Ngenda New Farmers' Company Limited & 4 others v Mbugua & 5 others (Civil Application E041 of 2022) [2025] KECA 955 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 955 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E041 OF 2022

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

MAY 23, 2025

BETWEEN

NGENDA NEW FARMERS' COMPANY LIMITED ..... 1ST APPLICANT

PETER NG'ANG'A KIBE ..... 2ND APPLICANT

MONICA KABURA ..... 3RD APPLICANT

BERNARD MUTURI ..... 4TH APPLICANT

MICHAEL MBUGUA ..... 5TH APPLICANT

AND

MARGARET NYOKABI MBUGUA ..... 1ST RESPONDENT

CATHERINE FELISTUS WAMBUI ..... 2ND RESPONDENT

HUMPHREY MWAURA ..... 3RD RESPONDENT

GEOFFREY KIBATHI MBUGUA ..... 4TH RESPONDENT

EILEEN WANJIKU MBUGUA ..... 5TH RESPONDENT

GEORGE SIMON KAMAU ..... 6TH RESPONDENT

(Application for leave to file and serve the Notice of Appeal and Record of Appeal out of time from the Judgment of the Environment and Land Court of Kenya at Murang'a (Kimei, J.) dated and delivered on 21st November, 2016 in E.L.C. Case No. 84 OF 2017.)

RULING

1. This is a reference to the full Court, under rule 55 (1)(b) of this *Court's Rules*, from the decision of a single Judge of this Court (A. Muchelule, JA.) dated 11th November, 2022. The learned single Judge's

ruling was made pursuant to an application for extension of time dated 10th June 2022, made under Rule 4 of this Court's Rules, seeking leave to file the notice of appeal and have the same deemed as duly filed and properly on record upon payment of the requisite fees and; that this Court be pleased to grant leave to the applicants to file the memorandum of appeal out of time to file an appeal out of time against the judgment of the Environment and Land Court (ELC) (J. G. Kemei, J) rendered on the 17th October 2019.

2. In dismissing the application for extension of time the learned Judge expressed himself in part as follows: -

> " The judgment sought to be appealed against was rendered on 17th October 2019 by Justice Kemei of the ELC Court at Muranga. The applicants have deponed that they were not satisfied with the outcome. They instructed their advocates to appeal. The advocates did not appeal. They instructed Messr s Kamau Kinga & Co. Advocates to come on record for them. On 20th October 2020 the new firm was allowed to come on record, and asked for certified copy of typed proceedings and judgment on the same day. A follow-up letter was done on 6th April 2022. It was not until 5th May 2022 when the proceedings were availed. The applicants f u r t h e r deponed that the court nonetheless declined to give a certificate of delay, saying that the letter of 29th October 2020 was not on record. Lastly, it was deponed that the delay to have the firm of Messrs Kamau Kinga & Co. Advocate came on record was due to the outbreak of Covid-19 pandemic as a result of which the court could not be physically accessed...
>
> 6. It is notable even after the new advocates received the proceedings, and knowing that they were late by a long time, they did not file the application immediately.
>
> 7. Secondly, there appears to be no explanation on the part of the new advocates for the period between 29th October 2020 and 6th April 2022 in terms of seeking to file a notice of appeal out of time. The proceedings were not required at that stage.
>
> 8. The judgment was on 17th October 2019. The new advocates came on record on 20th October 2020. One year in between after the initial instructions to the previous advocates to appeal, what action did the applicants take during the period to pursue the intended appeal? I ask this question because, this matter belonged to the applicants. Even as they blame the advocates, they have to show that throughout the intervening one-year period they diligently knocked on the doors of the advocates, as it were, seeking that they act on the instructions. In other words, an applicant who is blaming his advocates for failing to act on instructions has to demonstrate that he was himself diligent in pursuing the matter.
>
> Given the facts of this application, and after considering the sworn affidavit and written submissions, I conclude that the applicants took inordinately long to bring the application, and that the explanation given was not at all reasonable. I find that to allow the application would unduly prejudice the accrued interests of the respondents."

3. The above findings by the learned Judge precipitated this reference before us. We heard the application through the virtual platform of this Court on the 25th November 2024. Present for the applicants was learned counsel Ms. Waweru, while the respondents were represented by learned counsel Ms.

Matoke holding brief for Mr. Orina. Both counsel highlighted their written submissions which we have considered.

4. Ms. Waweru in her highlights submitted that the reason for the situation the applicants found themselves in was the restrictions necessitated by the Covid-19 pandemic which affected the normal operations of the Courts, including the closing down of all Court registries. She urged that between October 2020 and July 2022, there were directions for a shutdown of movements from Nairobi to Muranga, which indeed affected the entire country. As a result, physical access to Court was impossible. Physical service of process was stopped, and the receipt of the Court process was also interrupted during that time. Everything was done by email, which by then had significant challenges. In the case of her clients, emails sent seeking typed proceedings were said not to have been received.

5. She urged that urged that the reason why a notice of appeal was not filed immediately was because, the applicants herein had instructed their then advocates to file a Notice of Appeal and apply for proceedings, that the advocate informed the applicants that they had done so, which they discovered later was not true. The said advocates had been appointed by the 2nd, 3rd, 4th and 5th applicants who were later removed from office.

6. That later, members of the 1st applicant's appointed the current counsels on record who applied for leave to come on record in an application dated 10th August 2020, since judgment had already been delivered. The ruling for the said application was delivered on 29th October 2020 by Lady Justice Kemei at Murang'a and the application was allowed. That by this time, Covid-19 pandemic had spread throughout the country resulting in prohibition of physical court attendance. The applicant's counsels applied for copies of the proceedings and the judgment which was delivered on 17th October 2019, as per the attached letter in the supporting affidavit. That on 13th April, 2022 when the 1st applicant's counsel went to court registry to enquire about the proceedings with the last letter sent on 6th April 2022, they were told that the letter dated 29th October 2020 was not in the court file. On the 5th May 2022, the 1st applicant's advocates went to collect the typed proceedings and the letter be-speaking proceedings could not be found and therefore the registry declined to give them a certificate of delay.

7. Ms. Matoke in her highlights opposed the application basically because of the long delay involved in filing the application. Regarding whether there was good and sufficient reason not to file the appeal in time learned counsel urged that the applicant had displayed inordinate delays in the matter. It was urged that upon notification, both parties consented to have the judgment delivered on 17th October 2019. Further that by 15th March 2020, after Covid-19 struck, the Chief Justice had already given directions regarding Court operations. To date no appeal has been filed and taking cognizance of the fact that the applicants were at all times represented by counsel, they must have been advised accordingly.

8. Learned counsel further urged that no sufficient cause has been demonstrated to show why the a p p l i c a n t s did not make use of the alternative means of court o p e r a t i o n s that had been put in place. For that proposition counsel relied on the case of *Berber Alibhai Mawii vs. Sultan Hasham La/ii & 2 Others* [1990-1994] EA 337 where the Court held that:

> "Inaction on the part of the advocate as opposed to error of a judgment or a slip is not excusable."

9. Learned counsel contended that extension of time as sought will highly prejudice the respondents as it is clear that the applicants slept on their rights and now intend to drag the respondents back to court approximately 36 months later. He urged that the applicants should not be allowed to subject the

respondents to an endless cycle of litigation with high costs, and urged us to dismiss the application with costs.

10. We have considered the application as well as the rival submissions of counsel. In an application under Rule 4 of this Court's Rules, as was the one before the learned single Judge of this Court, the single Judge is exercising unfettered discretion on behalf of the whole Court; such discretion ought to be exercised based on principles of law. A full bench would only interfere with the exercise of such discretion if it is apparent that the single Judge took into account an irrelevant matter which he/she ought not to have taken into account or failed to take into account a relevant matter which he/she ought to have taken into account or that he/she misapprehended the law applicable and evidence before him or that his decision was plainly wrong.

11. This Court in the case of *Simeon Okingo & 4 Others vs. Benta Juma Nyakako* [2021] eKLR cited a ruling of the same Court on a reference to full Court in *John Koyi Waluke vs. Moses Masika Wetangula & 2 Others*, Civil Appeal (Application) No. 307 of 2009, (Unreported) where the Court stated inter alia:

> " Having considered all that has been urged before us in this reference we would say that we have stated time without number that in exercising the unfettered discretion under Rule 4 of this Court's Rules, a single judge of the Court is doing so on behalf of the whole Court, and the full bench of the Court would only be entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion the single Judge has taken into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law. It is not enough, for example, to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result."

See also *African Airlines International Ltd vs. Eastern & Southern African Trade & Development Bank (PTA BANK)* [2003] KLR 140 and *Mbogo vs. Shah* [1968] EA 93.

