Warui & 2 others v Ikui (Environment and Land Miscellaneous Application 6 of 2021) [2022] KEELC 3879 (KLR) (3 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3879 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 6 OF 2021

EC CHERONO, J

JUNE 3, 2022

BETWEEN

CECILIA WANGECI WARUI ALIAS CECILIA GAKUNJU IKUI ..... 1ST APPLICANT

TERESIA KANINI ..... 2ND APPLICANT

JONA KARIUKI ..... 3RD APPLICANT

AND

KABUKU IKUI ..... RESPONDENT

RULING

1. The applicants, *vide* a notice of motion dated September 27, 2021and filed on September 28, 2021seek the following orders: -

    a. Spent

    b. That this honourable court be pleased to enlarge time within which the applicants may file an appeal against the judgment delivered on August 2, 2011and consequently grant leave to the applicants to file their appeal in terms of the annexed memorandum of appeal marked CWW2 in the supporting affidavit.

    c. That this honourable court be pleased to grant an order of preservation of the suit property, rice holding number 2649 to avoid wastage and/or sale until the intended appeal is heard and determined.

    d. That the costs of this application be in the cause.

2. The application is opposed by way of a replying affidavit sworn by the respondent on October 29, 2021.

3. On March 29, 2022, the parties agreed to canvass the application by way of written submissions. The applicants filed theirs on April 11, 2022while the respondent did not file submissions.

APplicants Case and Submissions

4. The applicants' case is that the 1st applicant filed Wanguru Misc Succ No 19 of 2010 through the firm of Ann Thungu and Co Advocates which was fully heard and judgment was delivered on August 2, 2011

5. They stated that they were aggrieved by the said judgment and instructed their former counsel to prefer an appeal.

6. They further stated that on several occasions, she enquired from her former advocate on the progress of their appeal who assured them that action had been taken.

7. They stated that upon due diligence, they realized that the appeal was never filed. They are now desirous of filing an appeal against the entire judgment.

8. They stated that there is imminent danger that the suit property might be dealt with by the respondent and 3rd parties in a manner rendering it forever out of their reach hence, rendering the intended appeal nugatory.

9. They stated that the trial magistrate had no jurisdiction to hear and determine the suit as a succession cause in respect of the suit property is vested with the scheme committee and that the court's mandate is limited to approving the appointment.

10. They stated that they had been advised by their advocates on record that the time required to file an appeal has since lapsed and that the intended appeal is merited, arguable and it raises pertinent points of law and therefor they have overwhelming chance of success.

11. They stated that the respondent will not suffer any prejudice or any damage that cannot be compensated by an award of costs if the application is allowed.

12. They submitted that the respondent had not relied on any provision of law that requires the signature to be in a specific page or place and that Order 51 rule 13 of the *Civil Procedure* does not provide that a signature must be embedded at a specific page or place and that all it provides for is for the application to be signed.

13. They submitted that article 159 (2) d of the *constitution* of Kenya, 2010 and Order 19 rule 7 CPR provides that justice shall be administered without undue regard to procedural technicalities. They relied on the case of *Jimco Enterprises vs Deposit Protection Fund & 2 Others* (2006) e KLR.

14. They submitted that on the issue of service of the application upon the firm of Anne Thungu and Company Advocates, the applicants submitted that by the time the matter came up for further hearing on March 7, 2022 they had already complied with Order 9 rule 9 and 10 of the *Civil Procedure Rules* and that the issue had been overtaken by events.

15. They submitted that though the delay of 10 years is a long one, it should not shun the applicants from accessing the corridors of justice without according them a fair hearing.

16. They submitted that they are lay people with no knowledge of court procedures and they relied on their advocate's information that their appeal had been filed. They also relied on the case of *Paula Waheti Muchina v Henry Wanjohi Muchina* (2003) e KLR.

17. They submitted that in considering whether or not there was inordinate delay in filing the application depends on the unique circumstances of each case, the subject matter of the case, and the explanation given for the delay, if any.

18. They submitted that they have given a viable, logical and excusable explanation for the delay and would be in the interest of justice and fairness if the application is allowed. They relied in the case of *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* (2015) e KLR.

19. They further submitted that since the subject matter is land, they are desirous of ventilating their case in the higher court and if this is denied, then it will amount to substantial prejudice and that since the respondent has been enjoying the fruits of the judgment for a period of 10 years, no prejudice will be suffered that cannot be compensated by costs.

20. They submitted that to have the negligence of their former advocate visited upon them will not only be prejudicial but unfair and contrary to the tenets of article 159 (2) (d) of the *constitution* of Kenya. They relied on the case of *Philip Chemwolo & Anor v Augustine Kubede* (1982-88) KAR 103.

21. They submitted that since the former advocates were served, they would have disputed the facts that they were never instructed to file the appeal which they didn't and thus they stand to be prejudiced if the mistakes of the former counsel are visited on them yet they were keen on trying to pursue their right of appeal.

22. They submitted that the issue of failure to attach the order appealed from is a procedural technicality which is curable and that the same has been raised prematurely since the appeal is still at its initial stages.

23. They submitted that the subject matter of the appeal land which is within Mwea Settlement Scheme and which raises pertinent public interests and how the succession of the rice holding 2649 was handled contrary to the laid down procedure in the Irrigation (National Irrigation Scheme) regulations 1977 and that the court had no jurisdiction in nominating a successor. They relied on the case of *Republic of Kenya v National Irrigation Board Mwea Irrigation Scheme & another Ex Parte Joseph Mutahi Karuiru & 2 others* [2019].

