



**Maliango v Kinovi & another (Miscellaneous Application
E005 of 2021) [2022] KEELC 2373 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2373 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
MISCELLANEOUS APPLICATION E005 OF 2021**

CG MBOGO, J

JULY 6, 2022

BETWEEN

KWINGA MALIANGO APPLICANT

AND

**PHILLIP NYAMASYO KAVISI (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE KAVISI KINOVI) 1ST RESPONDENT**

BENJAMIN KIMWELI KAVISI 2ND RESPONDENT

RULING

1. What is before this court for determination is the notice of motion application dated 29th April, 2021 expressed to be brought under Sections 13, 16A & 30 of the *Environment & Land Court Act*; Order 50 Rule 5, Order 40 Rule 1(a); Order 51 Rules 1 & 3 of the *Civil Procedure Rules*, Section 3 and 3A of the *Civil Procedure Act* seeking the following orders: -
 1. spent
 2. That the applicant be granted leave to file a Memorandum of Appeal out of time and/or time for filing a Memorandum of Appeal be extended to allow the applicant to file a Memorandum of Appeal against the Judgment and Decree by the Makueni District Land Dispute Tribunal at Matiliku Do.O's Office in case no. 53/2006 adopted by the Makueni Magistrates' Court in L..T.C No. 19 of 2008; (Kwinga Maliango versus Benjamin Kimweli Kavisi) that was entered against the applicant herein on 29/10/2008.
 3. That there be an order of temporary injunction to restrain the respondents, either by themselves, their agents, employees, and/ or servants from wasting, damaging, alienating, selling, subdividing, removing, disposing, or dealing in any manner whatsoever with property known as parcel Nzau/Ikangavya/65 located within Makueni County and measuring approximately 6.4 Ha pending hearing inter-partes of this application and intended appeal.



4. That the costs of this application be provided for.
 5. That this court be pleased to issue other orders that it deems fit for the interest of justice and for purposes of protecting the interests of the applicant in the suit property.
2. The application is premised on the grounds on the face of it and in the supporting affidavit of the applicant sworn on even date. The applicant deposed that land parcel number Nzai/Ikangavya/65 is their ancestral land that was fraudulently acquired by the respondents. That in the year 1976, the applicant filed a claim at the Makueni District Land Adjudication Office which was dismissed on 23rd September 1976 and found in favour of the respondents. Being dissatisfied with the decision, he appealed to the then Makueni District Land Dispute Tribunal at Matiliku's DO's office which was dismissed on the basis that his appeal was referred to the Tribunal without authority and in any case, he should have appealed to the minister. It followed thereafter that on 29th October, 2008, the ruling of the Dispute Tribunal was adopted by the magistrates' court as judgment.
 3. The applicant further deposed that by the time he filed an appeal to the Tribunal, Kavisi Kinoti was already deceased and therefore, the proceedings that were taken at the District Land Dispute Tribunal were irregular as there was no administrator for the estate of the deceased. Further, that in July, 2010, he filed a succession cause so that an administrator could be appointed to allow him challenge the decision and he fell ill and has been undergoing frequent hospitalization and treatment which weakened his body and therefore he could no longer be able to prosecute the citation.
 4. The applicant deposed that when his health improved, he sought to continue prosecuting the citation only to be informed that it was dismissed on 20th July, 2015 for want of prosecution. That an application for reinstatement of the citation was granted and the respondents entered appearance on 8th March, 2021. That the delay in filing the appeal was occasioned by long sickness and the death of Kavisi Kinovi which circumstances were beyond his control. The applicant contends that his appeal has high chances of success and he further prays for orders restraining the respondents from further dealing in the land. Annexed to his supporting affidavits is a copy of the District Land Dispute Tribunal judgment dated 23rd September, 1976, a copy of the decision by the Makueni District Land Dispute Tribunal at Matiliku's DO's office dated 23rd September, 2008, a copy of succession cause number 521 of 2010 among others.
 5. The application was opposed by the replying affidavit of the 2nd respondent sworn on 24th May, 2021 and on behalf of the 1st respondent. The 2nd respondent deposed that the adoption of the Tribunal's decision by the Magistrates' Court gave the applicant 30 days right of appeal. That since then, the applicant never filed any appeal and is only wasting the court's time and that the applicant's claim of sickness is no excuse and only an afterthought.
 6. The applicant filed written submissions dated 13th July, 2021. The applicant submitted that Section 79 (G) of the *Civil Procedure Act* vests the high court with jurisdiction to grant leave to file an appeal out of time which powers are also enjoyed by the Environment & Land Court. The applicant relied on the case of *Gilbert Kimutai Koech versus Wilson Kipngeno Koech* [2018] eKLR. The applicant submitted that for the court to exercise this discretion in favour of the applicant, the applicant should demonstrate that the delay in lodging the appeal is not inordinate and where its inordinate, the applicant must give plausible explanation to the satisfaction of the court. The applicant relied on the case of *Aviation Cargo Support Limited versus St Mark Freight Service Limited* [2014] eKLR and *Sayers versus Clarke Walker (A Firm)* 2002 EWCA Civ 645.



7. The applicant further submitted that he will be greatly prejudiced should the court not grant the orders sought. He believes that the reasons so far stated are satisfactory as per the case of *Giella versus Cassman Brown & Company Limited* [1972] EA 358.
8. The respondents filed written submissions dated 21st June, 2021. The respondents submitted that the Limitations of Actions Act Cap 22 under Section 17 and 18 extinguishes a right to recover any interest the applicant should have been entitled to and that even if the applicant is seeking an equitable remedy, the doctrine is clear that equity does not aid the indolent but the vigilant and the averment of long illness holds no water as 12 years has since lapsed. The respondents filed a further written submissions dated 21st July, 2021 and submitted that the draft memorandum of appeal does not demonstrate any arguable appeal. They relied on the case of *Dickson Ngige Ngugi versus Consolidated Bank Limited & Another* ELC No. 583 of 2016.
9. I have read and carefully analysed the application, replying affidavit and the written submissions filed by both parties and the issue for determination is whether the applicant ought to be granted leave to file a memorandum of appeal out of time.
10. The applicant's instant appeal is premised on Sections 79G and 95 of the *Civil Procedure Act* which provide for filing of appeals from the subordinate courts and for enlargement of time respectively. Section 79G provides as follows:

79G. 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.

Section 95 provides thus:-

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.
11. It is plain therefore that the court, when considering an application such as the instant one, has unfettered discretion; and, therefore, need only concern itself with whether justifiable cause has been shown to warrant such exercise of discretion. For this reason, the principles laid down by the Supreme Court in *Nicholas Kiptoo Korir arap Salat v IEBC & 7 Others* [2014] eKLR are pertinent; namely:

“(T)he underlying principles a court should consider in exercise of such discretion include:

1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
 6. Whether the application has been brought without undue delay.
 7.”
12. The same principles were enunciated in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* where the Court of Appeal held that:
- “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.”
13. For purposes of determining whether the applicant is entitled to the discretion of this court, I have considered the application for leave to file appeal out of time under the following parameters:
- [a] whether there is a good and reasonable explanation for the delay;
 - [b] whether the application has been brought without undue delay;
 - [c] whether the proposed appeal is arguable, and
 - [c] whether any prejudice will be suffered by Respondent.
14. A perusal of the annexures to the applicant’s supporting affidavit indicate that the magistrate’s court adopted the award of the District Land Dispute Tribunal as judgment of the court on 29th October, 2008 with a right of appeal of 30 days explained. The intended memorandum of appeal herein is dated 29th April, 2021. This means that the applicant has sought to file an appeal after 13 years since judgment was delivered/adopted. This is indeed a very long period of time to bring an appeal to this court. The reason cited for this delay is that the applicant has been in poor health undergoing frequent hospitalization. However, the only document in support of ill health is one dated 24th October, 2019. This court is left to wonder, was the applicant bedridden during the entire 13 years to disable him from filing an appeal before this court. I am not convinced that the reason for the delay in filing the memorandum of appeal as plausible. Having found no reasonable delay, I will not proceed to determine whether the appeal is arguable because, I would be engaging in a futile exercise.
15. Arising from the above, I find that the notice of motion application dated 29th April, 2021 lacks merit and the same is dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK VIA EMAIL ON 6TH JULY, 2022.

MBOGO C.G

JUDGE

6/7/2022

In the presence of: -

CA: Timothy Chuma

