



**Cheruiyot v Chebochok & 3 others (Environment & Land Case
36 of 2018) [2024] KEELC 1049 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1049 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 36 OF 2018
MC OUNDO, J
FEBRUARY 29, 2024**

BETWEEN

HEZRON KIMELI CHERUIYOT PLAINTIFF

AND

RUSI CHEPKEMOI CHEBOCHOK 1ST DEFENDANT

JOSEPH KIPYEGON SIGEI 2ND DEFENDANT

MOSES KIPKOECH SIGEI 3RD DEFENDANT

JOHN SIGEI 4TH DEFENDANT

RULING

1. Pursuant to a Ruling delivered on the 15th June, 2023 by this Court allowing the Respondent's Preliminary Objection to the application by the Applicant seeking that the court reviews its order contained in the ruling of the 15th April 2021, vary the same and reinstate the suit for hearing, the Applicant has now filed the present Application by way of a Notice of Motion dated 21st September, 2023 under Section 7 of *Appellate Jurisdiction Act*, Section 95 of the *Civil Procedure Act*, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, where he seeks for leave to file a Notice of Appeal against the said ruling out of time, and serve the same within fourteen (14) days of the grant of the order for extension of time.
2. The application is supported by the grounds therein as well as by the sworn affidavit of Joel Kimutai Bosek, an Advocate of the High Court of Kenya, of an equal date who deponed that the ruling to the Preliminary Objection filed by the Respondent dismissing their (Applicant's) application for review dated 19th August, 2022 had been delivered on the 15th June, 2023 without Notice wherein the period for filing a Notice of Appeal had lapsed on 29th June, 2023 which then became necessary to file the instant application in order to safeguard the Applicant's right to an appeal.



3. The application was opposed by the Respondents' Replying Affidavit sworn by Julius Kiprotich Mutai, an Advocate of the High Court of Kenya on the 3rd November, 2023 who deponed that the instant application had been reactionary, made in bad faith for wrong purpose, unmerited and deserving nothing other than a frown followed by an order dismissing the same with costs. That the Plaintiff had not demonstrated that they had made efforts to inquire from the court as to when the Ruling on their Review application was to be delivered after the said Ruling had failed to be delivered on 30th March, 2023.
4. That for the application of this nature to succeed, a plausible and satisfactory explanation for delay was the key that unlocked the court's flow of discretionary favour and there had to be valid and clear reasons, upon which discretion could be favourably exercisable and the Plaintiff had demonstrated none.
5. That the intended appeal was a frivolity with no chances of success as the Plaintiff's review application had been dismissed on a Preliminary Objection by the court on the account of lack of jurisdiction and further that the Applicant had failed to file submissions in support of their review. That the Applicant was on a fishing expedition ought to take cognizance of the fact that litigation must come to an end. That the Respondent would be prejudiced should the instant application be allowed as they would be kept under the unending apprehension of a pending case that was never coming to an end due to numerous frivolous applications proffered by the Applicant.
6. The application was disposed of by way of written submissions.

Applicants' written submissions.

7. In support of their application dated 21st September, 2023, the Applicant herein gave the background of the matter before framing his issues for determination as follows:
 - i. Whether Notice was served regarding the ruling date.
 - ii. Whether there is sufficient cause for extension of time.
 - iii. Whether the application is merited.
8. The Applicant placed his reliance on the Supreme Court's decision in the case of *Nicholus Kiptoo Arap Korir Salat v IEBC and 7 others* [2014] eKLR which had spelled out the principles to be considered in determining an application for extension of time, to submit that as the record shows, Notice of the new date on delivery of ruling had not been brought to their attention.
9. That in line with the directions of 30th March, 2023, the court in realizing that one party had been absent, it ought to have confirmed if indeed the ruling Notice had been served upon the Applicant. That the failure of the Applicant and/or his Advocates to attend court during the delivery of the ruling had not been an act of indolent, rather a total reliance on the set systems and the directions of the court hence the Applicant could not be faulted.
10. His submission was that as soon as the Applicant became aware that the ruling had been delivered, on 15th June 2023, and upon being served with the Notice of Taxation, he had filed the instant application. That there was no prejudice which the Respondents would suffer if the instant application was granted as prayed since they were currently in occupation and enjoyment of the suit land and continued to retain monies paid to them for the purchase of the said property. He thus urged the court to exercise its discretion to allow the Applicant exhaust all possible recourse.



11. That the instant application was meritorious. That the application had raised the issue of the court proceeding on what it had adjudicated as an ordinary contract and not an interest in land which would otherwise have been in its purview. That in so pronouncing itself, then it had lacked jurisdiction to so pronounce itself and had thus occasioned a grave mistake of law that ought to be set aside.
12. That the court had wide unfettered discretion to apply in the interest of justice and that the instant case met the threshold for the exercise since the Applicant had been aggrieved by the unfair and unjust acts of the Respondents who took and retained his money while using the technicality and the legal system to hide from doing what they ought to have done.
13. On the first issue for determination as to whether Notice to the impugned ruling had been issued, the Applicant submitted in the negative. He relied on the provision of Section 1A and 1B of the *Civil Procedure Act* to submit that the technology of sending the Notice by email would have been the most effective way of bringing the ruling date to their attention hence the Deputy Registrar having failed to do so, it had been unfair to condemn the Applicant on the failure of an officer of the court.
14. On the second issue for determination as to whether there was sufficient cause for extension of time, the Applicant submitted that upon being served with the Bill of Costs that was due for taxation, and on learning that the impugned ruling had been delivered, he had taken the shortest time possible to file the instant application. He placed reliance on the decision in Nairobi ELC Case Number 12 of 2011 (*Marion Wakanyi Kamau v Deliverance Church Registered Trustees and another*) (unreported) to submit that the Respondents had not preferred any other reason as to why Applicant had only learnt of the ruling after receiving the Notice for taxation.
15. On the third issue for determination as to whether the instant application was merited, reliance was hinged on the Court of Appeal decision in the case of *Charles Karanja Kiiru v Charles Gitbinji Muigwa* [2017] eKLR, where the court cited its earlier decision in *Edith Gichungu Koine v Stephen Njagi Thoitthi* [2014] eKLR to urge the court to grant the prayers in the instant application in the interest of justice.

Respondents' Submissions

16. The Respondents, in opposition to the application filed their submissions dated 23rd November, 2023 wherein they gave the background of the matter before framing their issues for determination as follows:
 - i. Whether the Applicant had demonstrated sufficient cause to warrant extension of time to file a Notice of Appeal.
 - ii. Whether the Applicant's Notice of Motion application is merited and whether the orders sought therein should be granted.
 - iii. Who should bear the costs of the application?
17. On the first issue for determination, the Respondents submitted that the Applicant had not tendered satisfactory explanation for the delay in the filing of their intended Notice of Appeal. That his contention that they had not discovered that their Review application had been dismissed on the 15th of June, 2023 up until the 15th of September 2023 when they had been served with Taxation Notice did not hold any substance. That the Applicant was guilty of laches for which the courts had time and again frowned upon indolent litigants who did not diligently pursue their cause.



18. That the Applicant had not demonstrated any efforts he had made on inquiries from the court when the ruling on their Review Application which had been deferred on the 30th of March, 2023 would be delivered. Reliance was placed on the decision in the case of *Church of God East Africa & another v Dinah Buluma* which cited the cases of *Ratnam v Cumarasamy* (1964) 3 ALL ER 933 and *Benard Kibor Kitur v Alfred Kiptoo Keter & another* [2018] eKLR to submit that the Applicant had not made a case to warrant extension of time to file the Notice of Appeal since no cogent reasons had been given for the failure or delay to file the same within the stipulated timeline. Further reliance was also placed on the Supreme Court decision in the case of *Nicholus Kiptoo Arap Korir Salat's Case* (*supra*) on the principles governing the exercise of discretion in an application for extension of time to reiterate that equity aids the vigilant and not the indolent hence the Applicant having failed to follow up on the status of his Review despite having legal representation, the instant application did not meet the threshold for grant of the orders sought.
19. That the extension of time being a creature of equity, one could only enjoy it if he acted equitably since he who seeks equity must do equity thus one had to lay a basis that he had not been at fault in letting the time lapse. Further that extension of time was not a litigant's right against a court, but a discretionary power of the court which required that a litigant lay a basis for the grant of the same. That it was trite law that for an application of this nature to succeed, a plausible and a satisfactory explanation for delay was the key to unlock the court's exercise of its discretion yet the Applicant had demonstrated none. That the court's discretion could not be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of a party who had established sufficient cause to warrant the orders sought.
20. On the second issue for determination, the Respondents submitted that the instant application was reactionary, a sham, had been made in bad faith and amounted to an abuse of the court process thus should be dismissed with costs. That the Applicant had been awoken from slumber upon service of the Taxation Notice and upon realizing that their application for review had been dismissed with costs, they filed the instant application in an attempt to forestall the costs. Reliance was placed on the decided case of *Stanley Kainyongi Mwenda v Cyprian Kubai* [2000] eKLR which cited the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*-Civil Application No Nai. 255 of 1997 (unreported) to submit that the intended appeal was a frivolity with no chance of success since the Applicant's review application had been dismissed on a Preliminary Objection. Further, the Applicant did not file submissions in support of their review application hence the instant application had been a nonstarter. That the court had jurisdiction to grant the prayers sought in the instant application in light of the dismissal of the previous application by this court for want of jurisdiction.
21. They relied on the provisions of Article 159 (2) (b) of the *Constitution* of Kenya that provided that justice should not be delayed, to submit that the instant application had been a brazen attempt to occasion inordinate delay to the conclusion of the instant suit to the detriment of the Respondents' rights thus the court ought not to countenance the same. Further that the Respondents stood to suffer prejudice if the orders sought were granted since they would be denied the fruit of the judgement and ruling both which had been in their favour thus keeping them under the unending apprehension of a pending case that was not coming to an end due to numerous frivolous applications proffered by the Applicant.
22. They placed reliance on the provisions of Sections 1A and 1B of the *Civil Procedure Act* to submit that not even the overriding objective principle under the said sections could come to the aid of the Applicant. They thus submitted that the instant application was utterly devoid of merit, was academic and a waste of court's precious time.



23. On who should bear the cost of the application, the Respondents submitted that the Applicant should be condemned to bear the costs since the instant application was non-meritorious and frivolous as had been demonstrated from the foregoing.
24. They concluded that the instant application ran contrary to the very tenor and principles of natural justice as the Applicant's conduct had militated against the efficient and expeditious finalization of the instant suit. That time was a crucial component in the dispensation of justice, hence the maxim justice delayed is justice denied. That it was a litigant's legitimate expectation where they had sought justice that the same would be dispensed timeously but the instant application only served to occasion inordinate delay towards the expeditious disposal of the instant suit which had been adverse to the cause of justice. They thus submitted that the instant application was an afterthought, made in bad faith, was an abuse of the court process and ought to be dismissed with costs.

Determination.

25. I have considered, the Applicant's Application, the supporting affidavit, the Respondents' Replying Affidavit as well as the written submissions of both parties. The impugned Ruling sought to be appealed against herein was delivered by this court on the 15th June 2023. The Applicant has now filed the present Application by way of a Notice of Motion dated 21st September, 2023 which is about 3 months later seeking leave to Appeal, the said ruling, out of time.
26. I find two issues for determination arising therein namely:
 - i. Whether the court should enlarge time to enable the Applicant file his Appeal after the expiry of the statutory period.
 - ii. What orders this Court should make?
27. Section 7 of the *Appellate Jurisdiction Act* which gives the High Court (read Environment and Land Court) discretion to extend time for giving Notice of the intention to appeal from the Judgement of the High (read Land and Environment Court), stipulates as follows;

“The High Court may extend the time for giving Notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such Notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

28. In the case of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR the court held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. 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;



1. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
 1. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 1. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 1. whether there will be any prejudice suffered by the Respondent, if extension is granted;
 1. whether the application has been brought without undue delay; and
 1. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]”.

29. Having this in mind the question to ask is whether the Applicant had fulfilled the above requirements so as to be granted leave to file his Appeal out of time.

30. The 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. Although the Applicant’s submission was that he was unable to file his Notice of Appeal on time because neither he nor his Advocate on record was present when the Ruling was delivered and neither had there been Notice prior to its delivery the same having not been delivered on the date scheduled there had been no evidence adduced, as rightly put by the Respondent, demonstrating the effort the Applicant and/or his Advocate had employed to inquire as to when the impugned ruling was to be delivered.

31. The Respondents’ position is that they stood to suffer prejudice should the application be allowed as they would be denied the fruit of the judgement and ruling both of which had been in their favour. That secondly they would be kept under the unending apprehension of a pending case that had no end due to numerous frivolous applications proffered by the Applicant. Lastly that the Applicants’ intended appeal was a frivolity with no chances of success as his Review application had been dismissed on a Preliminary Objection on an account of lack of jurisdiction.

32. Indeed on the 23rd November 2022, the court had indicated that it would deliver the impugned ruling on 30th March 2023 on which day the court did not sit since it common knowledge that courts were proceeding on Easter vacation with effect from 29th March 2023 up to the 12th April 2023 as there had been sufficient notice nationwide to that effect. The court then proceeded for its annual leave on 1st May 2023 to 14th June 2023 with a Notice to that effect whereupon its resumption, the impugned ruling had been delivered on the 15th June, 2023. The Applicant cannot now feign ignorance of the happenings pre ruling day. The Applicant has now filed the present application dated 21st September, 2023, three (3) months after the cause of action, seeking for leave to file and serve Notice of Appeal out of time citing that there had been no Notice issued prior to the delivery of the impugned ruling.

33. I note that the reasons for the delay cited by the Applicant are largely undisputed and cogent as indeed whereas the court had proceeded for Easter Vacation and subsequently on leave, it was incumbent upon the court to issue Notice upon the parties on the date scheduled for delivery of the ruling which



notice I regrettably find is not contained on the court record. Indeed, the Respondents have also not provided any evidence that the Applicant was aware of the date for the ruling. In the absence of the said Notice for delivery of the Ruling, I find that the Applicant has given a plausible reason for the delay in filing a Notice of Appeal and that there is a sufficient cause to extend the time for filing of the same. I further find that no prejudice will be occasioned upon the Respondents should the instant application be allowed as they could be compensated by an order of costs in the event the intended appeal is not successful.

34. In the end, the Applicant's Notice of Motion dated the 21st September, 2023 is herein allowed with no costs. The Applicant is granted an extension period of 14 days after delivery of this ruling within which time to file and serve his Notice of appeal.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 29TH DAY OF FEBRUARY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