12. The applicants have argued that after judgment was rendered on 17th October 2019, they instructed their counsel on record to file an appeal, which they claim they misled them to believe that they had done. Consequently, they decided to change advocates and instructed Messrs. Kamau Kinga & Company advocates (KK advocates) to act for them. The firm was allowed to come on record on 29th October 2020, and that it on the same date the new advocates informed them that no appeal had been filed.

13. The applicants gave the reasons for the delay in instructing the firm of KK advocates, as first the fact the previous counsel misled them to believe that he had filed the appeal as instructed. Secondly, there was a change of management of the 1st applicant that followed the entry of judgment. The previous advocates had been instructed by the 2nd, 3rd, 4th and 5th applicants who were removed from office. That the new officials of the 1st respondent came into office as the Covid-19 pandemic had spread throughout the country and the introduction of restrictions that came with it. The applicants' explanation is that the delay in instructing Messrs. Kamau Kinga and company advocates was majorly due to the Covid- 19 pandemic.

14. There was the further delay of filing the appeal, from the date that the new firm came on record on 29th October 2020 and 10th June 2022, when the application for leave to extend time was made. The

applicants have annexed a letter requesting proceedings dated 29th October 2020, the same date KK advocates came on record; and further annexed letters following up on the proceedings dated 6th April 2022 and 5th May 2022 and one in proof of follow-up on their request for certificate of delay. No action was taken to file notice of appeal, even though the applicants did not require proceeding, certified or not to file the said notice.

15. The learned Judge after considering the application and the explanations given for the delay concluded as follows:

> "Given the facts of this application, and after considering the sworn affidavit and written submissions, I conclude that the applicants took inordinately long to bring the application, and that the explanation given was not at all reasonable. I find that to allow the application would unduly prejudice the accrued interests of the respondents."

16. The applicants counsel has urged us to reverse the decision of the single Judge citing *Telkom Kenya vs. John Ochanda & 996 Others* [2015] eKLR on grounds that the learned Judge failed to appreciate that mistakes of counsel ought not to be visited on the parties; two, to consider that the country was on shut down and that their advocate could not make physical appearances in Court; three, that the application was unopposed as no replying affidavit was filed; and, failed to consider that according to the judgment, it was acknowledged that there were two titles to the suit land, that the trial court cancelled one and left the one that was used to sub-divide the suit land.

17. It is clear that the issues affecting this matter arose during the Covid-19 pandemic. We take judicial notice that the Covid-19 restrictions affecting Courts country wide were imposed in March 2020 and ran up to 2022. Given the circumstances prevailing in the country at the time, and given how the judgment in the case was delivered, we are of the view that the applicants gave reasonable explanations as to why instructing a new counsel to take up the matter after the previous one let them down took so long. We are impressed by the displayed diligence in following up on the matter until the application was filed. Furthermore, the application was not opposed, given the prevailing circumstances, the fact the application was not opposed, and therefore no prejudice was demonstrated by the respondent which should have moved the Judge to make a favourable order in favour of the applicants.

18. As for the mistake of counsel in delaying filing the application for extension of time, we refer to this Court's decision in the case of *Belinda Muras & 6 Others vs. Amos Wainaina* [1978] KLR in which Madan, JA. (as he then was) as follows:

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."

19. As observed in the cited case, where a litigant raises the issue of negligence of counsel, the court will consider doing justice to the parties depending on the circumstances of the case. The Covid-19 pandemic period was an inimitable occurrence, not only in Kenya but the world over. It has been stated that the delay occasioned in this matter was as a result of the pandemic. The delay of not filing a notice of appeal immediately upon being instructed was a mistake of counsel. However, considering that the subject matter was land, and the issues the applicants intend to raise in the appeal as per the annexed memorandum of appeal, inter alia, include how the land was sub-divided and sold to third parties, while there was a valid charge over it as security for a loan then outstanding in favour of a party that

was not a party to the suit, and while the said chargor still held the original title. These are not idle grounds. A parcel of land cannot have two titles, and furthermore, where fraud is an issue raised in such circumstance, that is a matter deserving of consideration by this Court. We are convinced that the circumstances of the case warranted exercise of discretion in favour of the applicants.

20. We also find no prejudice will be suffered by the respondent if the applicants are granted the relief sought, bearing in mind that the respondent did not respond to the application.

21. We therefore, proceed to make orders as follows:

    1. Prayers 1 and 2 of the application dated 10th June 2022 are granted.

    2. The applicants do file the notice of appeal within 14 days from the date hereof.

    3. The applicants are granted leave to file and serve the memorandum of appeal out of time within 21 days of the date hereof.

    4. Costs of the application will abide the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MAY, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR