



Ragita alias Emmanuel Mogosi Ragita v Kuria West Land Disputes Tribunal (Kehancha Division) & 3 others (Constitutional Petition 4 of 2011) [2024] KEHC 1890 (KLR) (19 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION 4 OF 2011
TA ODERA, J
FEBRUARY 19, 2024**

BETWEEN

MUSA RAGITA ALIAS EMMANUEL MOGOSI RAGITA PETITIONER

AND

KURIA WEST LAND DISPUTES TRIBUNAL (KEHANCHA DIVISION) 1ST RESPONDENT

THE RESIDENT MAGISTRATE'S COURT AT KEHANCHA 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

SAMSON MARIGO MAKUBO 4TH RESPONDENT

RULING

1. *vide* a Ruling delivered by this Court on 29.3.2023, the Petition herein was dismissed for want of prosecution. The Ruling was predicated on the 4th Respondent's Application dated 25.10.2022.
2. From the Court's record, the Ruling was delivered in the presence of the Petitioner's and 4th Respondent's Advocates.
3. Aggrieved by the said Ruling, the Petitioners filed an Application dated 11th April 2023 *vide* the firm of M/S Oguttu Mboya, Ochwal & Partners Advocates, seeking the following orders:
 1. Spent.
 2. The Honourable Court be pleased to grant leave to the Petitioners/Applicants, to file and/or lodge an Appeal to the Honourable Court of Appeal against the Ruling and/or Order of this Honourable Court made on the 29th day of March 2023, insofar as the said Ruling and/



or Order arises from Order 17 Rule 2(1) and (3) of the *Civil Procedure Rules* 2010 thus same is not appealable as of right hence leave of the Court is necessary.

3. The Honourable Court be pleased to extend and/or enlarge time within which to file and/or lodge a Notice of Appeal, against the decision of this Honourable Court made on the 29th day of March 2023.
 4. The Honourable Court be pleased to grant and/or issue such further and/or other directions as may be necessary, just and/or otherwise expedient, to facilitate the realization of the Intended Appeal to the Honourable Court of Appeal.
 5. Costs of this Application be provided for and/or otherwise do abide the intended Appeal.
 6. Such further and/or other orders be made as the court may deem fit and expedient.
4. The grounds on the face of the Application are that the suit touches on the ownership, subdivision of L.R. No. Bukira/Buhiringera/144. The Petitioners/Applicants filed Kisii HC Misc. Application No. 52 of 2010 (JR) challenging the decision by the Kuria West Land Disputes Tribunal. The same was struck out as it was time-barred. They subsequently filed the instant Petition for conservatory orders. An Application dated 14.2.2011 was heard and dismissed on 15.7.2011. Aggrieved by that decision, they lodged a Notice of Appeal on 29.7.2011. The 4th Respondent filed a Bill of Costs dated 25.2.2015 which was heard and struck out on 27.10.2016. Meanwhile, the suit property was subdivided in 2014. The 4th Respondent filed an Application dated 25.10.2022 seeking to have the Petition dismissed for want of prosecution pursuant to Order 17 Rule (2) and (3) of the *Civil Procedure Rules*, 2010. On 8.3.2023, the Petitioners' Advocates orally raised a point of jurisdiction stating that it was the Environment and Land Court that had jurisdiction to determine the matter. A Ruling was delivered on 29.3.2023 dismissing the Petition for want of prosecution. Again, aggrieved by that Ruling, the Petitioners were desirous of appealing against it. However, the matter was not appealable as of right and thus they sought leave to appeal. They submitted that the right to appeal is a fundamental right enshrined in the [Constitution](#), the issues in question were pertinent and paramount and that the Respondents would not suffer any prejudice and it was therefore appropriate to allow the Application.
5. The 1st Petitioner swore a Supporting Affidavit on 11.4.2023 reiterating the grounds herein summarized. He deponed that the present Application was filed within the statutory 14 days and they were therefore seeking leave to file the appeal out of time. He also attached a copy of the Memorandum of Appeal to show the grounds of the proposed appeal.
 6. The 4th Respondent swore a Replying Affidavit on 12.6.2023 in opposition. He deponed that the Applicant's Counsel, Mr. Mulisa, made an oral application on 29.3.2023 seeking leave to appeal which was declined by the Court and so the instant application was res judicata. He deponed that litigation must come to an end and allowing the application for leave was akin to abusing the court process.

