Kuri v Minyori (Environment and Land Appeal E100 of 2021)
[2024] KEELC 1264 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1264 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E100 OF 2021

CK NZILI, J

MARCH 6, 2024

BETWEEN

LYDIA KURI ..... APPELLANT

AND

JOSEPH MWIKA MINYORI ..... RESPONDENT

RULING

1. On 12.2.2024, this court struck out the appeal for failure to file and serve the record of appeal within 60 days as directed by the court on 11.12.2023. The applicant has now applied for the reinstatement of the appeal. The reasons given are that there was an error apparent on the face of the record since the 60 days were to run until 5.03.2024 given time does not run during the christmas break. Further, the applicant says the orders after admission of the appeal and to file the record of appeal within 60 days were not communicated for purposes of compliance either physically or on time. The applicant terms the striking out as unnecessary, uncalled for, prejudicial and punitive.

2. Additionally, the applicant states that she has spent time and resources to file this application out of confusion brought about by the court's staff and the registry. All these facts are contained in an affidavit in support of the application sworn by Josphat Ndubi advocate on 13.2.2024.

3. The respondent opposes the application by an affidavit sworn on 19.2.2024. He terms the applications as full of half-truths, designed to hoodwink the court into believing that the applicant has been keen to prosecute her appeal. The respondent further avers that after the lower court file was forwarded on 29.11.2023, no steps were taken to file the record of appeal for three months until the 60 days lapsed on 12.2.2024. The respondent says no excusable justification has been given for the delay of an appeal filed in 2021 and more so when the applicant was enjoying stay orders issued by the lower court.

4. This application turns on whether the applicant has justified non-compliance with the orders dated 11.12.2023. The court record indicates the matter was mentioned before the Deputy Registrar

on 31.8.2023, 14.9.2023, and on 26.10.2023. During all those mentions, the appellant was duly represented. A mention was exparte taken for 11.1.2024 by the appellant. Neither her nor her advocates on record showed up. An affidavit sworn by Josephat Ndubi advocate confirms he is the one who took the mention date and served it upon the respondent. Counsel, however, is silent on the non-attendance and the reasons for it. If the appellant had shown up or were keen on following up on the appeal as deponed, it would have been clear that there were pending directions. It is the Deputy Registrar, in the absence of appearance by the appellant's counsel and non-compliance, who gave a date of 1.2.2024.

5. The appellant was served with the mention notice on 11.1.2024 by the respondent. An affidavit of service was filed on 12.1.2024, sworn by Andrew Ouma advocate. So, as of the filing of the affidavit of service on 9.1.2024, already the directions had been given. Additionally, the appellant, between 11.1.2024 and 12.2.2024, does not say what stopped her from perusing the court file and or complying with the court directives. More importantly, the appellant does not say why she did not attend court on 11.1.2024, if at all she has been keen to prosecute her appeal.

6. Counsel for the appellant has sworn an affidavit casting aspersions on the court, the staff and the registry, terming the directions and orders punitive, uncalled for, prejudicial, and causing him time and resources to prepare and file this application. Unfortunately, the record does not show any error on the part of the court, its staff, or the registry. It is the appellant who ought to have sought to peruse the court file, follow up and attend court on the very date she took exparte and, after that, establish what directions had been given in her unexplained absence on 11.1.2024. Between 11.1.2024 and 12.2.2024, this was a whole month of inaction by the appellant.

7. From the lower court record, the applicant was ordered to deposit security of ksh 150,000/=. Attempts, to apply for variation were rejected by the trial court on 21.10.2022. An extension of time to comply was allowed on 11.11.2022. The deposit was made. Costs were also assessed at ksh 106,555/= on 13.1.2023. Contrary to averments on efforts to push for the lower court file, this court has not seen a single letter by the appellant following up her appeal by ensuring the lower court file was forwarded.

8. The impression created by the appellant is of a keen person in following up on the appeal. Unfortunately, that picture is not reflected in her conduct since 13.1.2023. I, therefore, agree with the respondent that the appellant, instead of owning up to her mistakes or inaction, has deponed on oath half-truths. It costs nothing to own up to mistakes and seek more time to comply. Impediment to access to justice and an alleged violation of Article 159 of the *Constitution* does not apply to the appellant. The respondent is equally entitled to an expeditious disposal of the appeal and enjoyment of the fruits of his litigation. See *Westmount Holdings SDN B.H.D v Central Bank of Kenya* (Civil Applications 10 (E017) of 2020 (2023) KESC 3 (KLR) (8th October 2021).

9. In *Habo Agencies Ltd v Wilfred Odhiambo Musingo* (2020) eKLR, the court said one of the grounds to consider was if any sufficient cause had prevented the appellant from appearing. The court cited *Belinda Murai & others v Amos Wainaina* C. A no Nai 9 of 1978, on mistakes of counsel. Non-attendance of counsel has not been disputed. No explanation has been made for non-attendance or material placed before the court for consideration as it exercises its discretion. The court said the appellant was merely relying on plain indolence and dilatoriness, which was inexcusable. The court cited *Rajesh Rughani v Fifty Investments Ltd & another* (2005) eKLR that sheer inaction by counsel does not constitute an excusable mistake. The court cited Article 159 of the *Constitution* as emphasized in *Raila Odinga & 5 others v IEBC & another* (2013) eKLR & others (2014), that justice must be dispensed without undue delay and Article 159 of the *Constitution* was not a panacea for every breach of the procedure, but only in deserving cases.

10. The applicant's only attempt to show sufficient reasons which prevented her from filing the appeal is that time was not running against her between 21.12.2023 to 11.1.2024. I find the justification disturbing, more so when the appellant failed to attend the court on 11.1.2024 and or act for a whole month after 11.1.2024. Even after being asked by the court during the hearing of the application if the record of appeal was ready, the counsel told the court he could avail it by close of business, which never happened. See *Book Point Ltd v Guardian Bank Ltd & another* (2021) eKLR.

11. In *Maersk (K) Ltd v Murabu Chaka Tsuma* (2017) eKLR, the court considered Order 50 Rule 4 of the *Civil Procedure Rules* and Section 33 of the *Interpretation and General Provisions Act*. The court said the order could not apply to the time set by a statute such as the *Limitations of Actions Act* and the Law Reform Act, but only to the limited time under the *Civil Procedure Rules*.

12. In *Keziah Stella Pyman & 2 others v Paul Mwololo Mutevu & 8 others* (2023) eKLR, at issue was the filing of an appeal under Sections 79 G of the *Civil Procedure Act* vis a vis Order 50 Rule 4 of the *Civil Procedure Rules*. The court held that the High Court vacation falling between 21.12.2010 to 13.01.2011 was excluded in computing the time. The court also considered *Gabriel Osimbo v Chrispinus Mandare* (2020) eKLR and Sections 57 (b) of the *Interpaties & General Provisions Act*.

13. In this application, the order made by Yano J on 11.12.2023 was specific to 60 days. The same has not been reviewed, appealed against, or time sought to be extended beyond the sixty days. There were good reasons why the court gave a specific period. The applicant did not seek to extend or for clarity whether their time was frozen from running on up to 11.1.2024. He did not act within 30 days by 12.2.2024 or seek for extension of time. On 12.2.2024, counsel holding brief Mr. Kimathi Kamenchu for the appellant chose to mislead the court by applying for the lower court file to be returned to Tigania Law Courts for the signing of the decree. So, it is clear from the court record that the appellant has not extracted a decree and that could have been the sole reason for non-compliance. Looking at the totality of this, I find no error apparent on the face of the record as per *Nyamogo & Nyamogo Co. Advocates v Moses Kipkolom Kogo* (2000) eKLR.

14. The application lacks merits and is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6th DAY OF MARCH, 2024.

In presence of

C.A Kananu

Thangicia for appellant

Applicant

Kerubo for Kitheka for respondent

HON. CK NZILI

JUDGE