



M'Magiri v Nkogwe (Sued as legal representative of the Estate of Nkanatha M'Magiri) (Environment and Land Miscellaneous Application E006 of 2024) [2024] KEELC 4178 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4178 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2024**

**CK NZILI, J
MAY 8, 2024**

BETWEEN

MBAYA M'MAGIRI PLAINTIFF

AND

CAROLINE NKOGE (SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF NKANATHA M'MAGIRI) DEFENDANT

RULING

1. The court is asked to extend the time for the filing of an appeal out of time. The reasons are contained in the supporting affidavit of Mbaya Magiri, the applicant sworn on 8.2.2024.
2. It is averred that the subject matter of the appeal is his homestead situated on L.R No. Abothuguchi/Kariene/660, which was at the center of the judgment at the lower court, delivered on 27.10.2023. The applicant has averred that he was taken ill and could not afford the advocate's fees to file the appeal on time. He takes the view that the three-month delay was not deliberate or inordinate. Further, the applicant says he lives on the subject matter, and the respondent, a sister-in-law, intends to sell the land to third parties and evict him. The applicant states that she sought the proceedings by a letter dated 6.11.2023 and was yet to be supplied with them.
3. The application is opposed through a replying affidavit sworn by Caroline Nkongwe on 17.2.2024. It is averred that judgment was delivered in the presence of the applicant's lawyers; he has no excuse at all for failing to file the appeal if he was interested in any on time. The respondent avers that the delay is inordinate, inexcusable, and not explained at all by way of evidence in support of the allegations contained in the supporting affidavit.
4. The applicant relies on written submissions dated 19.2.2024. it is submitted that the applicant has made substantial development on the suit land for the last 45 years, that there would be a miscarriage of



justice if the orders sought were not granted, and that he faced hardship until time lapsed. Reliance is placed on *Thuita Mwangi v Kenya Airways Ltd* Misc Civil Application No. E488 of 2021 and *Charles N. Ngugi v ASL Credit Ltd* (2022) eKLR.

5. Section 79G of the *Civil Procedure Act* provides that this court has the discretion to admit an appeal out of time if the applicant had good and sufficient cause for not filing the appeal on time. In exercising discretion, the court has to consider inter alia, the reasons for the delay, length of the delay, prejudice to the opposite party, interest of justice public interest, and the bonafide of the application.
6. In *Kenya Sugar Research Foundation (as taken over by KALRO) v Divesh Construction Co. Ltd* (Civil applicant E18 of 2023 KECA (1479) KLR 8th December 2023 (Ruling), the delay was attributed to internal protocols and the need to consult widely on the next course of action which was said to be neither intentional nor inordinate. The court cited *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (1992) 2 E.A 231 on the parameters to apply on an extension of time, which is a discretionary relief. Further, the court cited *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission* (2015) eKLR, that the discretion is unfettered and that the applicant has to explain the reasons for the delay and show extenuating circumstances for the court to exercise his discretion in his favor, for it is not a matter of right. The court observed that a delay of one year was inordinate and the alleged blame on the trial court to exercise its duty to protect public resources unconvincing.
7. In this application, the applicant alleges that he was taken ill and had no financial strength to instruct counsel to appeal on his behalf. Medical evidence has not been availed to, at the very least, show when the applicant was taken ill and or recovered.
8. The grant or refusal of extension of time is a matter of judicial discretion that is not exercised subjectively, at whim, or by a rigid rule of thumb, but in a principled manner in accordance with reason and justice. See *Sammy Mwangangi & 10 others v Commissioner of Lands and others* (2020) eKLR.
9. Sickness must be demonstrated by way of medical reports. The reasonable cause for the delay must not only be averred but proved. A draft memorandum of appeal is not attached to the application. Evidence of any of the applicant's developments on the suit land is lacking. The lower court proceedings were signed on 6.11.2022. There is no evidence of a follow-up of the same. The applicant did not state when he acquired a copy of the judgment that appears to have been certified on 19.12.2023.
10. This application was filed on 8.2.2024. The delay is not only inordinate but also unexplained. Whereas the law does not set the maximum or minimum delay the same should be explained to unlock the court's flow of discretion as held in *Patrick Wanyonyi Khaemba v Teachers Services Commission & others* (2019) eKLR. A party must not be seen to presume the court's discretion. It is an equitable relief whose burden to discharge on the reasons for the delay vests with the applicant. It is only available to deserving cases. See *Nicholas Kiptoo Salat v IEBC* (*supra*).
11. Financial incapacity is not one of the considerations since the applicant had a right to seek leave to sue as a pauper. The upshot is that I find the application lacking merits. It is as a result of this dismissed with costs.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 8TH DAY OF MAY, 2024

In presence of

C.A Kananu



Anampiu for respondent

HON. C K NZILI

JUDGE

