Glory Outreach Ministry (Suing through Its Trustees Besnon Ekeno Erkuwan) v Lojuk & 4 others (Environment and Land Appeal 14 of 2022) [2023] KEELC 486 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 486 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 14 OF 2022

FO NYAGAKA, J

FEBRUARY 1, 2023

BETWEEN

GLORY OUTREACH MINISTRY (SUING THROUGH ITS TRUSTEES BESNON EKENO ERKUWAN) ..... APPELLANT

AND

ROBERT EKOMWA LOJUK ..... 1ST DEFENDANT

EKAI IMANA ..... 2ND DEFENDANT

PATRICK EKAL ..... 3RD DEFENDANT

FRED MUYA ..... 4TH DEFENDANT

EBULON LOMANAKWEE ..... 5TH DEFENDANT

RULING

1. Let it be known to all and sundry that it is wise to weigh your thoughts, words and actions before you speak or act for by these you will be judged. The sons and daughters of men are not endowed with omniscience to discern all and your true intents unless they are clear. In the fallen imperfect state of man anyone is bound to misunderstand your words and actions. For instance, the Respondent herein opposed the instant simple Application seeking leave to extend time for filing an appeal out of time by, among others, deponing that the Application was "self-drowned" and "...did not disclose any intent to please any public good to massage the ego of the court towards granting (it)."

2. To counsel, litigants and we who serve on the side of administering justice, it should be borne in mind that while writing or speaking using stylistic features is a good thing, it can cause the author's or speaker's heart to be elevated to the point of being disrespectful of others, and thereby spoil the broth. Care should be taken to be mindful of the audience or recipients and avoid tipping over: the tangent

can be extremely delicate. Such was the fate of the language in the term and phrase referred to in the previous paragraph.

3. The language imported an idea that cutting across our courts is case of being and serving with ego and that work of parties is to massage that ego so as to grant orders. Simply put, that courts are to be made to feel important and proud. Far be it from us, whether courts or those we serve, that that should be. But as I understand the import of the oath of service taken by judges and judicial officers, it binds each and every one of them to serve selflessly with humility and impartiality, among others, while embracing the national values and principles of governance as enumerated in Article 10 of *the Constitution* of Kenya and values and principles of public service as provided in Article 232. Above all, the fear of God should reign in every heart of every human. While it was designed to communicate that the instant application did not demonstrate any issue of merit to cause this court to grant the orders sought, it ended up portraying courts on a bad light. Regarding "self-drowned", unless explained which was not, the term is as confusing as is foreign.

4. Be that as it may, by a Notice of Motion dated 18/08/2022 and filed on 31/08/2022 this Court was called upon to grant a number of prayers as stated below. The application was accompanied with a Certificate of Urgency dated 18/08/2022 although as it is clear from the conduct of either the Appellant or its counsel that there was no sense of urgency in making the Application. I state so because from 18/08/2022 when the Application and Certificate were prepared and dated to 31/10/2022 when they were filed was a period of two months and twelve days. There cannot be anything urgent by any stretch of imagination in such an Application.

5. Be that as it may, the Application was brought, under Section 79G and 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules. It sought the following reliefs:

    1. That the Appellant be granted leave to file the Memorandum of Appeal and record of Appeal out of time against the whole Ruling of the Principal Magistrate C. W. Wekesa in Principal Magistrate's Court at Lodwar delivered on 24th May, 2022.

    2. THAT the Memorandum of Appeal annexed hereto be deemed as duly filed and served.

    3. THAT upon granting prayer Number 2 the Appellant be granted 14 days to file the Record of Appeal.

    4. THAT the costs of this Application be provided for.

6. In support of the Application, the Appellant enumerated grounds on its face. These were that the Advocate who was handling the matter left the law firm without notifying the main office; it was until the Appellant visited the Nairobi office towards the end of June, 2022 that he informed the lawyers about the judgment; the Appellant believed that the Advocate in the office filed an appeal against the judgment but he did not; immediately upon learning of the judgment the advocates applied for proceedings and the judgment; by the time the Appellant and the Nairobi lawyers received the information the time to file an appeal had run out; the Respondents are unlikely to suffer any prejudice if the orders are granted.

