



Mwangi (Suing As The Personal Representative Of The Estate Of The Late Peter Mwangi Mbuthia (Deceased)) v Gitonga (Defending as the personal representative of the Estate of the Late James Ndina Gitonga) & another (Miscellaneous Civil Application E016 of 2022) [2023] KEELC 21358 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21358 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
MISCELLANEOUS CIVIL APPLICATION E016 OF 2022
LC KOMINGOI, J
NOVEMBER 9, 2023**

BETWEEN

**SOLOMON NJORA MWANGI APPLICANT
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE
LATE PETER MWANGI MBUTHIA (DECEASED)**

AND

**ERIC MAINA GITONGA (DEFENDING AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF THE LATE JAMES NDINA
GITONGA) 1ST RESPONDENT
CRISPUS MBICI GAKUI 2ND RESPONDENT**

RULING

1. This is the Notice of Motion dated 4th May 2022, brought under;

(Under Section 1A, 1B, 3, 3A and 75 of *Civil Procedure Act*, Order 50 Rule 6 and Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all Enabling Provisions of the Law)
2. It seeks Orders;
 1. Spent
 2. That this Hon. Court be pleased grant leave to the Applicant to file an Appeal the judgement and decree adopted by Hon. R.A Oganyo in the Senior Resident Magistrate Court at Kajiado on 14th August 2007.



3. That this Hon. Court be pleased enlarge the time for filing of the intended Appeal by the Applicant against the judgement and decree adopted by Hon. R.A Oganyo in the Senior Resident Magistrate Court at Kajiado on 14th August 2007.
 4. That this Hon. Court be pleased to order stay of execution of the judgement and decree adopted by Hon. R.A Oganyo in the Senior Resident Magistrate Court at Kajiado on 14th August 2007, pending the hearing and determination of this application and the intended appeal.
 5. That the costs of this application be provided for.
3. The grounds are on the face of the Application. It is supported by the Affidavit of the Applicant sworn on 4th May 2022. He depones that the late Peter Mwangi Mbuthia was the registered owner of L.R. No. Ngong/Ngong/20790 but on 4th January 2007 the Land Disputes Tribunal without jurisdiction determined that the Respondents were the owners of the suit property. This decision was adopted by the Senior Resident Magistrate's Court Kajiado on 14th August 2007.
 4. Aggrieved, the Applicant challenged the Tribunal's award vide Machakos Judicial Review No. 407 of 2009 which was struck out on technicality. Subsequently, the Applicant filed Kajiado ELC Petition No. 9 of 2018 which was dismissed on the basis that the Magistrate's Court decision could only be challenged through an Appeal, hence the filing of the instant application and Memorandum of Appeal.
 5. The Applicant claims that the Appeal has a high likelihood of success and the Respondents would suffer no prejudice or loss if the Appeal is allowed. He further avers that the status quo of the suit property had been maintained and they were still in its occupation thus they will suffer substantial loss if the Appeal is disallowed.
 6. The 1st Respondent being the representative of his late father James Ndina Gitonga in his Replying Affidavit dated 20th July 2023 contested the Application on grounds that the subject of the appeal was no longer in existence because the property was subdivided on 27th August 2020, Title Deeds issued and consent from the land control board sought to further transfer the suit property. The Respondent also indicated that the Appeal had been filed after inordinate delay since the delivery of the magistrate's court decision on 14th August 2007 and had thus been overtaken by events.
 7. The Respondents confirmed that the Applicant had moved from court to court filing different suits regarding the same subject matter which amounts to forum shopping. That in ELC Petition No. 9 of 2018 the learned Justice Christine Ochieng' held that the Applicant's intention was to keep the matter ad infinitum. The Respondents sought for the application's dismissal with costs pointing out that the dispute regarding the suit property began in 2003 and it was time the matter was put to rest.
 8. The Notice of Motion was canvassed by written submissions.

The Applicant's submissions

9. In the submissions dated 20th July 2023 counsel submitted that the Applicant should be granted leave to file the appeal out of time citing the Supreme Court case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR. Counsel submitted that the Respondent allegation that they had executed the decree was unlawful because a decree could not be enforced after expiry of 12 years pointing out that the Applicant was still in possession of the suit property. Further, counsel submitted that no prejudice would be occasioned to the Respondents which could not be compensated with costs as was held in Nicholas Mutuku Mwasuna vs Patricia Mueni Kilonzo [2022] eKLR.



10. Counsel while making reference to *First American Bank of Kenya Ltd vs Gulab P. Shah & 2 others* [2002] 1 EA 65 and *Susan Ogutu Oloo & 2 others vs Doris Odindo Omolo* (2019) eKLR submitted that the Appeal was not inordinate, deliberate, prolonged or inexcusable since there was a sufficient explanation for the delay which had been provided.
11. Further the Appeal set out arguable points of law and fact and should be allowed as was held in *Kenya Commercial Bank Ltd vs Nicholas Ombija* [2009] eKLR and *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others* without undue regard to procedural technicality as was held by the Supreme Court in *Telkom Kenya Limited v John Ochanda & 996 others* [2015] eKLR.
12. On grant of stay of execution, counsel submitted that the subject matter of the appeal should be preserved so as not to render the appeal nugatory as was held in *Paul Kamura Kiruge vs John Peter Ng'ang'a* [2019] eKLR and *Kenya Red Cross Society vs Mbondo Katheke Mwanja* [2019] eKLR. Counsel submitted that the title in the name of the late Peter Mwangi was issued on 29th September 2022 during the pendency of this suit which was contrary to the doctrine of *lis pendens* and thus court should grant stay citing *Butt vs Rent Restriction Tribunal* [1982] KLR 417.

The Respondent's submissions

13. In the submissions dated 21st July 2023 counsel submitted that leave to file the said appeal out of time should not be granted since it had been filed 15 years after the judgement was passed which was inordinately late contrary to Section 79G of the *Civil Procedure Act* and Section 16A of the *Environment and Land Court Act*. Further, parcel Ngong/Ngong/20790 was no longer in existence following its subdivision and issuance of titles to the Respondents. While making reference to the Supreme Court case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR which settled the principle of enlargement of title counsel submitted that the Applicant's suits were forum shopping and he was guilty of laches.
14. Counsel also submitted that the Applicant did not meet the threshold for stay of execution pending appeal as per Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules since there was nothing to stay as parcel Ngong/Ngong/20790 was no longer in existence citing *Peter Maosa Nyang'au vs National Bank of Kenya Ltd & another* [2021] eKLR.
15. As such, the application should be dismissed with costs to the Respondents.

Analysis and Determination

16. I have considered the application, the rival submissions and the authorities cited. The issues for determination are:
 - i. Whether the Application has satisfied the threshold for leave to file an Appeal out of time and grant of stay of execution pending appeal.
 - ii. Who should bear costs of this
 - iii. application?
17. The right to appeal a court decision is a fundamental component of fairness and justice pegged on rules and timelines governing the filing of appeals. These timelines are designed to provide certainty and finality to legal proceedings.



18. The issue of extension of time was unequivocally addressed by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the Court pronounced:

“... we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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 for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

19. The same court in *Telkom Kenya Limited v John Ochanda & 996 others* [2015] eKLR held:

(18) In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such an appeal, provided sufficient explanation is proffered for the cause of delay...

20. Has the applicant given sufficient reason for the cause of delay? The Applicant has sought leave of court to file an appeal out of time and stay of execution of a decision that was made in 2007. The Applicant claims that this delay is not inordinate because it was occasioned by a result of several courts failing to grant him a fair hearing and dismissing his suits on technicality. The Respondent has vehemently contested the application claiming that the Applicant has spent years filing suits in different courts over the same subject matter which was an act of ‘forum shopping’.

21. This court has perused the annexures in support of this application and reviewed the court cases that the Applicant has filed over the years. It is noted that recently in 2019, the Honourable Christine Ochieng J. dismissed a suit filed by the Applicant guised as a Petition stating that it was an abuse of the court process and the Petition was intended to keep the matter ad infinitum.

22. The Applicant is quite litigious!! In a legal system that is designed to provide a fair and just resolution to disputes, it can often be exploited by those who wish to manipulate the process for their own advantage. One such tactic that has become increasingly prevalent is the filing of a multiplicity of suits, a strategy employed by litigants to prolong legal battles indefinitely. Which is evident in this particular application. This practice not only places an undue burden on the courts but also undermines the very principles of justice and efficiency articulated under Article 159 of *the Constitution* that the court is meant to uphold.



23. It is evident that from 2007 when the suit at the lower court was determined, the Applicant had legal representation who ought to have known and guided his client on the available avenues such as appeal. But instead the Applicant decided to clog the judicial system and waste limited judicial time and resources with suit after suit after suit trying his luck at the best outcome.
24. Fifteen years cannot be argued to be reasonable delay as submitted by counsel for the applicant who further beseeched the court to disregard the length of time as an undue technicality. Article 50 of *the Constitution* is crystal clear on what a fair hearing entails which include trials being conducted without unreasonable delay. This means that for justice to be fair it also ought to be timely and expeditious. Fifteen (15) years of delay is anything but expeditious.
25. The Respondent has also contested the application with evidence on ground that the substratum of the suit was no longer existent. Although the Applicant questioned this pointing out that the Respondent executed the decree after 12 years which action was statute barred. This court has also taken note of the mutation form annexed regarding the suit property and a consequent Title Deed bearing the new land number issued in the year 2022.
26. I find that the Applicant has failed to demonstrate sufficient reasons to warrant this court to exercise discretion in his favour.
27. The application and is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9TH DAY OF NOVEMBER 2023.

L. KOMINGOI

JUDGE.

In The Presence Of:

Mr. Nderitu for the Applicant.

Mrs Gitau for the Respondent.

Court Assistant - Mutisya