24. They submitted that the intended appeal is not frivolous but has overwhelming chances of success and therefore, the suit property should be preserved to avoid changing hands further awaiting the outcome of the appeal. They relied in the case of *Vishva Stone Suppliers Company v RSR Stone [2006] Limited* [2020] e KLR.

25. They submitted that their application and prayers sought therein be allowed in its entirety together with costs to the applicants.

Respondent's Case:

26. In the replying affidavit, the respondent stated that the judgment sought to be appealed from was executed over 10 years ago and interfering with it would occasion undue hardship to him and one Petronilla Warui.

27. He stated that the application is an afterthought solely intended to give the applicants a second chance to bite the cherry after 10 years of living with the judgment of the court.

28. He stated that the applicants are guilty of inordinate delay and have not demonstrated that they instructed M/S Ann Thungu & Co Advocates to file an appeal. He said that there is no receipt attached for payment of deposit for the appeal.

29. He stated that the applicants are the ones who filed the suit in the lower court and they cannot now turn around and claim that the court did not have jurisdiction.

30. He stated that he is an elderly person and cannot cultivate the holding which he surrendered to Petronila Warui who has been cultivating and utilizing the holding openly for several years and that litigation must come to an end as he will be greatly prejudiced.

31. He stated that the application is incompetent as it is not signed and is also supported by an incompetent affidavit with the jurat appearing on a separate page contrary to the rules of procedure.

Analysis: -

32. I have considered the rival submissions on the preliminary objection dated October 29, 2021. It now settled that a preliminary objection is a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. This position was held in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696*, where it was held that:

> " A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

33. The respondent opposition to the application raised the following grounds-;

    a. The application is incompetent as it is not signed as required.

    b. The affidavit of Cecilia Wangechi Warui sworn on the September 27, 2021 is incompetent and inadmissible since the jurat is on a separate page contrary to the law.

    c. The application is not served upon the firm of Ann Thungu & Co Advocates as required despite making her professional reputation.

34. I have looked at the said application and confirm that the same is indeed signed. On the issue of the jurat appearing on a different page, I am of the respective view that the same does not go to the root of the application rendering it incompetent.

35. In the case of *Burnaby Properties Limited v Suntra Stocks Limited* [2015] e KLR, the court held that: -

> " [8] On the basis of the above legal position, courts have stated that the jurat of an affidavit being in a separate page is not a defect or a matter that goes to jurisdiction of the court. I would, therefore, regard the alleged defect as an irregularity of form rather than substance. See again what Ringera J (as he then was) stated in Milimani HCCC No 26 of 2004, *Patrick Thinguri & 1,006 Others v Kenya Tea Development Agency Co & Another* (unreported), that..."

36. On the issue of service, I find that the same is not a pure point of law that can dispose of the application in limine and therefore, does not qualify as a preliminary point of objection.

37. Section 79G of the *Civil Procedure Act* which provides that: -

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 order: 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.

38. The above principles for extension of time have been outlined by the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) e KLR as follows: -

> "(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 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 respondent of the extension is granted.
>
> (6) Whether the application has been brought without undue delay; and
>
> (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time."

39. It is evident from the above authority that extension of time is not a right of a party as purported by the applicant in his application and submissions. The same is discretionary and only available upon satisfactory explanation of the delay by the applicant.

40. The applicant has claimed that judgment in Wang'uru Misc Succ No 19 of 2010 was delivered on August 2, 2011. However, the applicants have not annexed the said judgment or even the resultant order/decree.

41. The application herein was filed on September 28, 2021 which is approximately 10 years after the judgment was delivered.

42. The applicants are blaming their former advocates for the delay alleging that they instructed them to file an appeal and upon enquiring on the progress, they realized that the same had not been filed.

43. It is trite law that whoever alleges must prove.

44. Firstly, the applicants have not tendered any evidence to the effect that they were represented by the firm of Ann & Thungu & Co Advocates in the lower court and also that they instructed her to file an appeal on their behalf.

45. Even assuming that they instructed the said firm of advocates to lodge the appeal, a case belongs to a litigant and not the advocate. The explanation by the applicants that the mistake by their hitherto advocates should not be visited on them cannot stand as cases do not belong to advocates. The applicants have not shown what steps they took to ensure that their appeal was filed.

46. In view of the matters aforesaid, I find that the explanation given by the applicants for failing to file appeal in time is not satisfactory and excusable. The delay to for 10 years is indeed inordinate and prejudicial to the respondent if the application herein is allowed.

47. The applicants have alleged that they have an arguable appeal with likelihood of success. However, the same cannot be determined as they have not attached a copy of the impugned judgment.

48. The respondent in his submissions stated that he has already executed the judgment/decree and owing to his old age, he has surrendered the rice holding to one Petronila Warui who has been cultivating the same. I have looked at the annexures marked KI I & II in the replying affidavit and confirm that the decree has indeed been executed.

49. I therefore find that the application has been overtaken by events.

Conclusion

50. For all the reasons given hereinabove, it is find my finding that the notice of preliminary objection dated October 29, 2021 is without merit and the same is not upheld. I also find the application dated September 27, 2021 lacking merit and the same is hereby dismissed with costs to the respondent.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 3RDJUNE, 2022.

HON. E.C. CHERONO

ELC JUDGE

In the presence of-;

M/S Amba H/B for Wangechi Momanyi for Applicant

Respondent/advocate - absent

Kabuta, C/A - present.