Magiri & another v Magiri (Miscellaneous Application E113 of 2024) [2025] KEHC 706 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 706 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

MISCELLANEOUS APPLICATION E113 OF 2024

HM NYAGA, J

JANUARY 23, 2025

BETWEEN

JOSEPH KIRIMI MAGIRI ..... 1ST APPLICANT

MOSES GIKUNDA MAGIRI ..... 2ND APPLICANT

AND

ESTHER KABURO MAGIRI ..... RESPONDENT

RULING

1. Vide an application dated 24th September 2024, the Applicants have sought the following orders"-

    a. Spent

    b. That the Honourabe Court is pleased to extend time for the Applicants to file appeal against the Ruling of the Senior Resident Magistrate delivered on 30th July 2024 in Meru Succession No. 282 of 2016.

    c. That pending the inter-parties hearing of the application, an order be issued, for maintenance of the currently prevailing status quo in respect to the estate of the deceased herein to mean that the Consent the Honourable court on 18th August, 2020 shall not be implemented in the Lands Office and/or on the ground.

    d. That pending hearing and determination of the intended Appeal before the Honourable Court, an order be issued for Maintenance of the currently prevailing Status quo in respect to the estate of the deceased herein, to mean that the Consent adopted by the Honourable Court on 18th August, 2020 shall not be implemented in the lands office and/or on the ground.

    e. That the costs of this application be in the appeal.

2. The Application is supported by the grounds set out on its face and the affidavits of the Applicants sworn on even date.

3. In a nutshell, the Applicants case is that the Ruling in question, delivered on 30th July 2024, was based solely on the consent that had been entered and the court did not take into account other issues raised by the Applicants in the matter. That aggrieved by the said ruling, the want to exercise their right of appeal, hence the need to have leave.

4. The 2nd Applicant concurs that at the time the Ruling in question was delivered, he was out of town for work and only came to learn of the same on 4th September 2024, 4 days after time for Appeal had lapsed. He states that he stands to be evicted and so the court should preserve the status quo. That he has good grounds of appeal as evidenced by the draft Memorandum of appeal.

5. The 1st Applicant avers that he too was not present when the ruling was delivered as he was ill, as evidenced by the annexed hospital notes. That he only became aware of the ruling 4 days after the time set out for appeal had lapsed.

6. The Respondent did not file any reply to the Application, despite being given time at his advocates request, to do so.

7. Only the Applicant filed submissions. It is submitted that while the discretion of the court is unfettered, the applicants are supposed to show good cause upon which sole discretion should be exercised in their favour. Counsel referred the court to the decision in Stanley Mwangi Kihoro and 2 others vs KenyaMill Trading Co Ltd (2015) eKLR on the principles that govern the grant of leave to appeal out of time. Also cited was Thuita Mwangi vs Kenya Airways 2003 – eKLR and Edward Njone Ngaya & Anor vs Damaris Wanjiku Kamau [2015] eKLR.

8. It is submitted that the Applicants have adduced sufficient cause to explain the delay and if the court does not the grant of the orders sought, the Applicants stand to suffer prejudice since their houses that are in the land in question may be demolished.

9. Section 79G of the *Civil Procedure Act* 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 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."

10. It suffices to state that the said section recognizes and provides a chance to an intended appellant to seek leave to appeal out of time.

11. The factors to be considered by the court in deciding whether to grant or not grant such leave were reiterated in the cases cited by the applicant.

12. The Supreme Court of Kenya in the case of County Executive of Kisumu vs County Government of Kisumu & others [2017] eKLR reiterated the considerations to be made in such a case to be as follows:

    a. 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;

b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

e. Whether there will be any prejudice suffered by the respondents if the extension is granted;

f. Whether the application has been brought without undue delay; and

g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

13. The discretion to extend time must be exercised within the principles of the law and factors to be considered when determining such an application. The principles were set out in the Court of Appeal case of Omar Shurie vs Marian Rashe Yafar (2021)eKLR where it was 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."

14. Thus, in short the Applicant have to satisfy the court to:-

a. Reasons that led to the delay in filing the appeal.

b. The length of the delay.

c. The chances of the intended appeal succeeding.

d. The degree of prejudice to be suffered by the respondent of the application is granted.

15. The Applicants have explained that at the time the ruling was delivered, they were not present and only became aware of it on 4th September 2024.

16. I have perused the Lower Court record. Surprisingly the record as forwarded does not contain any Ruling as stated by the Applicants. The last proceedings were on 17th January 2023, when the matter was listed before Hon M.A. Odhiambo SRM. The parties were absent and the court ordered that a fresh date be fixed at he Registry.