Submissions

The Petitioners' Submissions

7. The Petitioners' filed their submission dated 14.7.2023. They submitted that the order emanating from the Ruling delivered on 29.3.2023 was not appealable as of right. They cited Section 75 of the [Civil Procedure Act](#) and Order 43 of the *Civil Procedure Rules*.
8. They submitted that it was therefore necessary to obtain leave to appeal. The issues they raised in the Petition were submitted to be pertinent issues.



9. They submitted that extending time is a matter of discretion. In support of this, they cited the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997 (unreported)).
10. They also cited the Court of Appeal decision in *Charles Karanja Kuru v Charles Gitthinji Muigwa* (CA 71/2016) in support of the submission that leave must first be obtained before appealing.
11. They emphasized that the appeal would also determine the question whether this Court has jurisdiction in the matter.

The 4th Respondent's Submissions

12. The 4th Respondent filed unsigned Submissions dated 24.7.2023. They submitted that the Petitioners' Counsel made an oral application for leave on 29.3.2023 which application was declined.
13. Further, leave ought to be obtained within 14 days of the date of the order and since the Petitioners were yet to obtain leave, the instant Application was incompetent. He urged the Court to dismiss the Appeal.

Determination

14. I have considered the Application, the Replying Affidavit and the Parties' Submissions.
15. I wish to start by disabusing an argument by the 4th Respondent that leave ought to be obtained within 14 days. A proper reading of order 43 Rule 2 of the *Civil Procedure Rules*, 2010 provides that an application for leave- to appeal shall be sought in the first instance from the court that made the order either orally at the time the order is made or within fourteen days from the date of such order.
16. Therefore, if leave is not sought orally immediately upon delivery of a ruling, one would still have a window of 14 days from the date of the Ruling to file an application for leave. To my mind, Order 43 Rule 3 of the *Civil Procedure Rules* does not create a scenario where one is given strictly 14 days within which to apply and obtain leave.
17. I am therefore satisfied that the present Application is proper having been filed within 14 days from the date of the Ruling under challenge.
18. I further note that the 4th Respondent deponed that the Petitioners' orally sought leave on 29.3.2023 after delivery of the Ruling but the same was dismissed.
19. To satisfy the doctrine of *res judicata*, the following must be proven:
 - a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised. See *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR.
20. I have perused the Court record and there is no indication that the Petitioners' Counsel applied for leave orally and that the said oral application was dismissed. It follows, therefore, that the Application is not *res judicata* as submitted.



21. On whether the Application has merit, it is trite law that granting Leave to file an appeal out of time is a discretionary matter which discretion ought to be exercised judiciously.
22. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court derived the following principles to be considered when exercising its discretion to extend time to file an appeal out of time:
 - 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 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.
23. In the case of *Thuita Mwangi v Kenya Airways Ltd.* [2003] eKLR, the Court of Appeal faced with an application for extension of time to file a fresh Notice of Appeal and Record of Appeal, the Court held as follows: -

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now 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.”

These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.



Again, as we have pointed out, we do not think the Court intended that the list of four items it set out in Mutiso’s case, ante, was ever meant or intended to be exhaustive. It is also clear that the third issue for consideration, namely, the chances the appeal succeeding is the application is granted is merely stated as something for a “possible” consideration, not that it must be considered. This is understandable because the “chances of an appeal succeeding” is normally dealt with by this Court under the rubric of an “an arguable appeal” or “an appeal which is not frivolous” and the full Court normally considers that issue under rule 5(2)(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case *Bhaichand Bhagwanji Shah v D Jamnadas & Co Ltd* [1959] EA 838 where Sir Owen Corrie, Ag JA is recorded as saying at pg. 840 Letter I to pg 841 at Letter A:

“.....It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant’s affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application....”

