Wathanga & 2 others v Joseph & another (Miscellaneous Application E012 of 2022) [2023] KEELC 18604 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18604 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

MISCELLANEOUS APPLICATION E012 OF 2022

A NYUKURI, J

JULY 5, 2023

BETWEEN

GLADYS WANJIRU WATHANGA ..... 1ST APPLICANT

MARY WANGUI WAMBUGU ..... 2ND APPLICANT

ISAAC THUKU WAHOME ..... 3RD APPLICANT

AND

SAMSON MUKEKU JOSEPH ..... 1ST RESPONDENT

JOHN VUTI ..... 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 7th March 2022, the Applicants sought the following orders;

   (a) Spent

   (b) That this court be pleased to grant the Applicants leave to appeal out of time against the ruling and orders of Hon Everlyne S A Olwande Chief Magistrate Mavoko ELC No E005 of 2021 delivered on 23rd December 2021.

   (c) That the costs of this Application be provided for.

2. The application is predicated on the grounds on its face as well as the affidavit in support thereto sworn on 7th March 2022 by Beatrice Ndunge Wanyama advocate for the Applicants. The Applicants' case was that on 1st March 2021, the Respondent filed a preliminary objection dated 22nd February 2021 in Mavoko ELC No E005 of 2021 and that it is only on 24th February 2022, when counsel for the Applicants was in court in a related matter namely Mavoko ELC No E002 of 2021, when she learnt from counsel for the Respondent that a ruling had been delivered dismissing the suit in Mavoko ELC E005 of 2021. Counsel stated that on 25th February 2022, she went to court and indeed confirmed that

a ruling had been delivered on 23rd December 2021. She stated that she was not aware of the ruling and had been waiting for communication on the date of the ruling from court. She confirmed that indeed on 23rd December 2021, the suit had been fixed for ruling but there was no causelist for that day for the trial court. Counsel alleged that she logged in the court virtual platform but she was not admitted after 30 minutes and that therefore she logged into the court's link for Hon S Jalang'o (PM) but she was also not admitted. She says she logged into that court because it is the same court that mentioned the matter on 3rd November 2021 and gave a ruling date for 23rd December 2022.

3. She stated that without any information from court she remained in limbo and having lost track, she wrote a letter seeking for a mention date but the letter was not responded to. She stated that the ruling was prejudicial and intended on behalf of her client to appeal.

4. She further stated that the Applicants are the lawful appointed guardians of Ann Wairimu Wahome, the owner of the suit property and who is of unsound mind and needs the court's protection. She stated that the claim is for recovery of land and not fraud as indicated in the plaint and that the intended appeal is arguable and has high chances of success. According to her, the orders sought shall not prejudice the Respondent. She attached a copy of the preliminary objection, the causelists, ruling, emails to court, plaint and application dated 14th January 2021, draft memorandum of appeal and a letter applying for proceedings.

5. The application was opposed. Michael Mwendwa, advocate for the 2nd Respondent filed a replying affidavit sworn on 26th May 2022. It was the 2nd Respondent's case that the parties in Mavoko Chief Magistrates Court ELC Suit No E005 of 2021 were the current applicants in their representative capacity as administrators of the estate of Dr. Anne Wairimu Wahome and the 1st and 2nd Respondents, but that the current application had been instituted in the Applicant's personal capacity making the Application fatally defective.

6. Mr. Mwendwa deposed that the Applicants did not deserve the orders sought for non disclosure of the truth. He asserted that when the Applicants filed suit on 2nd February 2021, the Respondent had been in occupation of the suit property for 14 years and that the question of limitation of action and jurisdiction was raised at the earliest instance by way of preliminary objection which was heard and a ruling date fixed for 23rd December 2021. Counsel stated that on 23rd December 2021 when he logged into the lower court's virtual platform, he was informed by the court staff that the ruling had been delivered in the absence of both counsel. That he requested for a copy of the ruling and was told the same would be sent later after it had been corrected.

7. He further averred that on 28th December 2021 a copy of the ruling was sent to his office email and the same copied to the Applicants' advocate email. He faulted the Applicant's advocate for failure to explain why she failed to take action on the ruling from 28th December 2021.

