruling had been delivered on 2nd May, 2023, it made necessary steps to obtain a copy of the ruling and filed the present application on 11th May, 2023 and attached a draft copy of Memorandum of Appeal.
35. It submits that the dispute at hand is in relation to parcel Title No. Bahati/Kabatini Block 1/1405 (hereinafter referred to as the "suit plot" which Plot the Applicant was awarded by Bahati Land Dispute Tribunal on 22nd October, 1999 and later the same was adopted as an order of court on 14th February, 2005.
36. It submits that for the court to proceed to dismiss the application dated 29th October, 2021 seeking to enforce the said order of 14th February, 2005 was unfair and prejudicial to the Applicant herein who



was rightfully and lawfully allocated the said suit Plot and from the Grounds of Appeal attached in the draft copy of Memorandum of Appeal.

37. The Applicant relies on the judicial decisions of *Stecol Corporation Limited Vs Susan Awuor Mudemb* [2021] eKLR and *MFI Document Solutions Ltd Vs Paretto Printing Works Limited* [2021] eKLR.
38. It is the Applicant's submission that the issue in dispute pertains to land which is of high economic value and the matters pertaining to dispute of the same is one that should be taken on high regard and it's only fair and just that the Applicant be granted leave to Appeal out of time and for the court to arrive at a just determination.
39. The Applicant submits that the said application has been brought in good faith and being an equitable remedy, it prays that the honorable court exercises its discretion and allows/ grants leave and extends time to the Applicant to file the Appeal out of time.
40. The Applicant prays that the application dated 11th May, 2023 be allowed with costs.
41. The Respondents' filed their submissions on 13th June, 2023 and they identify the following issues for determination:
 - a. Whether the Application meets the threshold for grant of leave to file Appeal out of time?
 - b. Who bears the costs?
42. They submit that Applicant's application has not met the threshold for grant of leave to file appeal out of time.
43. The Respondents' rely on Section 79G of the *Civil Procedure Act* and submit that an Applicant seeking extension of time to file an Appeal must show that he has a good cause for doing so. They also rely on the judicial decision of *Daphne Parry Vs Murray Alexander Carson* [1963] EA 546.
44. They submit that the lower court in the Ruling delivered on 23rd March, 2023, by Honourable B. Ochieng indeed did grant the Applicant 28 days to Appeal. However, the Applicant did not file a Memorandum of Appeal within the stipulated time.
45. The Respondents' submit that the power of the court to enlarge time and allow a party to file an appeal out of time is provided for under Order 50 Rule 6 of the Civil Procedure Rules.
46. They further submit that while the discretion of the court is unfettered, a successful Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor.
47. The Respondents' rely on the judicial decisions of *First American Bank of Kenya Ltd Vs Gulab P. Shah & 2 others Nairobi (Milimani) HCCC No 2255 of 2000 (2002) 1 EA 65* and *Susan Ogotu Oloo & 2 others Vs Doris Odindo Omolo* [2019] eKLR.
48. The Respondents' submit that the Applicant's explanation for the delay in filing of the Memorandum of Appeal was that it was not aware that the Ruling was delivered on 23rd March, 2023. They submit that however, this is not sufficient explanation since a notice was circulated through the public notice board and shared widely. They further submit that the reasons given for the delay are rather vague and not sufficient to warrant this Honourable Court's discretion in the Applicant's favour.
49. It is also the Respondents' submission that extension of time is an equitable remedy reserved for a deserving Applicant and since the Applicant has failed to demonstrate a good and sufficient cause for not filing the Appeal in time, the same ought not to be granted.



50. The Respondents' submit that the Applicant has neither shown any evidence that it was not indolent nor has the Applicant shown that indeed it followed up on the ruling.
51. The Respondents' submit that the grounds put forward in the draft Memorandum of Appeal in support of the Applicant's intended Appeal are not arguable. They cite reasons set out in the replying affidavit.
52. The Respondents' further submit that the instant application lacks merit for failure to meet the threshold for grant of leave to file appeal out of time and ought to be dismissed with costs.
53. On the issue of costs, the Respondents' rely on the judicial decision of Republic Vs Rosemary Wairimu Munene, Ex-parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd.
54. The Respondents' submit that given the reasons set out in their Replying Affidavit and their submissions, this Honourable Court should arrive at the finding that the application filed by the Applicant is not merited and strike it out with costs to the Respondents.

Analysis and Determination.

55. I have considered the application, the affidavits in support of the application, the Replying Affidavit and the rival submissions filed.
56. In my view, the questions that arise for determination are:
 - a. Whether this Honourable court should enlarge time within which to file an Appeal against the ruling delivered on 23rd March, 2023 in Nakuru Chief Magistrate Land Dispute No 1 of 2000?
 - b. Who shall bear costs of this application?

A. Whether this Honourable court should enlarge time within which to file an Appeal against the ruling delivered on 23rd March, 2023 in Nakuru Chief Magistrate Land Dispute No 1 of 2000?

57. Section 79G of the *Civil Procedure Act* provides that:

“Every Appeal from a Subordinate Court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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.” (Emphasis mine)

58. It is evident from the above legal provision that the decision whether or not to grant leave to Appeal out of time or to admit an Appeal out of time is a matter that calls for exercise of discretion. Judicial discretion must be exercised judiciously. This means that discretion must be based on legal principles.
59. One of those judicial principles is that the Applicant must satisfy the court that he/she has good and sufficient cause for not filing the Appeal in time. In *Mbukoni Services Limited & another Vs Mutinda Reuben Nzili & 2 others* [2021] eKLR, the Learned Judge cited with approval the decision in *Daphne Parry Vs Murray Alexander Carson* [1963] EA 546 where it was held that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to



the Appellant, its interpretation must be in accordance with judicial principles. If the Appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the Appeal should be dismissed as time-barred even at the risk of injustice and hardship to the Appellant.

60. The principles to be taken into consideration in exercising the discretion on whether or not to enlarge time were enumerated in *Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed the following view:

“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”.

61. On the question of length of delay, reason for delay and prejudice to the Respondent. There is not doubt that there is delay in filing the Appeal. Ruling was delivered on 23rd March, 2023. The appeal ought to have been filed on 23rd April, 2023.
62. The Applicant in the affidavit supporting the application deposes that they learnt about the ruling on 2nd May, 2023 upon information of its delivery being given by their advocate on record. They state that as soon as they learnt of it, they filed the present application on 11th May, 2024. The applicants have explained that their Advocate had been out of office for two weeks, attending to a personal matter.
63. The Respondents acknowledge that notice of delivery of the ruling was put up on the notice board and they state that this is a public notice board and should serve as proper notice.
64. My view is that if a Judge or Judicial Officer informs litigants that a judgement or ruling shall be delivered on notice, which is less than desirable, that notice should be sent to the litigants or their advocates directly in addition to putting up the notice on a notice board. It is unfair to expect that the advocates or litigants shall keep visiting the court house and look at the public notice board day in, day out.
65. The Applicant filed this application 9 day after it became aware of the ruling, by which time, the statutory period for filing the Appeal had lapsed. Further, this application was brought 18 days after expiry of the 30-day period within which to file an Appeal. In all consideration, a period of 18 days does not prejudice the Plaintiffs/Respondents in any way.
66. On the question of the chances of the Appeal succeeding if the application is granted, the Applicant has attached the Memorandum of Appeal. The Respondents have made elaborate submissions on why the Appeal may not succeed, these submissions got to the merit of the Appeal. I am of the view that a party should not be denied a right to ventilate his claim and by extension to exhaust all the legal avenues available to it/him/her.
67. In *Samvir Trustee Limited Vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997*, The learned Judge held as follows;

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant....”



68. Taking all these into consideration, I find that the Applicant has satisfied this court that she is deserving of this court's discretion in extending time within which to file the Appeal.

C. Who should bear the cost of this application?

69. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd* [1967] EA 287.

Disposition.

70. In the result, the application dated 4th July, 2022 is allowed in the following terms

- a. Leave is hereby granted to the Applicant to file the Appeal out of time in respect of the ruling delivered on 23rd March, 2023 in Nakuru CM. Land Dispute No. 1 of 2000; Full Gospel Church Of Kenya Vs John Kirubi & 2 Others.
- b. The Memorandum of Appeal shall be filed and served within 10 days from the date hereof.
- c. In default of (b) above, the orders for leave in (a) shall stand vacated.
- d. The costs of this application shall be in cause.

71. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF FEBRUARY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr Karanja Mbugua for Njeri Njagua for the Applicant.

No appearance for the Respondents.

Court Assistant; Monica Wanjohi

