



REPUBLIC OF KENYA



KENYA LAW
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**Busienei v Keter (Miscellaneous Application E243 of 2023)
[2024] KEHC 4939 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION E243 OF 2023**

JRA WANANDA, J

MAY 15, 2024

BETWEEN

NOAH KIPROTICH BUSIENEI APPLICANT

AND

CHARLES KIPNGETICH KETER RESPONDENT

RULING

1. The Application before Court is the Applicant’s Notice of Motion dated and filed on November 15, 2023 seeking the following orders;
 - i. [.....] Spent.
 - i. That this Honourable Court be pleased to enlarge time to allow to the Applicant to file an Appeal out of time against the Ruling delivered on 21st September, 2023 vide Eldoret CMCC No. E631 of 2022.
 - ii. That there be stay of execution of the decree and/or NTSC against the Applicant pending the hearing and final determination of the intended appeal
 - iii. That costs of this Application be provided for.
2. The Application is filed through Messrs Rioba Omboto & Co. Advocates and is expressed to be brought under Section 3, 3A and 79G of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules* “and all other enabling provisions of the law”. It is premised on the grounds stated on the face thereof and supported by the Affidavit sworn by the Applicant, Noah Kiprotich Busienei.
3. In the Affidavit, the Applicant deponed that on December 14, 2022 he moved the Court to set aside the ex parte Judgment entered against him, that on 8/09/2023, his Advocates were served with a Notice of Ruling scheduled for September 14, 2023 but the Ruling was never delivered as scheduled and was instead delivered on 21/09/2023, that it is only recently when he was served with a Notice to Show



Cause (NTSC) dated November 26, 2023 through WhatsApp indicating that the same is coming up on November 23, 2023, and that it is upon perusal of the Court record that his Advocates discovered that the Ruling was delivered way back on September 21, 2023 and which was never notified to them.

4. He deponed further that he is aggrieved by the Ruling but was unable to lodge an Appeal within the requisite period, that the intended Appeal has high chances of success and raises weighty issues as shown in the attached draft Memorandum of Appeal, he has promptly filed this instant Application, failure to file the Appeal was not deliberate and/or intended to circumvent the due process, and that the *ex parte* Judgment arose out of a sale of land Agreement whereof the Respondent has taken part-possession and is waiting for issuance of title to him.

Replying Affidavit

5. In opposing the Application, the Respondent, through Messrs Songok & Co. Advocates swore the Replying Affidavit filed on November 30, 2023. He deponed that the Application is grounded on excuses that clearly exhibits the indolence of the Applicant which has been a common character since beginning of the lower Court suit, that the Ruling was delivered on September 21, 2023 and the allegation that the Ruling was delivered in the absence of Counsel for the Applicant and that the trial Court never issued Notice to the parties is not sufficient ground to explain the delay in filing the Appeal in time, that the Ruling was on the Applicant's Application to set aside and he ought to have been more vigilant in following up on the same, and that despite the Advocates not being present during delivery of the Ruling, the Ruling was sent via email to the Counsels.
6. He deponed further that the draft Memorandum of Appeal raises no weighty issues as alleged and has no chance of success as rightly pointed out by the trial Court, that the Application to set aside the *ex parte* Judgment failed because the Applicant failed to convince the trial Court that he was not aware of the existence of the case, the Judgment annexed demonstrates that the Applicant is a person who feigns ignorance of facts when it suits him and hopes to use technicalities such as the right of Appeal to buy time, frustrate and delay justice, that the Applicant has not denied all through his pleadings that he owes the Respondent a substantial amount of money and that in fact, he has been trying to negotiate with the Respondent to give the Respondent an alternative parcel of land

Hearing of the Application

7. It was agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Respondent's Counsel filed his Submissions on December 19, 2023.
8. As regards the Applicant, up to the time of concluding this Ruling and long after the timelines for filing of Submissions had lapsed, I had still not come across his Submissions. Despite reminders from the Assistant to this Court, the Applicant's Counsel never forwarded any Submissions until on 2/05/2024, long after I had already concluded the Ruling. The same does not even appear to have been formally filed as it does not even appear in the CTS Judiciary account for this Cause. As a result of this and the inordinate delay, I have declined to consider the Submissions and hereby expunge the same from the record.