8. He stated that counsel for the Applicant was aware of the ruling and that is why on 10th January 2022 she took a mention date for pretrial directions and served mention notice on 24th February 2022. He further stated that the Applicant had not placed all necessary material before court to allow the court grant orders sought. He blamed the Applicants of being indolent and casual in obtaining certified copies of proceedings and stated that the mistake on the part of the Applicants was inexcusable. He contended that the Applicants have not raised reasonable grounds of appeal and further proceedings herein will amount to waste of judicial time and unnecessary costs to the Respondent. He attached Respondents defence, witness statements and documents and preliminary objection in Mavoko ELC CMCC No E005 of 2021, email correspondence, ruling and a mention notice.

9. The application was canvassed by way of written submissions. On record are the 2nd Respondent's submissions filed on 22nd June 2022.

Submissions

10. Counsel for the 2nd Respondent submitted that the Applicants lacked capacity to make the present application. Counsel relied on Order 4 Rule 4 of the Civil Procedure Rules to argue that parties suing in a representative capacity ought to state the capacity in which they sue. Reliance was placed on the decision in the case of *Kahindi Katana Mwango & Another v Canon Assurance K. Ltd* [2013] eKLR to buttress the submissions that where a representative suit is filed and the pleadings do not state that the suit is representative that renders the suit incurably defective. Counsel also argued that Section 26 (1) (i) (a) of the *Mental Health Act* requires managers of the estate of a mentally challenged person to obtain leave of court before dealing with the property of the patient and that no leave was obtained.

11. It was further submitted for the 2nd Respondent that the Applicants had failed to offer explanation for the delay or the action they took to obtain the ruling from court after 23rd December 2021. Counsel referred to the decision in the case of *George Kangethe Waruhiu v Esther Nyamweru Munene & Another* [2021] eKLR, on the factors to be considered when the court considers an application to extend same.

12. On whether a party should not take the blame of their advocates, counsel relied on the decisions in the case of *Kenya National Highway Authority v Joseph Ndolo Mutua* [2020] eKLR and *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, to submit that a party ought to follow up on their cases even when they are represented.

13. Counsel argued that the reasons for the delay were unconvincing and that there was no evidence that the proposed appeal had reasonable chances of success as they did not attach defence, witness statements and documents to their application. Counsel referred to the cases of *Kenya Industrial Estates Ltd v. Samuel Sang & Another* [2007] eKLR, and *Brinks-MAT Ltd v. Elcombe* [1988] 3 ALL ER 188 for the proposition that an appellate court can only interfere with the exercise of judicial discretion of a trial court where it is shown that the trial court erred in principle; and that where there is no full and frank disclosure of material facts, discretion should not be exercised in favour of the Applicant.

14. Counsel for the 2nd Respondent extensively submitted on the merits of the ruling by the trial court in respect of the preliminary objection and why the suit was dismissed and the import of the provisions of the *Limitations of Actions Act* and more specifically Section 4 (2) and 26 thereof and cited and cases of *Edward Moonge Lengusuranga v James Lanaiyara & Another*, *Justus Tureti Obara v Peter Koipeitai* [2014] eKLR among other cases.

Analysis and Determination

15. Having considered the application, the response and the submissions, the issues that arise for determination are whether the application is incompetent and whether there is a good and sufficient cause to extent time for filing appeal.

16. The Respondent argued that because the case before the Chief Magistrate was filed by the Applicants in their capacity as having been appointed to manage the estate and be guardian of Anne Wairimu Wahome, the title of the application herein ought to have reflected that fact. I have considered the pleadings before the trial court which were attached to the supporting and replying affidavit and I note that none had any such descriptions in the title. The fact of the suit having been filed by the Applicants

as guardians of Anne Wairimu Wahome was disclosed in paragraph 6 of the plaint. In the Applicants' plaint before the trial court, they disclosed that they had been appointed to manage the estate and be guardians of Anne Wairimu Wahome in Nairobi High Court Miscellaneous Civil Application No 34 of 2011 – *Mary Wangui & 2 Others v Michael J. W. Githinji*. This fact is not challenged. What the 2nd Respondent has faulted, is the framing of the title of the instant application. In my view, the Applicants' capacity to sue for the estate of Anne Wairimu Wahome is not in dispute as they were granted the same vide the orders of the court in Nairobi High Court Miscellaneous Civil Application No 34 of 2011. The mere failure to include the description in the title of the application that the application is filed pursuant to the aforesaid orders in my view is not fatal as to render the instant application incompetent.

17. The issue of capacity would arise if the Applicants would not have been granted the order of court to represent Anne Wairimu's estate, and even if they would indicate a proper description in the title, without the court's orders, their application would have been incompetent. Therefore the real issue is not whether they are properly described, but whether they have been properly capacitated? In this case, capacity was clothed on the Applicants by the order issued by the High Court as stated above. Article 159 (2) (d) of the *Constitution* of Kenya enjoins this court to facilitate substantive justice and to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. In the premises, I find and hold that the application herein is not incompetent.

18. On the question of extension of time, Section 79 G of the *Civil Procedure Act* grants this court the jurisdiction to extend time to file appeal and provides as follows;

> 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 orders;
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> 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.

19. Essentially, an appeal against a decree or order of the subordinate court to this court ought to be filed in thirty days, but where an appeal has not been filed within the required time, an applicant wishing to obtain leave to file an appeal to this court out of time, ought to place material before this court demonstrating a good and sufficient cause for failure to file appeal in time, for this court to exercise its discretion to extend time. There is no standard definition of what amounts to a "good and sufficient cause". However, in my view, sufficient cause refers to that which is enough to respond to a specific question in the circumstances of each case.

20. In the case of *Murage Nyawira Gladys v Lydia Mutinda Mutunga* [2022] eKLR, the court cited with approval the decision in *FWNM v SMM* [2019] eKLR where it was held as follows;

> I again repeat the question what does the phrase "sufficient cause" mean. The Supreme Court of India in the case of PARIMAL v VEENA observed that;
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> > "Sufficient cause" is an expression which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough" in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides platitude which when the act done suffices to accomplish the purposes intended in the facts and circumstances existing in a case and duly examined from the view point of a

> reasonable standard of a curious man. In this context, "sufficient cause" means that a party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive."
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> However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.

21. In considering an application for extension of time, the court will normally consider the period for the delay, the reasons for the delay, the prejudice that may likely be suffered by the opposite party and if the matter touches on public interest.

22. In the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR, the Court of Appeal discussed the factors to be considered in an application for extension of time and held as follows;

> Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court, including but not limited to, the period of delay, the degree of prejudice to the Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.

23. In this matter, counsel for the Applicant deponed that she was aware that the ruling was to be delivered on 23rd December 2021 and that she logged into the court virtual platform but was not admitted and she tried logging into the virtual platform of the court that last mentioned the matter, but still she was not admitted. Counsel alleges that she sent emails, and wrote letters to court but she got no response. She even went ahead to ask for a mention date for pretrial which was granted to her. By virtue of Order 50 Rule 4 of the *Civil Procedure Rules* that provides that time does not run between 21st December to 13th January of the succeeding year, it is clear that at the time the ruling was delivered, time was not running. Time began to run from 14th January 2022, which means that the Applicants' time to appeal lapsed on 14th February 2022. The emails to court by the Applicants' counsel were dated 27th January 2022, 31st January 2022 and 8th February 2022, which is clearly within the time provided for appeal. Even the mention date taken in January 2022 and the notice served on counsel by the 2nd Respondent on 13th January 2022 was within the time provided for the appeal.

24. Looking at the efforts made by counsel for the Applicants, in finding out what transpired and taking a mention date for pretrial, when in fact the suit had been dismissed, in my view, it cannot be construed that there was indolence on the part of the Applicants. The Applicants advocates obviously made a mistake in taking a mention date for pretrial directions and even effecting service but there is no evidence that there was bad faith on the part of the Applicants.

25. The application herein was filed on 8th March 2022, which is 23 days after the lapse of the time to appeal. In my view, a delay of 23 days which was caused by a blunder of the Applicants' counsel is not inordinate and ought not prejudice the Applicants' right of appeal, as the delay is not inordinate.

26. In the premises, I am satisfied that the delay in filing the appeal is excusable and has been explained to the satisfaction of this court. The upshot is that the notice of Motion dated 7th March 2023 is merited and the same is allowed. The Applicant is hereby granted leave to file and serve their appeal against the ruling of Hon S A Olwande, Chief Magistrate in Mavoko ELC No E005 of 2021 delivered on 23rd December 2021, within 21 days of this ruling. In view of the proviso to the provisions of Order 50 Rule 6, the costs of this application shall be borne by the Applicants.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Wati for Applicants

Mr Kivuwa for Respondents

Josephine – Court Assistant