



Tough v Babhubhai Construction Company Limited & 2 others (Environment and Land Miscellaneous Application E013 of 2023) [2024] KEELC 6581 (KLR) (2 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6581 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2023
SO OKONG'O, J
OCTOBER 2, 2024**

BETWEEN

WILLIAM ROMAN MC TOUGH APPLICANT

AND

BABHUBHAI CONSTRUCTION COMPANY LIMITED 1ST RESPONDENT

JULIUS ONYANGO AYIEKO 2ND RESPONDENT

ALI NASUR MOHAMMED 3RD RESPONDENT

RULING

1. What is before the court for determination is the Notice of Motion application dated 4th October 2023 by the Applicant. The application was brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 43 Rules 2 and 3 of the Civil Procedure Rules, Articles 48, 50 and 59 (2) (d) of *the Constitution*. The Applicant sought for the following orders;
 - i. Spent.
 - ii. That the firm of Muma Nyagaka & Company Advocates be allowed to come on record in place of Kasamani & Associates Advocates.
 - iii. That the Honourable Court be pleased to enlarge time for the filing of the instant application.
 - iv. That the Honourable Court be pleased to grant leave to the Applicant to Appeal against the Order and decision made by the lower court at Kisumu in CMCELC No. 44 of 2019 on 18th March 2022 dismissing the Applicant's suit in the lower court for want of Prosecution.
 - v. That the Honourable Court be pleased to admit out of time the appeal filed by the Applicant against the said order of dismissal in Kisumu ELCA No. 18 of 2022.



- vi. That this Honourable Court does grant any further orders as may be just and expedient and for the interest of justice.
 - vii. That the costs of this application be in the main Appeal.
2. The Application that was supported by the affidavit of the Applicant sworn on 3rd October 2023 was based on the grounds that the lower court made an order on 18th March 2022 dismissing the Applicant's suit before that court and that the Applicant was dissatisfied with the order and wanted to appeal against the same. The Applicant averred that the order was not appealable as of right and the time for seeking leave to appeal had lapsed necessitating the extension sought. The Applicant averred that due to an inadvertent mistake on the part of his previous advocates, leave to appeal was not sought at the time of delivery of the ruling of the lower court or within 14 days as required by the Rules. The Applicant averred that it was after he had filed an appeal against the said order before this court namely, ELCA No. 8 of 2022, that his previous advocates noted that they had not obtained leave to appeal. The Applicant averred that the said advocates on realising their mistake, purported to make an application before the lower court for enlargement of time to apply for leave to appeal and for the validation of the appeal that they had already filed which application was dismissed by the lower court for lack of jurisdiction.
 3. The Applicant averred that the error of judgment and/or mistake of his advocates should not be visited upon him. The Applicant averred that the appeal he had filed could not be successfully prosecuted unless leave was granted as required by the rules. The Applicant averred that the appeal or the intended Appeal raised arguable grounds which merited serious judicial consideration and if his application was rejected; he would have been denied a right to be heard on the said appeal. The Applicant averred that his former advocates were not notified of the date for the ruling that was made by the lower court on 26th May 2023 dismissing his application for extension of time and leave to appeal for lack of jurisdiction. The Applicant averred that his present application was made without unreasonable delay and that for the ends of justice and fairness to be met, the application should be allowed as prayed.
 4. The Applicant averred that the lower court erred in dismissing his suit for want of prosecution. The Applicant averred that the decision of the lower court was not based on sound legal principles and a grave miscarriage of justice would be occasioned to him if he was denied leave to appeal against the impugned ruling. The Applicant averred that the court had unfettered discretion to grant the orders sought. The Applicant averred that the Respondent would not be prejudiced at all if the orders sought were granted since they were in possession of the disputed property.
 5. The application was opposed by the 1st and 3rd Respondents (hereinafter referred to only as "the Respondents") through a replying affidavit sworn by their advocate Winnie Anuro on 6th November 2023. The Respondents averred that following the dismissal of the Appellant's suit by the lower court on 18th March 2022 for want of prosecution, the Applicant filed Kisumu ELCA No. E018 of 2022 which was withdrawn with costs on 1st November 2022. The Respondents averred that it was after the withdrawal of the said appeal that the Applicant filed an application dated 9th November 2022 before the lower court seeking to enlarge time to file an appeal out of time and leave to appeal from the ruling of that court made on 18th March 2022 which application was dismissed by the lower court on 26th May 2023 for want of jurisdiction. The Respondents averred that the Applicant brought the present application 6 months after the lower court dismissed his said application for similar orders on 26th May 2023. The Respondents averred that the delay in bringing the present application was inordinate and inexcusable. The Respondents averred further that the intended appeal was misconceived and had no prospects of success. The Respondents averred that there was no explanation for the Applicant's inaction in the lower court that led to the dismissal of its suit for want of prosecution. The Respondents



averred that litigation must come to an end. The Respondents averred that without a cogent, full, honest and plausible disclosure of the reasons for the delay in bringing the application, there was no basis upon which the court could exercise its discretion in favour of granting the orders sought. The Respondents averred that the application was an afterthought and that allowing the application would prejudice the Respondents since they would have to pay legal fees afresh in a matter that to their mind was already concluded and fees settled.

Analysis and determination

6. The application was argued by way of written submissions. I have considered the Applicant's application together with the response thereto by the Respondents. I have also considered the submissions on record together with the authorities cited in support of the same.
7. Section 16A (1) of the *Environment and Land Court Act*, 2011 provides that all appeals from the subordinate courts and local tribunals shall be filed within 30 days from the date of the decree or order appealed against. Section 16A (2) of the said Act provides that:

An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.
8. Section 75(1) of the *Civil Procedure Act* provides as follows:
 - (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted...

Order 43 Rules 2 and 3 of the Civil Procedure Rules provide that:
 - (2) An appeal shall lie with the leave of the court from any other order made under these Rules.
 - (3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
9. Order 50 Rule 6 of the Civil Procedure Rules provides as follows:
 6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.
10. The Applicant's application seeks extension of time to apply for leave to appeal against the decision of the lower court that was made on 18th March 2022, and for leave to appeal. The Applicant also seeks an order that the appeal he had filed in this court namely; Kisumu ELCA No. E018 of 2022 be deemed as having been filed with leave of the court and within time. It is not contested that this court has the power to grant the orders sought. It is also not contested that the power is discretionary and that the court will only exercise its discretion to grant the orders for sufficient cause and for the ends of justice to be met.



11. Sufficient cause was defined in Attorney General v. Law Society of Kenya & another [2017]eKLR as follows:

“Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See Black’s Law Dictionary, 9th Edition, page 251

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

12. The Applicant approached this court on 5th October 2023; 1 year and 7 months after the ruling sought to be appealed was delivered on 18th March 2022. The Applicant attributed the delay in bringing the application to a mistake on the part of his previous advocates who filed an appeal against the said ruling without first obtaining leave. The Applicant contended that the present application was brought immediately the mistake was detected and an attempt to obtain leave to appeal from the lower court failed on 26th May 2023. I am satisfied that the Applicant had intended to appeal against the order of the lower court made on 18th March 2022 dismissing his suit in the lower court for want of prosecution. I am also satisfied that the Applicant has reasonably explained the delay in bringing the present application which is attributed to the inadvertent failure by the Applicant’s previous advocates to seek leave of the lower court to appeal against the orders made on 18th March 2022. These are however not sufficient to warrant the grant of the orders sought. The Applicant had a duty to satisfy this court that he has an arguable appeal that he should be allowed to pursue. I have perused the lower court’s ruling dated 18th March 2022 and the Applicant’s memorandum of appeal. In the lower court ruling, the lower court noted that the lower court suit was in court last on 28th February 2020 and that by the time the Respondents applied for its dismissal on 19th July 2021, no further step had been taken in the matter. I have noted that the Applicant attributed his failure to take action in the matter to attempts that had been made by the parties to settle the suit out of court and his failed attempt to substitute the 2nd Respondent herein who died while the lower court suit was pending. I am of the view that it is arguable whether the lower court was right in disregarding these explanations put forward by the Applicant for his inaction.
13. I have noted that what is in dispute between the parties is a parcel of land which the Applicant claims was transferred to the Respondents unlawfully. The Respondents have not convinced me that it would not be possible to conduct a fair trial in the lower court suit if the suit were to be reinstated. I am of the view that sufficient cause has been shown to warrant the grant of the orders sought by the Applicant. I am also satisfied that the ends of justice would be served if the Applicant is allowed to pursue his appeal against the lower court ruling.

Conclusion

14. In conclusion, I find merit in the Notice of Motion dated 4th October 2023. The application is allowed on the following terms;
1. The Applicant is granted leave to appeal against the ruling and orders made by Hon. K.Cheruiyot SPM on 18th March 2022 in Kisumu CMC ELC No. 44 of 2019.
 2. The Applicant shall file the appeal within fourteen (14) days from the date hereof in a new file.



3. The Applicant shall pay the costs of the application to the 1st and 3rd Respondents assessed at Kshs. 20,000/- payable forthwith and in any event within 30 days from the date hereof in default of which the 1st and 3rd Respondents shall be at liberty to execute for the recovery thereof.

DELIVERED AND DATED AT KISUMU ON THIS 2ND DAY OF OCTOBER 2024

S. OKONG'O

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERRING PLATFORM IN THE PRESENCE OF:**

Mr. D. Otieno h/b for Ms. Anuro for the Respondents

N/A for the Applicants

Ms. J. Omondi-Court Assistant

