



Gor Construction and Hardware Limited v Eco Bank Kenya Limited & another (Miscellaneous Civil Application 219 of 2024) [2024] KEHC 14158 (KLR) (13 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION 219 OF 2024
RE ABURILI, J
NOVEMBER 13, 2024**

BETWEEN

GOR CONSTRUCTION AND HARDWARE LIMITED APPLICANT

AND

ECO BANK KENYA LIMITED 1ST RESPONDENT

GARAM INVESTMENT 2ND RESPONDENT

RULING

1. The application dated 9th May 2024 seeks orders for leave of this Court to file and serve a Notice of Memorandum of Appeal out of time as against the Judgment rendered on 9th June 2022 in the Chief Magistrate's Court at Kisumu and that an injunction do issue against the Respondent pending the hearing and determination of the appeal.
2. The application is predicated on the grounds on the face thereof and on the affidavit sworn by Silvia Nyambeki Advocate wherein it is deposed that the learned trial magistrate delivered judgment without notice to the applicant as required under Order 21 Rule 1 of the Civil Procedure Rules dismissing the applicant's suit against the respondents.
3. That as a result, the applicant inadvertently did not file an appeal within the statutory timelines hence this application.
4. That the Applicant has an arguable appeal but is yet to receive copies of proceedings and judgment from the trial court as per the annexed draft memorandum of appeal. That the applicant will suffer irreparable loss and the appeal at risk of being rendered nugatory if the orders sought are not granted.
5. That damages would not adequately compensate the applicant since the parcels of land are developed, which land has sentimental value to the applicant.



6. That what the Applicant is allegedly owed to the Respondent as demanded is less than the Kshs.40 million the value of the property in issue.
7. That it in the interest of equity and justice that the orders sought are granted.
8. The applicant also filed a further affidavit deposing through counsel that following the delivery of judgment in the lower court, several attempts to secure the said judgement were made including written letters to the registry in Kisumu requesting the said judgement to no avail. She annexed copies of the said letters marked SK-2, SK-3 & SK-4.
9. The Respondents filed a replying affidavit sworn by their advocate Mr. Omagwa Angima deposing that the application by the applicant was devoid of any merit, that the applicant was guilty of inordinate unexplained delay and had adopted a lacklustre attitude towards it case by taking over two years to allege that it was never aware of the judgment and that the applicant is only intending to deny the respondent its right to exercise the statutory power of sale of the property to realise its security. That the application is an abuse of court process and that delayed justice is denied justice.
10. Only the applicant filed written submissions dated 23rd July 2024 arguing that this Court has jurisdiction to hear and determine the application, that the delay is explained as the trial court never issued notice of Judgment hence the appeal could not be filed in time. That sufficient cause has been established and that the appeal is arguable.

Analysis and Determination

11. I have considered the application, grounds and supporting affidavit. I have also considered the replying affidavit sworn by the respondent's counsel opposing the application and the applicant's written submissions as filed. The main issue for determination is whether the orders sought are merited.
12. The Applicant seeks leave to appeal out of time and if so, whether an injunction sought should issue.
13. The power to enlarge time for filing of an appeal out of time is a discretionary power. This power is donated by Section 79G of the Civil Procedure Act in the proviso thereof. This power is informed by the fact that an aggrieved party has a right of appeal to ventilate their grievances by exhausting the available appeal mechanisms in their pursuit of justice and to correct any errors that may have been made by the trial or appellate courts.
14. Section 79 G of the Civil Procedure Act stipulates that:

“Every appeal from a subordinate court to the High Court shall be filed within 30 days from the date when the lower court may certify as having been requisite for the preparation and delivery 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.” [Emphasis added].
15. The principle enunciated in the above Section was applied in *Diplack Kenya Ltd vs William Muthama Kitonyi* [2018] eKLR that an applicant seeking to have enlarged time for filing of an appeal must demonstrate that they have a good cause to do so.
16. In *Nicholas Arap Kiptoo Korir Arap Salat vs IEBC & 7 Others* [2014], the Supreme Court set out the the guiding principles in considering an application for extension of time which are that:
 - a. extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;



- b. a party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
 - c. whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
 - d. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. whether there would be any prejudice suffered by the respondents if the extension was granted;
 - f. whether the application had been brought without undue delay; and
 - g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.
17. The above principles were also restated in Paul Mulile Wambua vs Attorney General & 2 Others [2015] eKLR by the Court of Appeal.
 18. Applying the above principles to this case, the Judgment to be impugned was rendered on 9th June 2022 and this application was filed on 9th May 2024, nearly two years later, only less by 30 days.
 19. According to the Applicant, the delay was occasioned by the fact that it was never issued with a notice of delivery of the said Judgment.
 20. The question is, even if there was no notice of delivery of Judgment, what was the Applicant doing for nearly 2 years as there is no deposition that any inquiries were made during the period after the last hearing between 28th April 2022 and 29th September, 2023 a period of 17 months when the first letter was written to Court seeking to know whether judgment was delivered by the learned trial magistrate, after the hearing had been concluded.
 21. The further affidavit shows that the applicant's counsel wrote letters to court on 29th September, 2023, 20/12/2023 and 20/3/2024 asking whether judgment had been delivered in the case. On all those letters, there are date stamps of receipt of the letters by the lower Court mail registry.
 22. Although Hon. Gesora was said to be on transfer after he had heard the case, no letter was written to the trial magistrate seeking to know whether he had delivered judgment or not. Again, as I have stated above, it took the applicant seventeen months to inquire of the judgment which from the deposition by the applicant's counsel, was delivered within 60 days as required under the Civil Procedure Rules. The applicant does not state why it took nearly 2 years later to seek to know whether the judgment had been delivered and neither does the Applicant explain on oath what prevented it from learning of the judgment which was delivered in June 2022, following the hearing on 28th April, 2022.
 23. The affidavit by the applicant's counsel is devoid of any satisfactory explanation for the delay. It is not enough to cite non-compliance with Order 21 Rule 1 of the Civil Procedure Rules on the issuance of notice of Judgment date to the parties. In my view, the delay by the applicant in bringing this application was prolonged and inexcusable, such that it would cause grave injustice to the respondent.
 24. The question as to whether there was inordinate delay was considered by the Court of Appeal in the case of Cecilia Wanja Wamwira Kerugoya Civil Appeal No.211 of 2013 [2018] e KLR where it was held:

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view



that the learned judge in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed..... we have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or delay in filling the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice.”

25. In this case, it is my finding that the appellant's conduct of waiting for 17 months before inquiring as to whether judgment had been delivered, knowing very well that the delay of that magnitude would be unreasonable on the part of the trial magistrate was in my view, not excusable and was meant to deliberately delay the cause of justice and use it as an excuse for seeking enlargement of time to appeal. That delay was intended to paint the trial magistrate in bad light.
26. In *Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Company Ltd* [2015] eKLR; (page 3 paragraph 8) it was stated that:

“A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour.”
27. The Applicant's counsel casually states in her deposition that due to lack of notice of Judgment to the parties, the applicant “inadvertently failed to file Notice and Memorandum of Appeal in time.” For avoidance of doubt, a Notice of Appeal is only required when filing appeals from this Court to the Court of Appeal, not from the magistrates' courts to the High Court.
28. There is material non-disclosure of the reasons for the 17 months and the waiting until nearly 2 years elapsed is when this application was filed. The applicant does not disclose the time when it discovered that judgment had been delivered.
29. In other words, the reasons for the inordinate delay do not add up. There is an averment of an arguable appeal yes and that the lower court has not supplied copies of proceedings and Judgment. However, there is no evidence of any letter requesting for the proceedings and Judgment from the lower court, by the applicant upon learning of the delivery of the said judgment.
30. There is also no evidence that the Applicant paid for the said proceedings and Judgment but that the trial court has procrastinated in supplying the same.
31. Any party to proceedings who is keen on his case cannot wait for 17 months and nearly 2 years to establish whether Judgment was rendered dismissing his case or not. Only an indolent party does wait for that long.
32. In this case, the applicant is guilty of inordinate delay which is not explained to the satisfaction of this court. That delay in my view has been intentional and contumelious and amounts to an abuse of the court process; the delay is inordinate and inexcusable; and the delay is one that gives rise to a substantial risk to fair hearing in that it is not possible to have a hearing of issues in action or causes or likely to cause serious prejudice to the 1st respondent who is exercising the statutory power of sale to realise the security. I say the delay was deliberate because the applicant has not explained to this court whether in the matter involving sale of a property, there was an injunction issued at the trial stage or not.
33. Article 159 of *the Constitution* abhors delayed justice. A party who seeks the discretion of the court to be exercised in their favour must act diligently and in good faith. Even where the court is being blamed for rendering Judgment without notice, which judgment was delivered within 2 months from the date of the hearing, an inquiry made nearly 2 years after the hearing, there must be an explanation for the



delay for a party who actively participated in court proceedings. Furthermore, litigation must come to an end.

34. I find no sufficient or good cause for the delay
35. On whether an injunction should issue, the prayer for injunction is extremely barren and unsupported by any material. An injunction is a discretionary remedy as well. The prayer in the application seeking an injunction does not state the type of injunction and what purpose that injunction is to serve. The prayer simply states:- "...issue orders of injunction as against the Respondent pending the hearing and determination of this application and the appeal herein. This Court is unable to comprehend how it can issue an injunction without any basis for that injunction being laid before the Court.
36. On the whole, I find the application dated 9th May 2024 devoid of any merit and the same is hereby dismissed with an order that each party shall bear their own costs of the application.
37. This file is closed.
38. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF NOVEMBER, 2024

R. E. ABURILI

JUDGE

