



M’chene v M’chene & another (Environment and Land Miscellaneous Application E013 of 2023) [2024] KEELC 219 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 219 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2023
CK NZILI, J
JANUARY 24, 2024**

BETWEEN

GRACE KARURU M’NCHENE APPLICANT

AND

ISAAC ARIMI M’NCHENE 1ST RESPONDENT

AGNES NKATHA MURIUKI (SUED ON HER BEHALF AND ON BEHALF OF THE LATE ELIJAH IMATHIU - DECEASED) 2ND RESPONDENT

RULING

1. The applicant seeks to leave to file an appeal out of time. The grounds, as contained on the face of the application and a supporting affidavit of Grace Karuru M’Nchene dated 9.10.2023, is that though judgment was scheduled for 11.12.2019, the court was not sitting. Further, the applicant says he learned about the delivery of judgment on 2.2.2020, sought a copy of the same on 3.2.2020, and was supplied with the proceedings on 5.11.2020. Additionally, the applicant says she applied for a certificate of delay on 5.11.2020, which was never signed despite several attempts to follow up. She urges the court to grant the orders sought since she has an arguable appeal per the annexed draft memorandum of appeal.
2. Accompanying the supporting affidavit was the letter dated 3.2.2020, a receipt for payments of the proceedings and judgment draft certificate of delay receipt for its payment, email, and a copy of the draft memorandum of appeal as annexures marked GKM “1” & “2” respectively.
3. The respondents opposed the notice of motion through a replying affidavit of Agnes Nkatha Muriuki sworn on 19.10.2023. It is averred that the appeal should have been filed by 28.2.2020, but leave was only sought three years and ten months down the line with no explanation for the inordinate delay. The respondents aver the applicant is guilty of inaction, the extension of leave to appeal was not a matter of



- right, the delay is unreasonable, and the applicant failed to prove fraud, she was not in occupation of the suit land, and that there is no demonstration that the intended appeal has any chances of success.
4. Lastly, the respondents indicated that no security has been offered since they have a right to enjoy the fruits of their judgment.
 5. By written submissions dated 17.10.2023, the applicant submitted that the judgment was delivered without notice to him or his advocates. The delay was beyond his control; he did everything he was expected to do to obtain the proceedings and the certificate of delay, and he has a reasonable and arguable intended appeal; otherwise, he will be prejudiced. Reliance was placed on *MFI Document Solution Ltd vs. Paretto Printing Works Ltd* (2021) eKLR, *County Executive of Kisumu vs County Government of Kisumu & others* (2017) eKLR and *Nicholas Arap Korir Salat vs Independent Electoral and Boundaries Commission & others* (2014) eKLR.
 6. Leave to appeal out of time is a discretionary power bestowed upon a court to be exercised judiciously and on sound legal principles.
 7. The parameters have been subject to court decisions. Section 79 G of the *Civil Procedure Act* and 16 A (1) & (2) of the *Environment and Land Court Act* provide that an appeal has to be filed within 30 days, excluding the period certified by the lower court as necessary for the preparation and delivery to the appellants of a copy of a decree or order provided an appeal may be admitted if the applicant has a good and sufficient cause for not filing the appeal on time.
 8. In *Nicholas Arap Korir Salat vs IEBC* (supra), the Supreme Court of Kenya said the extension of time was not a right to a party; the burden is on the applicant to lay a basis to the satisfaction of the court; the discretion is based on case to case; reasonable cause for the delay should be available; prejudice to the opposite party must be considered, and lastly the public interest aspect must be considered.
 9. In *Kamlesh Patni vs Director of Public Prosecution & others* (2015) eKLR, the Court of Appeal observed that the court should be hesitant to close the doors to the corridor of justice before a litigant is heard. Further, articles 48 & 50 (1) of *the Constitution* guarantee every person access to justice.
 10. In this application, the application was filed three years and ten months after the delivery of judgment. The delay is solely attributed to the court and its registry. The burden was on the applicant to satisfy the court that the proceedings and judgment came too late. The judgment is not certified. The applicant did not state when he obtained it. Even during the Covid-19 pandemic, court operations were only scaled down but not closed down completely. No explanation for the period between 2020, 2021, and 2022 has been offered. No follow-up letters have been annexed to show that after 3.2.2020 when a deposit of Kshs.600/= was made, the applicant was vigilant. The certificate of delay was only paid for on 5.11.2020. After the email was sent on 11.11.2020, there is nothing to show that the applicant made any follow-ups in 2021, 2022, and the first half of 2023.
 11. Again, it is a trite practice that one does not require a certificate of delay as a prerequisite to apply for leave to appeal out of time. A copy of the judgment and or order or decree appealed against is all that one requires.
 12. Sufficient cause and good reason for not appealing must be reasonable and satisfactory. In *Wachira Nyaga vs Patrick Wamwirwa* (2018) eKLR, the court cited with approval *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & another* (2014) eKLR, where the Court of Appeal said there was no set rule as to what inordinate delay is it all depends on the circumstances of each case, the conduct of the applicant during the period of delay, if it was the deliberate explanation offered and if the applicant went to slumber. The applicant knew the nature of her case. The period of the delay is the litmus test as held in *Mwangi S. Kaimenyi vs. Attorney General & another* (2014) eKLR.



13. The delay of 3 years and 10 months is inordinate by any stretch of the imagination. It is also inexcusable. It cannot be true, as observed by Chesoni J in *Ivita vs Kyumbu* (1984) KLR 441, justice is justice to both the plaintiff and the defendant.
14. As to whether the appeal is arguable, in *Edith Gichugu Koine vs Stephen Njagi Thoithi* (2014) eKLR, the Court of Appeal observed that prejudice to the respondent as well as the overriding objective of just, proportionate, expeditious, and affordable resolutions of disputes are some of the parameters to consider.
15. Further, in *Paul Musili Wambua vs. AG & others* (2015) eKLR, the court said the chances of the appeal succeeding were among the considerations. I think the applicant was careless. Three years and ten months was too long, especially if the land in issue was or is valuable to the applicant. The prejudice she is likely to suffer is no more than what the respondents are likely to suffer, which prejudice has not been demonstrated.
16. The upshot is that I find the application lacking merits. It is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 24TH DAY OF JANUARY 2024

In presence of

C.A Kananu/Mukami

D.J Mbaya for Menye for respondents

Miss Githinji for the applicant

HON. CK NZILI

JUDGE

