



Republic v County Government of Kirinyaga; Magati & another (Exparte Applicants); Kabui (Interested Party) (Miscellaneous Civil Application 43 of 2018) [2024] KEHC 16218 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION 43 OF 2018
RM MWONGO, J
DECEMBER 4, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KIRINYAGA RESPONDENT

AND

FRANCIS KARIUKI MAGATI EXPARTE APPLICANT

AND

ANTONY MBUTHI KABUI INTERESTED PARTY

AND

JANE WANJIKU MUIRURI EXPARTE APPLICANT

RULING

1. The 1st Ex parte applicant filed originating summons dated 27th August, 2020 seeking the following orders:
 1. That this Honourable Court do grant leave to and allow the 1st Exparte Applicant to file the appeal against the Respondent out of time.
 2. That costs of this Application be provided for.
2. The application is supported the supporting affidavit of Onkendi John - Lewis with the following major averments:
 - i. That I am on record as the advocate for the 1st Exparte Applicant herein.



- ii. That the 1st Exparte Applicant herein filed a Judicial Review suit against the Respondent herein and Gitari J gave a Ruling against the 1st Exparte Applicant on the 29th May, 2020.
 - iii. That the ruling was delivered via electronic mail and as such, the 1st Exparte Applicant's advocate received the ruling when time had passed.
 - iv. That, the 1st Exparte Applicant did not file an appeal in time as my firm was able to access the firm's mail thirty days after the ruling had been delivered as it is a period where the legal practice has been affected by the novel Corona virus ravaging the country.
3. The 2nd Ex parte Applicant on 19th October, 2020 deposed to a 15 paragraphs Replying Affidavit with the following major averments:
1. That the 1st exparte applicant filed the notice of motion for judicial review and named me as the 2nd exparte applicant simply because we jointly owed plot number 75 Makutano.
 2. That the 1st exparte applicant alleged that we never sold the aforesaid plot to the interested party.
 3. That the 1st exparte applicant also alleged that we sold plot number A75 Makutano.
 4. That the intended 1st exparte applicants appeal has no chances of success in view of the above.
 5. That I was satisfied with the judgment of Gitari J at Kerugoya High Court.
4. Parties filed submissions as directed by the Court.

Interested Party/Applicant Submissions

5. As to whether the application is properly before this honourable court, the applicant submits that it does not adhere to the mandatory provision of law in Order 19 Rule 4 & 7 [Civil Procedure Act](#).
6. The applicant submits that the application is incurable defective as the applicant and the deponent are purporting to make this application are two separate individuals. That means one of the two is an imposter of the other. The law does not have a remedy as to imposters and this application ought to fall flat on the face of it.
7. As to whether the reasons advanced for filing the Appeal out of time is genuine, the applicant submits that counsel on record participated fully up to and including the date and the time the judgement of this honourable court was given. He gave his consent as shown in the record on 20th May 2020 for the Ruling Judgement to be sent to him electronically. On the 29th May 2020, the Ruling was delivered to all the parties as agreed. Thereafter, on 21st September, 2020 the counsel for the applicant made an application to file the Appeal out of time.

1st Ex Parte Applicant submissions

8. As to whether or not the application is properly before the Honourable Court, it was submitted that Section 3A of the [Civil Procedure Act](#) states that:

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may necessary for the ends of justice or to prevent abuse of the process of the court. Therefore, the Honourable court has the mandate as is provided for in Section



79G of the Civil Procedure Act to extend time for filing an appeal under that section and this extends to include the power to admit an appeal filed out of time.”

9. In *Asma Ali Mohamed v Fatime Mwinyi Juma CA75/2014* the court observed that the applicant must first file the appeal then seek its admission out of time. It is therefore clear that the Application is properly before court and the Honourable Court is invited to take into consideration Order 19 Rule 7 thereof, in any case.
10. As to whether the application is incurably defective because the applicant and deponent are separate entities it was submitted that it is trite law that the deponent depones in the application as the bonafide counsel on record. Secondly, such counsel is the one that is properly seized of the issues raised, regarding the failure to file the Appeal out of time. This is in line with Order 19 Rule 3 (1) of the Civil Procedure Rules, this rule provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove”.
11. It is not disputed that the deponent was indeed the counsel on record for the 1st Ex-parte applicant in the primary suit.
12. As to whether sufficient reason has been given to allow the appeal out of time the 1st Ex-parte applicant relies on the principles stated in the case of *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees, Civil Application 190 of 2019*.
13. The 1st Ex parte applicant avers that; the intended appeal is arguable and has high chances of success and that this court has the unrestricted discretion in granting leave to appeal out of time. The 1st Ex parte applicant undertakes to prosecute its appeal expeditiously and has disclosed that they are willing to abide by any conditions set by this Honourable Court for the grant of the orders sought herein.

2nd Ex parte applicant Submissions

14. The 2nd Ex parte applicant submits that the principles to be considered in exercising the discretion whether or not to enlarge time are stated in: *First American Bank of Kenya Ltd v Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002]1 EA 65*. In that case the Court set out the factors to be considered in deciding whether or not to grant such an application and these are:
 - a) the explanation if any for the delay;
 - b) the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
 - c) Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
15. It was submitted that the actions by the 1st ex parte Applicant are only meant to delay justice, because the 1st ex parte Applicant, the 2nd Ex parte Applicant and the Interested Party herein went to the County Criminal Investigations Officer, and it was confirmed that the fingerprints and signatures on the sale agreement were authentic. Further, the Office of the Director of Public Prosecution in their letter dated 27th October 2020 advised the Officer Commanding Station to institute criminal proceedings against the 1st Ex Parte Applicant for malicious damage.



Interested Party/Applicant's Submissions

16. The Interested Party submits that this application is an abuse of court process. Reliance is placed on the Court of Appeal case of Muchanga Investment Limited v Safaris Unlimit (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 (2009) eKLR where, while outlining what entails abuse of the court process, the court held that:

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides a frivolous, vexatious or oppressive.”

17. Therefore, the interested party submits that the application is not only frivolous but also amounts to an abuse of court process meant to waste the precious judicial time. Consequently, it should be dismissed with costs to the Interested party as it will be improper and impermissible to allow the Ex Parte Applicant to re-litigate, re-agitate and re-canvass matters that were settled with finality.

Respondent Submissions

18. The respondent submits that both options of Review and Appeal cannot be pursued concurrently or one after the other. From the above decision they conclude that the said application by the 1st Ex parte Applicant's application is totally defective and an abuse of the court process.

19. The respondent argued that in the decision by Lady Justice L.W. Gitari in this matter, she found that we did not act ultra vires; and stated in the second last paragraph as follows:

“There is no evidence that the Respondent acted out of malice. They have performed their function as required by effecting the transfer based on all the required documents. In a sitting of a committee which is authorized to transact the business of transfers/withdrawals of names in various markets within the county. The Respondent did not act. The action of the Respondent was not ultra vires”

20. Attached for ease of reference, was the sale agreement dated 2nd September, 2016 and minutes of Land Housing and Urban Development Planning Committee meeting which was held on the 17th October, 2016 at Sports View Hotel Kasarani, to show this Court that the laid down procedure was followed as provided by our laws.

21. Finally, the respondent submits that it is in the interest of justice that the said application dated 27th August 2020 by the 1st Ex parte Applicant be dismissed with costs to the Respondent as its main aim is to deny the Interested Party his right to property as enshrined in Article 40 of *the Constitution* of Kenya 2010.

Issues for Determination

22. The sole issue for determination is whether the court is satisfied that leave to appeal out of time should be allowed.



Analysis and Determination

23. The 1st Exparte Applicant's application for leave to appeal out of time emanates the 1st Exparte Applicant's Judicial Review suit against the Respondent herein in Gitari J gave a Ruling against the 1st Exparte Applicant on the 29th May, 2020.
24. The main issue which arises for determination in the instant application is whether the applicants deserve to be granted leave to file their appeal out of time.
25. The legal provision for filing appeal is found in Section 79G of the Civil Procedure Act CAP 21 which provides:

“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.”

26. The question is whether the applicants have satisfied the conditions to be granted leave to Appeal out of time.
27. In the case of Asma Ali Mohamed v Fatime Mwinyi Juma CA75/2014 the Court observed that:

“When a party wishes to obtain leave to file an appeal out of time, such a party must file the appeal and as provided in the proviso 79G, then must seek leave to admit that appeal out of time.”

It is therefore clear that the Application is properly before court and the Honourable Court is invited to take into consideration Order 19 Rule 7 thereof, in any case. However, the applicant has not attached a draft memorandum of appeal for the court to peruse. To that extent there is no appeal on record to which the court can exercise its discretion to allow admission out of time.

28. The 1st ex parte applicant avers that they did not file the Appeal in time because of the Corona Virus, that the intended appeal is arguable and has high chances of success and that this court has the unrestricted discretion in granting leave to appeal out of time. The 1st ex parte applicant undertakes to prosecute its appeal expeditiously and has disclosed that they are willing to abide by any conditions set by this Honourable Court for the grant of the orders sought herein.
29. Regarding whether or not the application should be allowed. It was explained in the case of: Muringa Company Limited v Archdiocese of Nairobi Registered Trustees, Civil Application 190 of 2019.

“Some of the considerations which are by no means exhaustive, in an application for extension of time include the length of the delay involved, reasons for the delay, possible prejudice, if any, that each party stands to suffer, conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interests of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate the dispute against the need to ensure timely resolution of disputes: the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”



30. The trial court delivered its ruling on 29th May, 2020. The applicant filed this application dated 27th August, 2020 on 4th September, 2020. It has taken the applicant four months between the date of judgment delivered in the trial court and the time when he filed the instant application. It is therefore our considered view that a delay of four months is inordinate and inexcusable particularly in light of the fact that no memorandum of appeal was filed.
31. In the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR, this Court stated:
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
32. The applicant deposed that she would suffer prejudice. However, the same has not been explained.
33. The respondent on its part states that if leave to appeal out of time is allowed, they will be greatly prejudiced. They submit that the application be dismissed with costs to the Respondent as its main aim is to deny the Interested Party his right to property as enshrined in Article 40 of *the Constitution* of Kenya 2010. James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR,
- “The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
34. As to whether there is an arguable appeal, the applicant has not attached a draft memorandum of appeal for the court to peruse.

Conclusion and Disposition

35. Ultimately, it has not been demonstrated, and the court is not persuaded, that this is a proper case for it to exercise its direction to allow an appeal to be filed out of time.
36. Accordingly, the application is dismissed with costs.
37. Orders accordingly.

DELIVERED AT KERUGOYA THIS 4TH DAY OF DECEMBER, 2024.

R. MWONGO

JUDGE

Delivered in the presence of:

Makhandia - for 2nd Exparte Applicant

Kamau - holding brief for Murigu for Interested Party

No representation - for County Government

No representation - Onkendi Advocate to 1st Exparte Applicant