17. That stated, it is strange that a ruling was indeed delivered by Hon E. W. Ndegwa SRM on 30th July 2024 yet it is not in the court record. Even the Application that elicited that ruling dated 12th March 2024 is not in the Lower Court record.

18. Looking at the matter, I suspect that the proceedings in question took place in a skeleton file rather than the original court file.

19. The Applicants have annexed a copy of the Ruling in question. The coram section indicates that on 30th July 2024, when the Ruling was delivered, the Applicants were not present, but the advocates were present indicated as follows:-

> Petitioners Advocate – Ms Otieno (adv)
>
> Respondents Advocate – Ms Mugo (advocate)

20. Therefore the Applicants were duly represented by an advocate with authority to represent them. They did not need to be present in person.

21. That said, it is well settled law that an error of omission by an advocate should not visit upon his/her client. It is very possible that, indeed, the Applicants came to learn of the decision after the period of appeal had lapsed.

22. I will therefore accept the explanation offered by the Applicants.

23. On the length of the delay, I note that the application was filed just 4 days after the period for filing of appeal had ended. Thus, there was no inordinate delay in bringing this application.

24. On whether the intended appeal has chances of success, I have duly considered the draft memorandum of appeal. The complaint by the Applicants is that in dismissing the application, the trial court only focused on the consent in question and not the other reasons adduced.

25. The consent in question is not in dispute. In dismissing the Application for Review, the trial court rightly considered the principles to be applied in setting aside of the consent. It is well settled in law that a consent order or judgment can be set aside on grounds that would justify the varying or rescinding a contract between the parties. This was well stated in Flora Wasike vs Destina Wamboka [1988] eKLR where the Court of Appeal stated as follows:-

> " It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out; see the decision of this Court in J M Mwakio v Kenya Commercial Bank Limted Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F C Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:
>
> > 'It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside of rectification of this order looked at as a contract.'

26. Similarly, in Kenya Commercial Bank vs Benjoh Amalgamated Ltd C.A. 276/97 the Court reiterated the holdings in Brooke Bond Liebig (T) Ltd vs Mallya 1975 E.A. 266 and earlier in Hirani Vs Kassam [1952]19 EACA 131 and quoted from Seton on Judgments and Orders 7th ed. Vol 1 p.124 that;

> " Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court.....or if consent was given without sufficient material facts....or in general for a reason which would enable the court to set aside an agreement."

27. As can be seen the setting aside of a consent order could be on grounds such as fraud, mistake, misrepresentation or any other reason that would persuade the court to vary or set aside the consent order.

28. When the Applicants went before the trial court, they indeed acknowledged the consent order. Their application was on the strength of the actual acreage of the land which according to them, was overstated in the consent order. The court found that the land in question measured 7.5 Hectares and was to be divided into 7 parcels measuring 0.81 hectares, making a total of 5.67 hectares. The balance of the land 1.58 hectares was to be subdivided equally between the seven(7) beneficiaries.

29. The Applicants state that the trial court in dismissing the application for review, failed to consider other factors, such as the fact that the deceased had already sub-divided the land and a mutation issued. That if the consent was executed it meant that their houses would be demolished.

30. An order allowing or dismissing an application for review is appealable by right as provided for under order 43 Rule 1 which states as follows

    1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—

       .....

       (x) Order 45, rule 3 (application for review);

31. In my view, there are triable issues raised by the applicants. A consent order may be proper on paper but may not be implementable on the ground itself, for a variety of reasons, including an error on the actual size of the land, and even the effect on any buildings on the ground. In my view that is a valid ground to review such a consent. I am of the view that the trial court should have given the applicants a listening ear and looked at the actual situation on the ground rather than rigorously stick to the consent. The acreage to each beneficiary may have remained the same but the manner of ensuring the same could have been altered to suit the circumstances on the ground.

32. On the question of prejudice, it is deponed that the Applicants houses stand to be demolished. They have demonstrated that they stand to suffer great loss if they are not allowed to appeal. That the appeal maybe rendered nugatory if their houses are actually demolished. I find this to be substantial loss to them that warrants intervention by the court.

33. Having considered the matter, I find that the applicants, who have a right of appeal against a refusal to review an order have met the threshold for the grant of the orders.

34. Consequently I grant the following orders:-

    a. The applicants are granted leave to appeal out of time.

    b. The Memorandum of Appeal to be filed and served within the next 10 days failing which the leave so granted shall lapse automatically without further references to the court.

    c. The status quo on the ground to be maintained.

    d. The applicants shall bear the costs of this application.

DATED, SIGNED & DELIVERED AT MERU THIS 23RD DAY OF JANUARY, 2025.

H.M. NYAGA

JUDGE