Gathua v Wainaina (Civil Application E133 of 2024)
[2025] KECA 139 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KECA 139 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E133 OF 2024

GV ODUNGA, JA

JANUARY 30, 2025

BETWEEN

NICASIO WAINAINA GATHUA ..... APPELLANT

AND

JOHN GATHUA WAINAINA ..... RESPONDENT

(Being an application for extension of time to file an appeal out of time from Judgment of the Environment and Land Court at Muranga (L. Gacheru, J) on 9th May 2024 in ELC Case No. E011 of 2023)

RULING

1. Before Court is a Notice of Motion dated 18th December, 2024 wherein the applicant seeks; leave to file and serve appeal out of time; and the status quo be maintained in suit property LOC 4/Muruka/1062 till this appeal is heard and determined.

2. Vide an Originating Summons dated 30/5/23, the applicant contended that parcel of land No.LOC.4/ Muruka/1062 (the suit property) registered in the respondent's name was family land to be held in trust by the respondent in trust for the applicant and his siblings, which the Respondent inherited from his father, the applicant's grandfather.

3. On 9th May 2024, the learned Judge (L. Gacheru J.) held that the applicant had not proved his case on the required standard of balance of probabilities and dismissed the Originating Summons in its entirety for lack of merit with costs to the respondent.

4. Aggrieved, the Applicant lodged a Notice of Appeal dated 16th May 2024. The attached Memorandum of Appeal containing 6 grounds of appeal is dated 18/12/24.

5. The instant application is primarily premised on the grounds that at the time of delivery of the judgment the applicant was unwell and was thereafter admitted in hospital; that his advocate lodged a

Notice of Appeal on time but due to the applicant's ill-health, he was not able to follow up on filing of the appeal as he was advised by the doctor to have rest at home as a result of a stroke; that he will suffer irreparable loss if the land parcel is disposed off as he stands to be evicted; that he is ready to abide with the conditions and timelines set by this Court regarding security; and that he has an arguable appeal with good chances of success as per his attached Draft Memorandum of Appeal.

6. In his submissions, the applicant cited the case of Thuita Mwangi v Kenya Airways Limited [2003] eKLR and submitted that a delay of five months in filing this application after the lapse of the set timeline which expired on 9th July 2024, is not inordinate delay.

7. The application was not opposed.

8. I have considered the application, affidavit in support of the application and the submissions and authorities relied upon. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal; and fourthly, whether the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.

9. Those principles were restated by Waki, JA in Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR as follows:

> " The exercise of this Court's discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38."

10. On its part, the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

11. In Leo Sila Mutiso v Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231 this Court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay;

thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. 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; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondents 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.

12. In this case, the factual averments in so far as they address the said principles are not disputed since no replying affidavit was filed. In the case of Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor [2014] eKLR it was appreciated that:

> " Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

13. From that authority, it is clear that the litmus test for inordinate delay is that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. In other words, in determining whether or not the delay is inordinate, it is not a matter of arithmetic. Therefore, the fact that there is a long delay does not, of itself, necessarily mean that the delay is inordinate. All the surrounding circumstances, including the reason for the delay must be considered by the Court.

14. In this case, the delay is 6 months explained on the grounds of serious illness, stroke. This Court while considering a similar reason in Njoroge v Kuria [2005] 1 KLR 782, expressed itself as follows:

> " It is not in dispute that the application to seek extension of time to lodge an appeal was lodged 8 months after the date the applicant's notice of appeal was struck out. The reason given for this lapse was because the applicant and his counsel became sickly soon after the ruling intended to be appealed from. The applicant presented before the learned single judge medical reports to show that he suffered from ill health necessitating frequent treatment. It is the contention of the applicant, an elderly and semi-illiterate person, that his nagging ill health and the incapacitation of his advocate greatly compounded the delay. Had the learned single judge taken into account the illness of the applicant's counsel as well, he would have found that the applicant had given a sufficient and reasonable explanation for the delay sufficient enough for the single judge to exercise his discretion in favour of the applicant... It cannot be gainsaid that as the ` matter in dispute herein is a family land to which both parties make rival claims, the particular circumstances of this case and interests of justice demand that the dispute be canvassed before the Court so as to bring the matter to its finality. Moreover, the applicant who has not been guilty of any laches has persistently shown a desire to appeal. These obvious facts, which manifested themselves in the material presented before the learned single judge, were regrettably not taken into account when considering the merits of the application...No prejudice is likely to be suffered by the respondent, but

if any, for example in the nature of the delay occasioned in enjoyment of the fruits of the judgement would be compensable in costs."

15. Since there is no allegation of any prejudice that is likely to be occasioned to the respondent if the application is allowed, on the authority of Touring Cars (K) Ltd & Anor v Ashok Kumar N. Mankanji Civil Application No. 78 of 1998 and Grindlays Bank International (K) & Another v George Barbour Civil Application No. Nai. 257 of 1995 and as it is not shown that there is fraud or intention to overreach I find merit in this Motion which I grant.

16. Accordingly, the time within which to file and serve the Memorandum and Record of Appeal is extended with a period of 14 days from the date of the delivery of this ruling. I however, have no jurisdiction, as a single Judge to deal with the prayer for maintenance of status quo.

17. There will be no order as to the costs of this application.

18. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JANUARY, 2025.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR