



**Nampaso (Suing as a Personal Representative of the Estate of Charles Kapolonto, Deceased) v Gilisho & 8 others (Environment and Land Miscellaneous Application E21 of 2023) [2024] KEELC 1473 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1473 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E21 OF 2023  
CG MBOGO, J  
MARCH 20, 2024**

**BETWEEN**

**ANTHONY OLE NAMPASO ..... APPLICANT  
SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES  
KAPOLONTO, DECEASED**

**AND**

**PETER GILISHO ..... 1<sup>ST</sup> RESPONDENT  
WILSON KORIATA ..... 2<sup>ND</sup> RESPONDENT  
TITIMET OLE NAMPASO ..... 3<sup>RD</sup> RESPONDENT  
CHRISTINE CHEROP NGETICH ..... 4<sup>TH</sup> RESPONDENT  
ZABLON MWANGI ..... 5<sup>TH</sup> RESPONDENT  
NAROK SOUTH DISTRICTS ..... 6<sup>TH</sup> RESPONDENT  
BOARD OF LMANAGEMENT - ILKIMITARE PRIMARY  
SCHOOL ..... 7<sup>TH</sup> RESPONDENT  
SANAYET OLE PARMUAT ..... 8<sup>TH</sup> RESPONDENT  
DANIEL NAINGEJ KIPEEN ..... 9<sup>TH</sup> RESPONDENT**

**RULING**

1. Before this court for determination is the Notice of Motion Application dated 16<sup>th</sup> November, 2023 filed by the applicant herein and is expressed to be brought under Order 51 Rule 1, Order 50 Rule 6 and Order 42 Rule 6 (6) of the *Civil Procedure Rules* and Sections 1A, 1B, 3A, 63, 75 (1)(h), 78 (2) and 79 (b) of the *Civil Procedure Act* seeking the following orders: -



1. Spent.
  2. Spent.
  3. Spent.
  4. That time be enlarged within which the applicant may file an appeal from the decision of the Hon. Samuel Mungai (CM) in Narok CMELC/E072/2021 *Anthony Ole Nampaso versus Peter Gilisbo & 8 Others*-dismissing the notice of motion dated 23.03.2023 and which orders states that it was issued on 31.05.2022.
  5. That until the disposal of the intended appeal or until further orders, the respondents by themselves, their servants, agents or otherwise whomsoever be restrained, stayed or prevented from wasting, damaging, alienating, selling, subdividing or in any other manner disposing of any of the parcels of land comprised in Titles No. Cis Mara/Lemek/4260,4261,4262, 6933 to 6936 and 7079 to 7222.
  6. That upon consideration of the facts raised in this application this honourable court be pleased to make any further order (s) as may facilitate the just, expeditious, proportionate and affordable resolution of the matter raised herein.
2. The application is premised on the grounds inter alia that the applicant's Advocate was virtually present before Hon. Samuel Mungai CM, on 31<sup>st</sup> May, 2022 when the court started delivering the ruling in MCELC/E072/2021. Further, that a few paragraphs into the court, the network collapsed and the ruling was never delivered on that day.
  3. The application is supported by the affidavit of Ernest Githuka Ndung'u, advocate sworn on even date. In his affidavit, the counsel deposed that by a notice of motion dated 1<sup>st</sup> March, 2022 filed in MCELC/E072/2021, the applicant herein sought for an order of injunction and inhibition to safeguard the suit properties pending the hearing and determination of the suit. Further, that pending the hearing and determination of the application, the applicant stumbled upon some respondents at the Narok Land Registry presenting a bunch of transfers which led the applicant to file a notice of motion dated 23<sup>rd</sup> March, 2022 seeking an injunctive order pending the hearing and determination of the notice of motion dated 1<sup>st</sup> March, 2022.
  4. The counsel deposed that the trial court heard the application dated 23<sup>rd</sup> March, 2022 and granted the orders sought. Further, that the notice of motion dated 1<sup>st</sup> March, 2022 was canvassed by way of written submissions and ruling fixed on 31<sup>st</sup> May, 2022. He further deposed that on 31<sup>st</sup> May, 2022 he logged into the court's virtual network which got disconnected soon after and upon enquiry, he was informed to follow up on the same at a later date. He deposed that he later followed up on the same and he was informed that the ruling was delivered on 9<sup>th</sup> June, 2022. The counsel further deposed that he prosecuted the appeal E007 of 2022 knowing all along that the ruling had been delivered on 9<sup>th</sup> June 2022 as he was certain that it had not been delivered on 31<sup>st</sup> May, 2022.
  5. The counsel further deposed that this court, dismissed the appeal on the basis that no decision had been delivered on 9<sup>th</sup> June, 2022 and thus, no appeal could lie. Further, that he observed keenly that the appeal dismissed the notice of motion dated 23<sup>rd</sup> March, 2022 and not the application dated 1<sup>st</sup> March, 2022. The counsel deposed that a mistake happened on his part which he takes responsibility and he seeks an avenue to be granted to enable him address the substantive matter which is the preservation of the suit properties further alienation. Further, that the main suit is pending hearing



and the respondents seem to have no qualms disposing the suit properties, and that the plaint has to be invariably amended to accommodate these new parties.

6. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents opposed the application vide the replying of the 5<sup>th</sup> respondent sworn on 28<sup>th</sup> November, 2023 by Zablon Mwangi. The 5<sup>th</sup> respondent deposed that the application is time barred as it is more than 1 ½ years since the ruling sought was delivered. Further, that the ruling to the application dated 1<sup>st</sup> March, 2023 was delivered on 31<sup>st</sup> May, 2023 as correctly noted in the ruling delivered by the trial court. Further, that it was imperative for the applicant to undertake a thorough research which he was bound to do after the trial court delivered the ruling on 31<sup>st</sup> May, 2023.
7. The 5<sup>th</sup> respondent deposed that it is perplexing that the applicant continues to pursue this matter in court whereas he is a beneficiary of the very plot he has obtained an injunction being Cis-Mara/Lemek/7099.
8. On the 15<sup>th</sup> March, 2024 the applicant filed his written submissions dated 7<sup>th</sup> March, 2024. The applicant submitted that Section 16 A (2) of the *Environment & Land Court Act* provides 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 on time as contained in his application and supporting affidavit.
9. The applicant further submitted that if the court is minded to enlarge time within which he may lodge an appeal, he seeks that the suit properties be preserved pending the hearing and determination of that appeal. Further, that this order would be to aid in the preservation of the suit properties as parties ventilate the substantive issues in court. Also, that it is not meant to give any party any advantage or to prejudice, as it would aid the efficient disposal of the pending matters and aid the rule of law. He submitted that whereas the matter is pending before the magistrates' court, there is wanton interference by some defendants in some of the suit properties while the matter is in court which has affected the substratum of the suit.
10. On the 15<sup>th</sup> March, 2024 the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents filed their written submissions of even date where they raised four issues for determination as listed below: -
  1. Whether order of extension of time to file an appeal should be granted to the applicant.
  2. Whether the suit property forms part of the estate of the deceased.
  3. Whether order of injunction should be granted in favour of the applicant.
  4. Costs of the application.
11. On the first issue, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents submitted that an application for extension of time must show good and substantial reason for the delay and prima facie good cause why the intended appeal should be heard. Further, that it is on satisfaction of both that the court will use its discretion to grant the application. They relied on the case of *Nicholas Kitoo Arap Korir Salat versus Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR.
12. They further submitted that the reasons for the delay being misconception that the ruling was delivered on 9<sup>th</sup> June, 2022 is not excusable since excusable delays are delays that are unforeseeable and beyond the control of the party. Further, that non-excusable delays are delays that are foreseeable or within the party's control. They submitted that as a court officer, the advocate of the applicant is under obligation to be aware of all court records and not delegate such a duty to someone else as the applicant's advocate admitted in his supporting affidavit. Reliance was placed in the case of *National Union of Mineworkers versus Council of Mineral Technologies* [1998] eKLR.



13. On the second issue, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents submitted that the succession cause of the estate of Charles Kapolonto Nampaso (deceased) is ongoing and the suit properties are not of the supposed listed properties by the applicant, form part of the estate of the deceased.
14. On the third issue, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents submitted that the suit parcels do not form part of the estate of the deceased, and hence, the applicant cannot claim infringement of legal right over the estate of the deceased hence no *prima facie* case has been established. They further submitted that the applicant has not demonstrated that irreparable injury will be occasioned to him if an order of temporary injunction is not granted and that there cannot be injury where no legal rights exist.
15. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents relied on the cases of *Giella versus Cassman Brown* (1973) EA 358, *Mrao Limited versus First American Bank of Kenya Limited* [2003] eKLR, *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* [2018] eKLR and *Paul Gitonga Wanjau versus Gathuthis Tea Factory Company Limited & 2 Others* [2016] eKLR.
16. In conclusion, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents submitted that they have demonstrated that the balance of convenience tilts in their favour since the suit properties do not form part of the estate of the deceased. They relied on the case of *Amir Suleiman versus Amboseli Resort Limited* [2004] eKLR.
17. I have considered the application, the replying affidavit and the written submissions filed by the applicant and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents. In my view, the issue for determination is whether the application has merit.
18. Order 50 Rule 6 of the *Civil Procedure Rules* empowers the court to enlarge the time fixed for doing any act or taking any proceedings. For purposes of enlargement of time to file appeal in this case record of appeal, the other relevant provision is Section 79G of the *Civil Procedure Act* which provides that:

“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 good and sufficient cause for not filing the appeal in time.”

19. The applicant in this case therefore, must demonstrate “good and sufficient cause for not filing the appeal in time.” In the case of *Thuita Mwangi versus Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the *Court of Appeal Rules* which is in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent of the application is granted.”



20. While the discretion of the court is unfettered, the applicant is obligated to adduce material evidence upon which the court should exercise its discretion in his favour. Notably, every person is entitled as envisaged under Article 50 (1) of the Constitution to have a fair trial and which provides as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

21. In the instant case, the counsel for the applicant argued that this court dismissed the appeal on 9<sup>th</sup> November, 2023 on the basis that no decision had been delivered on 9<sup>th</sup> June 2022 and thus no appeal could lie. He contended that looking at the order more keenly, he noted that the order only dismissed the notice dated 23<sup>rd</sup> March, 2022 and not the one dated 1<sup>st</sup> March, 2022. Further, that the dates when it was issued and the date when it was given seem to be used interchangeably which was a mistake on his part and which he takes responsibility.

22. In my view, the learned counsel for the applicant seems to have been indolent as he rightfully acknowledges so in his affidavit. The reasons adduced by the learned counsel are not persuasive to enable this court grant the said orders. Paragraph 13 of the ruling delivered by this court on 9<sup>th</sup> November, 2023 gave it reasons for dismissal of the memorandum of appeal as there was no ruling delivered on 9<sup>th</sup> June, 2022. This court went ahead and also gave its reasons why it would not also consider the memorandum of appeal if the said appeal was challenging the ruling delivered on 31<sup>st</sup> May, 2022.

23. From the above, I find no merit in the Notice of Motion Application dated 16<sup>th</sup> November, 2023 and it hereby dismissed. I make no orders as to costs.

It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 20<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**20/03/2024.**

In the presence of: -

Mr. Meyoki Pere – C.A