Respondents' Submissions

9. Counsel for the Respondent submitted that in dismissing the Application seeking to set aside the *ex parte* Judgment, the trial Court noted that the Applicant did not deny service of Summons to enter Appearance or the Plaintiff upon him, did not dispute that he failed to enter Appearance or file a Defence within the stipulated time, and did not deny that the Respondent paid him the consideration of Kshs 3,300,000/-. Counsel also submitted that the trial Magistrate noted further that there was no notable



defence to the suit and that therefore, setting aside of the suit would serve no meaningful purpose and would be in contravention of the “overriding objectives” of the *Civil Procedure Act*.

10. Counsel submitted further that the right of Appeal is not automatic but a discretion to be exercised judiciously, that under Section 79G and 95 of the *Civil Procedure Act*, the onus is on the Applicant to provide “good and sufficient reason” as to why he failed to file the Appeal out of time which obligation the Applicant has failed to discharge. He cited the Supreme Court case of *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* [2014] eKLR and also the case of *Ishmael Kagunyi Tande v Housing Finance Company of Kenya Ltd* [2005] eKLR as well as the case of *Kenya Kazi Security Services Ltd v Kenya National Private Security Workers Union* [2013] eKLR.

Determination

11. The issue for determination is “whether the Applicant should be granted leave to appeal out of time and whether therefore, an order for stay of execution pending appeal should therefore issue”.
12. Section 79G of the *Civil Procedure Act* donates to this Court the power to allow a party to file an Appeal before it out of time. The Section 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 a good and sufficient cause for not filing the appeal in time.” [Emphasis added].”

13. In the case of *Edith Gichungu Koine v Stephen Njagi Thoitithi* [2014] eKLR, the Court of Appeal guided that in an application for extension of time, the Court ought to take into account several factors as observed by Odek JJA as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

14. It is therefore the position that where the delay by a litigant is well explained and the matter sought to be heard out of time raises triable issues or arguable points, the Court will be reluctant to punish such litigant by declining to grant him enlargement of time. On this point, I am guided by the decision in *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR, where the Court of Appeal, in declining to strike out a Notice of Appeal filed one day out of time, stated as follows:

“40. It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the *Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the *Constitution* to adhere to national values and principles of governance which require them whenever



applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld. For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice."

15. Similarly, in the case of Charles Karanja Kiiru v Charles Gitbinji Muigwa [2017] eKLR, the Court of Appeal upheld the following statements made by the trial Judge (P.J. Otieno J) in the suit brought before it on appeal:

"It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint"

16. The question now is whether the delay herein has been well explained and whether there is an arguable appeal with chances of access.
17. In explaining the delay, the Applicant states that his Advocates were served with a Notice informing them that the Ruling would be delivered on September 14, 2023 but that the Ruling was never delivered as scheduled. He states further that it is only when he was subsequently served with a Notice through WhatsApp indicating that the suit is coming up for Notice to Show Cause (NTSC) on November 23, 2023 that his Advocates, upon perusal of the Court file, discovered that the Ruling was delivered way back on September 21, 2023. I note that immediately thereafter, the Applicant filed this instant Application on November 16, 2023.
18. In his response, the Respondent concedes that the Ruling was not delivered on September 14, 2023 as scheduled and was delivered later on September 21, 2023 in the absence of Counsel for the Applicant. He also tacitly concedes that no notice was issued to the Applicant informing him of the change in the date of delivery of the Ruling. The Respondent then states that the Ruling was, upon delivery, forwarded to the parties via email but he has not produced any evidence to support this allegation.
19. In view of the foregoing, and although it is true, as correctly argued by the Respondent, that the Ruling being on the Applicant's Application, the Applicant ought to have been more vigilant in following up on the same, I am prepared to hold that the delay to file the instant Applicant has been well-explained
20. The second consideration that I now need to determine is whether the intended Appeal has chances of success, i.e., is there a weighty appeal? does it raise triable issues or arguable points? In other words, would it serve any purpose to allow the Appeal to be filed out of time?
21. In the suit before the Magistrate's Court, the Applicant failed to enter appearance or file a defence and as a result, interlocutory judgment was entered against him. He then applied for setting aside of that interlocutory Judgment but the Application was dismissed. It is that Ruling that he now wants to appeal against out of time.
22. That the demonstration of a "reasonable defence" that raises triable issues is one of the factors that a Court faced with an Application to set aside a regular *ex parte* judgment should consider was affirmed



by the Court of Appeal in the case of James Kanyiita Nderitu & Another [2016] eKLR, where the Court stated as follows:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. [emphasis mine]

23. In his Ruling, the Learned Magistrate’s made findings as follows:

“I have considered the grounds on which the application is premised and I find the applicant is not denying that he was served with the Plaintiff and Summons to enter appearance. It is not in dispute that the applicant failed to enter appearance and file his defence within the stipulated time. It is also not in dispute that the applicant paid to the defendant and the defendant acknowledged receipt of Kshs 3,300,000 from the Plaintiff. That being the case the defendant has no reasonable defence to the suit and therefore setting aside the judgment entered herein will serve no meaningful purpose and in fact will be an affront to the overriding objective of the Civil Procedure Act and the Civil Procedure Rules. The overriding objective is to facilitate just, expeditious, proportionate and affordable resolution of disputes

The Court is enjoined in making any decisions to seek to give effect to the overriding objective specified in subsection (1) above and I will have failed to do so were I to allow the instant Application”

24. I have carefully perused the draft Memorandum of Appeal presented herein and also the draft Statement of Defence presented by the Applicant in the lower Court suit and I am constrained to agree with the Learned Magistrate that there is absolutely no reasonable defence raised by the Applicant against the claim made by the Respondent. Consequently, the draft Memorandum of Appeal presented is one that I may refer to as a sham.

25. The Respondent’s claim (as the Plaintiff) against the Respondent (as the Defendant) in the lower Court was that the parties entered into an Agreement for sale of land in which the Respondent was to purchase from the Applicant a parcel of land at a price of Kshs 3,300,000/- which amount the Respondent paid in full. The Respondent filed the suit seeking refund of the said amount on the ground that the Applicant, despite receiving the money in full, failed to transfer the land as agreed.

26. Upon looking at the record, like the Learned Magistrate, I, too, note that the Applicant did not deny service of Summons to enter Appearance or the Plaintiff upon him. All he says is that he was unable to file a defence in time because he had been attacked by thugs. I however note from the exhibits presented that such attack by thugs occurred around August 2021, long before this suit was filed around September 2021, about 1 year later. The same is therefore a lame excuse.



27. I also note that the Applicant does not deny that indeed, he received the said sum of Kshs 3,300,000/- in full from the Respondent as purchase price. He also does not deny that he failed to perform his part of the bargain in that he has, to date, not transferred the parcel of land to the Respondent and neither has he refunded the money as stipulated in the Agreement (with 20% interest). He has also not blamed the Respondent in any way for causing or contributing to the failure to transfer the land nor has he alleged that he has any claim of his own against the Applicant. In light of the foregoing, of what use will it be to elongate this litigation any further?
28. In the circumstances, my considered view is that allowing the Applicant to file an Appeal out of time to challenge the Ruling will be an effort in futility and a waste of precious judicial time. It will serve no meaningful purpose.
29. In light of my above findings, the issue of whether to grant stay of execution pending Appeal does not now arise.
30. In the end, the Notice of Motion dated November 15, 2023 filed by the Applicant fails and the same is accordingly dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF MAY 2024

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

