



**Mbogoh v Chironda (Miscellaneous Application E002 of 2023)  
[2024] KEELC 1147 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1147 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
MISCELLANEOUS APPLICATION E002 OF 2023  
EK MAKORI, J  
FEBRUARY 21, 2024**

**BETWEEN**

**SAMUEL MATAZA MBOGOH ..... APPLICANT**

**AND**

**SELINA BEGONJA CHIRONDA ..... RESPONDENT**

**RULING**

1. Application dated 3<sup>rd</sup> July 2023 seek among other prayers:
  - a. Spent.
  - b. That this Court be pleased to grant the applicant leave to file an appeal out of time against the Ruling delivered by Hon. J.M. Kituku on 3<sup>rd</sup> May 2023, in Kilifi SPMCC Case No. 176 of 2018 Selina Begonja Chironda v Samuel Mataza Mbogoh.
  - c. Spent
  - d. That pending the hearing and determination of the Intended Appeal, this Court be pleased to stay the proceedings in Kilifi SPMCC Case No. 176 of 2018 Selina Begonja Chironda v Samuel Mataza Mbogoh.
  - e. That the costs of this application be provided for.
2. The respondent filed his replying affidavit sworn on 24<sup>th</sup> July 2023 opposing the Notice of motion application.
3. The parties canvassed the application by way of written submissions
4. The main reason the applicant proffers for being late in the filing of the intended appeal was that on 12<sup>th</sup> April 2023, the Court failed to deliver its ruling as scheduled. It was later notified the ruling was to be delivered on 21<sup>st</sup> April 2023. That day the Court did not sit because the day was declared a public



holiday. instead the same was delivered on 3<sup>rd</sup> May 2023 the Court allowed an application for review ordered for the reopening of the case and directed the parties to file their further documents within 14 days after the said ruling.

5. The applicant came to learn of the ruling after being served with pretrial documents hence the current application.
6. The applicant avers that sections 79(G) and 16 (A) of the *Environment and Land Act* provide mechanisms and timelines on appeal to the appellate Court. The Sections provide 30 days within which to appeal after delivery of judgment or order made by the Subordinate Court. In case of being late, the Section provides that leave may be granted if one shows the Court that he had a good and sufficient cause for filing the appeal out of time.
7. On the principles applicable concerning the extension of time the applicant has cited the following authorities – *Mombasa County Government v Kenya Ferry Services & Another* [2019] eKLR and *Peter Maosa Nyangau v National Bank of Kenya Ltd & Another* [2021] eKLR.
8. The applicant stated that a stay of proceedings in the Lower Court will be necessary to preserve the substratum of the suit pending appeal.
9. The applicant cited the case of Global Tours & Travels Ltd Nairobi winding up cause No. 43 of 2000 enunciating the principles applicable for stay to be granted. The applicant is of the view that he was not late in bringing up the current application and that there is an arguable appeal. The case of *Niasons Kenya Ltd v China Road & Bridge Corporation Nairobi (Milimani)* HCCC No. 126 of 1999.
10. The respondent contends that the application is misconceived as it was made late and no reasons have been provided why an appeal was not lodged within time.
11. The respondent stated that the applicant has long sold the property and therefore has come to this Court with unclean hands.
12. Issues for the determination of this Court is whether to grant leave to appeal out of time.
13. The principles for the grant of leave to appeal out of time are provided in the case of *Mombasa County Government v Kenya Ferry Services & another* [2019] eKLR:

“Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... 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;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;



4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
  5. whether there will be any prejudice suffered by the respondents if extension is granted;
  6. whether the application has been brought without undue delay; and
  7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]
- (26) Further, in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, this Court emphasized the need for the Applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the Court. On the issue of delay occasioned by typed proceedings, we stated as follows:
- “[24] a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered.” [emphasis added]”
14. The reasons provided for the delay in bringing up an appeal on time were that the ruling was delayed by the Magistrate and the applicant and his advocate were not aware of it till pretrial documents were supplied to them. The applicant does not show whether after the Magistrate had failed to deliver the ruling on time, what steps were taken to follow up the next date which had been fixed by the Magistrate. It has not been shown that the trial Court had issued the judgment without the knowledge of the applicant or his counsel. To me, the ground put across does not satisfy this Court to exercise its discretion in favour of the applicant.
  15. On the merits of the intended appeal, the ruling delivered by the Magistrate was in the exercise of the powers conferred upon him by Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* in review. In the case of *Stephen Mwallyo Mbondo v County Government of Kilifi* [2021] eKLR, the Court had an opportunity to express itself when an appellate Court can interfere with the exercise of discretion in this manner:
 

“The general principles on when an appellate court may interfere with a discretionary power of a trial are now well settled. In the case of *Mbogo & Another vs Shah*, [1968] EA, these principles were set out as follows: -

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
  21. In *Patel v E.A. Cargo Handling Services Limited* (1974) E.A. 75, this Court held as follows:
 

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the



court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules: the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

22. In *Shanzu Investments Ltd v Commissioner of Lands* [1993] eKLR, the court observed as follows on the discretion to set aside ex-parte judicial decisions: -

“The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party’s favour, depends, on a large measure, on the facts of each particular case. The tests for the exercise of this discretion are these: - First, was there a defense on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay?”

23. In *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48 Briggs JA said at 51: -

“I consider that under Order IX rule 20, the discretion of the court is perfectly free, and the only question is whether, upon the facts of any particular case, it should be exercised. In particular, a mistake or misunderstanding of the appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”

16. In this matter, the respondents applied for a review of the final judgment by the Magistrate citing the discovery of a new document that was not available to the respondent when presenting evidence in the Lower Court. In his ruling, the Magistrate having considered the powers conferred to him by Section 80 of the *Civil Procedure Act* and Orders 45 and 40 of the Civil Procedure Rules, and guided by judicial precedents, found that ‘there was sufficient cause’ to warrant review, and declared the case to be reopened and parties to once again file rebuttals in respect to the new evidence. The Magistrate exercised his discretion in opening the matter and cannot be faulted, there is no evidence that in so doing he exercised his discretion injudiciously. The matter is still active and a decision will be made after a full hearing of the parties. I see no reason to disturb the findings of the Magistrate.
17. The upshot is that the application dated 3<sup>rd</sup> July 2023 is hereby dismissed with costs. The parties are to first resolve the issues pending in the primary suit which is Kilifi SPMCC No. 176 of 2018 - Selina Begonja Chironda v Samuel Mataza Mbogoh.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 21<sup>ST</sup> DAY OF FEBRUARY 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Lewa for the Appellant.

Ms. Apiyo for the Respondent

Court Assistant. Happy