24. This was the holding in the cases of *Charles Karanja Kiiru v Charles Gitbinji Muigwa* [2017] eKLR; *Omar Shurie v Marian Rashe Yafar* [2020] eKLR; *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR where the Court of Appeal pronounced itself as such.
25. I am therefore tasked with determining whether the present application meets the requirements set out hereinabove.

Length of Delay

26. In the present Application, there is no delay as leave is yet to be granted at this juncture. However, it is anticipated that if the Petitioners were to obtain leave, the same would be out of time given that the Ruling in question was delivered on 29.3.2023 and leave has not been obtained yet, so to speak.

Reason for the Delay

27. As discussed above, the delay would ideally be occasioned by the time taken to apply and obtain leave, if the Application is successful.

Chances of the Appeal succeeding

28. This is what will form the bulk of the basis of my decision. Looking at the facts of the case, it is evident that there was a period of delay spanning over six years from the period of inaction to when an application for dismissal for want of prosecution was filed. Specifically, the last action was in 2016 and the Application was filed in 2022.
29. I have perused the Petitioners’ Application and there is no explanation for the period of inaction of 6 years. In fact, their chronology of events clearly points to a period of inaction of about 6 years.



30. It is not enough for the Petitioners to submit that the Petition raises weighty issues. If indeed the Petitioners were concerned and interested in pursuing the said weighty matters, they would have moved the Court appropriately and promptly.
31. It is also not lost to this Court that the Petitioners have raised the issue of this Court's jurisdiction. It is public knowledge that the first Judges of the Environment and Land Court were appointed in October 2012. Practice Directions were subsequently issued on various dates with the first Practice Directions being issued on 9.11.2012 vide Gazette Notice No. 16268.
32. I find that as at the time this Petition was filed, i.e. 2011, this Court indeed had jurisdiction. It is a timeless relic that jurisdiction is everything and without it, a Court cannot make any other move. It must down its tools. See *The Owners of Motor Vessel Lilian "S" v Caltex Oil Kenya Ltd.* [1989] KLR1
33. In any event, the Petitioners are trying to have their cake and eat it too. If this Court did not have jurisdiction, then it would also mean that it would not have jurisdiction to entertain the instant application. In addition, it would also mean that this Court would not have the power to transfer the matter to the Environment and Land Court since out of nothingness, flows nothingness.
34. In the circumstances, I find that the Petitioners have not satisfied this Court that they have an arguable appeal.

Degree of Prejudice to the Respondent should the Application be allowed

35. Indeed, the right to appeal is protected under the *Constitution*. However, the right is not absolute. Again, litigation must come to an end.
36. Additionally, Article 50[2][e] of the *Constitution* provides for the right for a trial to begin and conclude without unreasonable delay.
37. Article 159[2][b] of the *Constitution* provides that justice shall not be delayed.
38. The Oxygen Principles under the *Civil Procedure Act* Cap 21 of the Laws of Kenya provide that there shall be efficient disposal of the Court's business, efficient use of the judicial resources and timely disposal of proceedings. These judicial resources include time- time is quite possibly among the most expensive and valuable resources of the Judiciary that must be used optimally.
39. Failure to prosecute one's case not only wastes the Judiciary's resources and creates backlog, but it also violates the Respondent's right to a fair trial. Therein lies the prejudice.
40. In the end, the Application dated 11.4.2023 is dismissed with costs to the 4th Respondent.

DATED, DELIVERED AND SIGNED AT KISII THIS 19TH DAY OF FEBRUARY 2024.

TERESA ODERA

JUDGE

In the presence of:

Magara: I am for the 4th Respondent

Mulisa: I am for the Petitioners/Applicant

Oigo –

Court Assistant