7. The Appellant supported its Application through two Affidavits, one being sworn by its learned counsel and the other by the Appellant himself. By an Affidavit sworn on 18/08/2022, learned counsel Mr. Oduor Henry John deponed that the matter was initially handled by an associate in his law firm. His name was Kennedy Odhiambo. He swore further that he became aware of the of the delivery of the judgment in May, 2022 in late June, 2022 through their client. He immediately applied for proceedings and judgment to enable him file a Memorandum of Appeal. Upon receiving them he found that the Associate stopped attending the matter from the time it reached Defence stage. He deponed further

that the Appellant was keen on prosecuting the matter and counsel's mistake should not be visited on the client. He stated further that no prejudice would be occasioned on the Respondents if the Application was allowed. He then annexed to the Application and marked as OJH1 copies of a letter dated 18/06/2022 requesting for proceedings, the Memorandum of Appeal dated 26/07/2022 filed herein, receipts for and the proceedings and judgment in Lodwar SPMCC No. 4 of 2020.

8. The Appellant, one Ekeno Erkuwan Erkuwan, swore an Affidavit on 18/08/2022 in support of the Application. He deponed that the law firm currently representing him was the one which did so in the lower Court through an Associate by name Kennedy Odhiambo whom he came to learn left the law firm to join politics. He stated further that when judgment was delivered he informed the said Associate about it and instructed him to appeal therefrom. When he visited the Nairobi office he was informed that the office was not aware of the judgment. The Nairobi office immediately took steps to get the proceedings and judgment and file an appeal as instructed. He then pleaded not to be punished for mistakes of counsel and that this Court exercises discretion to grant the orders sought. Lastly, he deponed that immediately upon realizing that an appeal had not been filed he moved to this Court appropriately.

9. Without any surprise, the Application was opposed. The Respondents did so through an Affidavit sworn by one Ekai Imana, the 2nd Respondent on 29/11/2022. He deponed that the Application was fatally defective, inept, ambiguous, misconceived, untenable in law, lacking in merit and an abuse of the process of the Court. As for grant of leave to file an Appeal out of time, he deponed that the Application did not meet the threshold of Sections 79G and 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules. He also swore that there were no special circumstances which could sway the discretion of the Court to the favour of the Applicant. He then annexed to the Affidavit and marked them as EI-2 a number of copies of affidavits of service to show that the Applicant was always properly served and involved.

10. He deponed that the period of delay was so long that it could not be accounted for and the reasons given were flimsy since desertion of one single staff did not mean that the Lodwar office of counsel was closed down but was operational. He then deponed further that the draft appeal annexed to the supporting Affidavit showed that it was hopeless, self-drowned (sic), self-defeated, dead on arrival and lacked in merits. Lastly, he swore that the Application did not disclose any "...intent to please any public good to massage the ego of the court" (emphasis by Italics).

Submissions

11. The Application was to be disposed by way of written submissions of which by the 18/01/2022 when the Application was heard only the Applicant indicated that he had filed on 6/12/2022. The Respondents' counsel informed the Court that they did not intend to file any on behalf of their clients.

12. In the submissions by the Applicant, finally placed in the Court file on 24/01/2023, learned counsel stated that the Application was merited and this Court had jurisdiction to determine it. He stated that the Respondents had not contended that they would be prejudiced by the grant of the orders sought. He relied on Articles 48 and 50 of *the Constitution* of Kenya on access to justice and asked that the applicant be not locked out of the process. He stated that the application was not an abuse of the process of Court. He repeated Order 50 Rule 6 of the Civil Procedure Rules which provided for the enlargement of time and Articles 159 of *the Constitution* on the need for the court not to base its decision on technicalities and Article 10 on the national values and principles of governance. He relied on the case of Vishwa Stone Suppliers Company Ltd. vs. RSP Stone (2006) Civil Application No. 55 of 2020, Court of Appeal sitting in Nairobi.

13. Although the Respondents did not file submissions, that will not prejudice position in the determination of the Application on merits since submissions do not constitute facts and pleadings of parties. For this proposition reference is made to the Court of Appeal case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR. Thus, even where submissions have been filed, the Court may as well not consider them. Indeed, the Court of Appeal, in the above authority has stated that many decisions have been rendered by Courts without submissions being considered and they have been found lawful. Therefore, I now proceed to determine the instant Application.

Analysis And Disposition

14. I have given due consideration of the Application before me. I have also taken into account the law, the facts relied on and the submissions filed by counsel. From these, the following issues lie for determination:-

    a. Whether the Applicant has satisfied the conditions for grant of an order for extension of time

    b. Whether the Memorandum of Appeal herein should be deemed duly filed and served.

    c. What orders to issue including who to bear costs.

15. Having set down the issues for determination, the Applicant submitted on one issue which I must address myself on at the preliminary stage. He stated that this Court had jurisdiction to handle the Application. Since the Court's jurisdiction is not conferred on a Court by parties but the law, I have the duty to first determine whether or not I have the requisite jurisdiction. This is because, times without number, it has been repeated that absent of jurisdiction, a court must down its tools. Thus, the holding of Nyarangi JA in the seminal case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 is instructive on this issue. He stated as follows:-

> 'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

16. On this, the Supreme Court in the more recent decision of Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, observed that:-

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

17. From the two authorities cited, it is clear that without jurisdiction the Court should not make any attempt to determine any issue in any matter, except that specific issue as to whether or not it has jurisdiction. In the instant case, the Applicant sued the Respondents in the Senior Principal Magistrates' Court in Lodwar for an order restraining the defendant therein and or their agents from trespassing onto the subject matter of the suit, and a declaration that the Plaintiff is the rightful owner of the said piece of land (which was specified in the pleadings). Clearly, the subordinate court dealt with an issue relating to land.

18. By virtue of Section 19(2) of the *Environment and Land Court Act*, this Court applies the *Civil Procedure Act* and consequently the Civil Procedure Rules, 2010. Section 65(1) of the *Civil Procedure Act*, and Order 42 Rule (1) of the Civil Procedure Rules, appeals from the said Court lie to this Court. Thus, where a party fails to appeal from the subordinate Court within time and wishes to apply for leave to file an appeal out of time, he/she has to move this Court, by virtue of Section 79G of the Act. Therefore, in terms of considering the instant Application, it is my finding that since the Appellant has come to this Court seeking enlargement of time to appeal a decree of the subordinate Court, this Court has jurisdiction to consider the Application.

19. Having found that this Court is vested with the jurisdiction to handle the instant Application, I now begin analyzing the issues I framed.

Whether the Applicant has satisfied the conditions for grant of an order for extension of time

20. In analyzing this issue an examination of the law and facts is apt. Regarding the law, the Applicant relied on Section 79G and 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules, 2010. Section 79G of the *Civil Procedure Act* is about time for filing appeals from the subordinate Courts to this Court. It provides that that the time is 30 days of the decision. However, the Section, vide a Proviso thereto, also provides for the exception the requirement. The Proviso reads, that "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." Therefore, there are circumstances which must be explained to the satisfaction of the Court, which can cause one to be permitted to file an Appeal out of time. I shall analyze these reasons later in this Ruling.

21. Section 95 is about enlargement of time for the doing of an act where the period is either fixed by the Court or the Act itself, and it is not complied with. In that case the court may, from time to time, exercise discretion to enlarge the time depending on the circumstances of the case.

22. I am now left with considering Order 50 Rule 6 of the Civil Procedure Rules which the Applicant relied on. The provision gives the parties leeway to enlarge time for the delivery, amendment, or filing of any pleading, answer or other document of any kind, without making an application to Court. Where they decide to do so, they will have to file a written consent. It therefore means that the parties herein having decided to bring the application, the Rule is not applicable to the circumstances herein.

23. Apart from Order 50 Rule 6 of the Civil Procedure Rules which I have found above to be irrelevant, the other relevant provisions above give conditions under which the extension of time may be made by the Court. It is with noting that the grant of such an order is discretionary. The discretion should be exercised judiciously. It means the Court has to apply its mind properly to the law and the facts of each case and determine the application in a just and reasonable manner.

24. From the relevant provisions cited by the Applicant it is not automatic that once a party moves the Court for enlargement of time, he/she will be granted the prayer. The Court has discretion, and

obligation, to consider a number of factors. In the case of Thuita Mwangi v Kenya Airways Ltds [2003] eKLR the Court of Appeal held: -

> "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."

25. Further, Court of Appeal in Susan Ogutu Oloo & 2 others vs Doris Odindo Omolo [2019] eKLR where Otieno-Odek JA held as follows: -

'The instant application is founded on Rule 4 of the Rules of this Court. In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo arap Korir Salat V. IEBC (2014) eKLR Sup. Ct. Application No. 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted.'

26. In the instant case, applying the principles enunciated in the two authorities citied above, first, it took the Applicants the Applicants from 24/05/2022 to 31/10/2022 when they brought this Application. There was delay of five (5) months or so. This delay was inordinate. Absent of an explanation for this delay, the application is lost. Courts have emphasized in many an instance that any delay however small must be explained. For this position, reference is made to two Supreme Court of Kenya decisions of Nicolas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others SC. App. No. 16 of 2014; [2015] eKLR in which the Court emphasized seven principles to be followed in applications of this nature, including some that, "1. extension of time is not a right of a 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 extension of time has the burden of laying a basis, to the satisfaction of the Court; ... 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;" and Mombasa County Government v Kenya Ferry Services & another [2019] eKLR where the Court cited the Nick Salat case with approval.

27. In the instant case, the Applicants have explained the cause of the delay in two ways, namely, that counsel who handled the suit from where the intended appeal arises abandoned the matter and went into politics without notifying the main law firm office, and that it took time for them to procure both the typed proceedings and judgment to enable them to appeal. While it is not a requirement in law in appeals at this stage that getting proceedings is a condition precedent to filing an appeal, it would be reasonable to expect that learned counsel having not handled the suit in the trial court wanted to apprise themselves with the facts, evidence tendered and reasoning of the Court in the judgment. Thus, even though it appears to me that the Applicant visited the Nairobi office of counsel a week before the lapse of 30 days for appealing were ended as seen from the date of the letter annexed to the Affidavit of Oduor Henry John and marked OJH1) applying for proceedings and that of delivery of judgment, I am of the view that the explanation for delay is satisfactory.

28. That which is not satisfactory is the delay between 18/08/2022 when the Application appears to have been prepared and 31/10/2022 when the Application was filed. Anyway, were it not for the reason of dating the Application, the certificate of urgency and supporting affidavits the said date, it could have been difficult for the court to tell when the proceedings and judgment may have been obtained. But it appears they may have been obtained by 18/08/2022. From the totality of the circumstances of this case, this Court is prepared to treat that lapse of the filing of the documents from when they were dated to the time they were presented to Court as a mistake on the part of the counsel and further the Court is of the view that this mistake of counsel, coupled with the one of desertion of the counsel engaged at the time of trial, should not be visited on their client. I would excuse it. I am guided by the holding by the Court of Appeal case of Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR, wherein it was stated as follows:-

> "From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."

29. After considering the requirements above as I have, I must add that I have carefully analyzed the Memorandum of Appeal which I will treat as a draft one because of the explanations and finding in the paragraphs immediately here below and I am of the opinion that it is not a frivolous one but raises arguable points.

Whether the Memorandum of Appeal herein should be deemed duly filed and served

30. What is left of me to determine is whether I can grant this Application to validate an appeal that was filed without the leave of the Court. The Memorandum of Appeal herein was filed without leave of Court. Thus, as it was then and is, it was filed in contravention of the law. It was a nullity. Actually, there is no appeal filed in this matter. This Court cannot legalize an illegality. To do so would be akin to returning a still born into the womb in order to start grant it life afresh: one would be killing automatically the mother who is already grieving and in pain. This Court will therefore not grant the Prayer No. (2) of the Application. I am guided by the Court of Appeal case of Kiru Tea Factory Company Ltd vs. Stephen Maina Githiga & 13 others [2019] Eklr where the judges held that "The common thread from the decisions cited above is that where leave of court is required, any pleading filed without leave is a nullity and liable to be struck out."

31. In Neptune Credit Management Limited & another v Jigisha P. Jani & another [2021] eKLR the Oguttu Mboya J took a similar position by holding, thus:-

> "Suffice it to say, that a legal Document, which is filed out of time and without leave of the court is itself a nullity and cannot be the subject of validation.
>
> 73. To the contrary, a party and/or litigant who desires to file a legal documents and/or pleadings out of time, is called upon to approach the court for leave to extend and/or enlarge time, and upon enlargement of such time, same can thereafter proceed to lodge the requisite pleadings and/or documents."

c. What Orders to issue including who to bear costs

32. And since I have found out that the Memorandum was a nullity, I strike out the Memorandum of Appeal herein and direct that the Applicant herein files a fresh one containing the orders granted herein and serve, within the next seven (7) days. This is to be done, notwithstanding that Directions have not been given in terms of Order 42 Rule 11, in order to fast-track the intended appeal, and in the interest of justice as per Section 3A of the *Civil Procedure Act* and bearing in mind Article 159(2)(d) of *the Constitution*. I have also noted from the annextures to the Application that typed proceedings of the lower Court are ready and the judgment is available. What is not clear is whether the decree was extracted. Therefore, the Applicant will also file and serve the Record of Appeal within the next twenty-one (21) days of this order.

33. Further, the Applicant shall endeavor to, and, communicate with the trial Court to ensure that the original of the Court file is transmitted to this Court within the period of thirty (30) days of filing the intended appeal, in order to facilitate the taking of Directions on the said intended Appeal herein. They are required to also take a mention date on the appeal before this Court within thirty (30) days of filing it.

34. Although the Application has succeeded in part, the Respondents will be given the costs thereof.

35. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 1ST DAY OF FEBRUARY 2023

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE