Gatura v Robert & another (Civil Application E461 of 2022) [2024] KECA 196 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 196 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E461 OF 2022

DK MUSINGA, K M'INOTI & M NGUGI, JJA

FEBRUARY 23, 2024

BETWEEN

MICHAEL KARUKU GATURA .... APPLICANT

AND

STEPHEN NGUGI ROBERT .... 1ST RESPONDENT

NJOKI KAGECHE .... 2ND RESPONDENT

(Being a reference to the full Court against the Ruling of Laibuta, JA. dated 17th February 2023 in Civil Application No. E461 of 2022)

RULING

1. This is a reference to the full Court which is anchored under rule 57 of this *Court's Rules*. The reference is from the decision of a single Judge (Laibuta, JA.), dated 17th February 2023. The ruling was made pursuant to an application made under rule 4 for extension of time to file an appeal and lodge a record of appeal out of time from the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (M. D. Mwangi, J.) delivered on 27th January 2022 in ELC Suit No. 735 of 2020.

2. The learned single Judge found the application unmeritorious and accordingly dismissed it. In dismissing the application, the learned Judge made, *inter alia*, the following findings:

> " (4) ...the applicant's Motion for extension of time was filed only 18 days after the applicant obtained certified copies of the proceedings and judgment. However, the record before me does not include a certificate of delay to aid in proper computation of the time allowed to approach the Court on appeal.
>
> (5) The impugned judgment and decree of the High Court of Kenya (sic) at Nairobi (M. D. Mwangi, J.) dated 27th January 2022 is unequivocal as to the state of the affairs relating to the land dispute whose determination is now

> challenged on appeal. Having carefully considered the applicant's Motion, the grounds on which it is anchored, the affidavits in support thereof and in reply, the impugned judgment and decree, there is no doubt in my mind that the dispute has been the subject of final determination as far back as 1983 in Nairobi HCCC No. 1664 of 1977. Accordingly, the intended appeal can only be a replay of what would be tantamount to abuse of the Court process. In my considered view, it is not arguable. In the circumstances, I need not test the applicant's Motion on the remaining guiding principles for grant of orders under rule 4 of this *Court's Rules*. Suffice it to say that granting such orders would unduly prejudice the respondents who have been in possession of the suit property since 1964 and a replacement title issued to the 2nd respondent in 1988 under a court order that has never been challenged."

3. It is the above findings by the learned Judge that have precipitated this reference. The application was canvassed by way of written submissions. Through his submissions dated 8th December 2023, the applicant contends that the main reason for the delay in filing an appeal is the fact that he is a lay person and that he visited various law firms and organisations seeking help, until he met Justice Defenders Kenya, who agreed to assist him. A further reason advanced for the delay is lack of proceedings and judgment from the trial court, and that when he finally obtained the said documents, the trial court's registry did not issue him with a certificate of delay, and that he did not, as a lay person, know that it existed.

4. The applicant reiterates that his intended appeal is arguable. As regards the finding by the learned Judge that the intended appeal is *res judicata*, he contends that although there was a previous matter in the year 1977, he was not a party to it, and that in any case, the trial court still heard the suit giving rise to this application (ELC 735 of 2020) and determined it on its merit. On this basis, he faults the decision of the learned Judge and contends that he should be allowed an opportunity to be heard on appeal.

5. The 2nd respondent's written submissions on record appear to be in response to the application under rule 4, which is the subject of this reference. There are no written submissions on record from either of the respondents in response to this reference.

6. We have considered the application in its entirety, the submissions and the applicable law. It is trite law that a reference to the full court is not an appeal, although it is in the nature of one. In exercising the discretion under rule 4, the single Judge was exercising the power on behalf of the full court, and his discretion would not therefore be easily upset except on sound principles. See *Mansur Jiwani t/a Computer City v Ovidian Advertising & Design Ltd* [2006] eKLR.

7. In a reference, the applicant must demonstrate that the learned single Judge disregarded a relevant matter, regarded an irrelevant matter, or acted on a misapprehension of evidence or applicable law. See *John Koyi Waluke v Moses Masika Wetangula & 2 Others* [2010] eKLR.

8. The issue which we must address ourselves to is whether the learned Judge exercised his discretion judicially in disallowing the application made under rule 4. We have carefully perused the impugned ruling and note that the learned Judge appreciated the principles to be applied in an application under rule 4 as laid down in various decisions of this Court, including *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p 231 and *Fakir Mohammed v Joseph Mugambi and 2 Others* [2005] eKLR. The learned Judge appreciated that although the application under rule 4 had been filed only 18 days after the applicant obtained certified copies of the proceedings and judgment from the trial court, the applicant had nonetheless not included a certificate of delay in his record to aid in proper computation of the time allowed to approach this Court. We note from his application that the main reason for

the delay in filing the appeal was the delay by the trial court's registry in supplying him with typed proceedings and certified copy of the judgment. The onus, in our view, lay with the applicant to demonstrate the time taken to prepare and supply the typed proceedings which could have been easily deciphered from a certificate of delay, which he failed to produce. In the circumstances, we agree with the findings of the learned Judge that in the absence of a certificate of delay, it is not possible to compute time for purposes of an application under rule 4. The arguments that the applicant is a lay man and was therefore unaware of the existence of a certificate of delay is neither here nor there, and, in any case, it is an afterthought since it was not one of the grounds raised in the application for extension of time.

9. On the other principle considered by the learned Judge, which is the chances of the appeal succeeding, where the learned judge stated that the dispute had been finally determined way back in 1983, there can be no basis of faulting the single judge for arriving at that conclusion.

10. We have perused the judgment of the trial court and note that indeed the first issue identified by the court for determination was whether the suit was *res judicata* in view of HCCC 1664/1977 (O.S). The trial court addresses itself to this issue at length. At paragraph 28 of the impugned judgment, the trial court held thus:

> "The Plaintiff in this case produced the Decree in the High Court Civil Case 1664/1977 (OS) as one of his exhibits. The Decree discloses that the parties in the case were Njoki d/o Kageche (Miss), Wambuku w/o Ngeche (miss) & Michael Karuku s/o George Gatura. These are the same parties in this case. The claim before the court was for adverse possession where the Plaintiffs were seeking for a declaration that they had acquired the title over the suit property Dagoretti/Mutuini/T.115, and that the Defendant's title was extinguished under the *Limitation of Actions Act*, Cap 22. The said orders were granted as prayed for after the suit was heard on 2nd march 1983 and judgement delivered on 9th March 1983, before Hon. Justice O'Kubasu (as he then was), and in the presence of counsel for the Plaintiffs and counsel for the Defendant. The Decree was issued on 15th August 1983."

11. As such, the trial court was satisfied that all the elements for *res judicata* as set out in *IEBC v Maina Kiai & 5 Others* [2017] eKLR had been satisfied. The argument by the applicant that he was not a party to the said suit was found to be untrue, as evidence adduced showed that he was a party and was represented all along by an advocate known as Wamba. Therefore, we fail to understand how the learned Judge could have exercised his discretion injudiciously by finding that the intended appeal was not arguable by reason of the dispute between the parties being *res judicata*. We dare add, in any case, that litigation must inevitably come to an end at a particular point in time.

12. Based on the material placed before the learned Judge, we are satisfied that he did not consider any irrelevant matters or disregard any relevant matters that would have influenced his decision. We are satisfied that the learned Judge acted within the parameters set out in, *inter alia*, *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p 231 and *Fakir Mohammed v Joseph Mugambi and 2 Others* [2005] eKLR.

13. In the upshot, we are satisfied that the learned Judge exercised his discretion in a judicial manner. We have no basis for interfering with the learned Judge's judicial exercise of discretion. We find this reference devoid of merit and accordingly dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

D. K. MUSINGA, (P).

....

JUDGE OF APPEAL

K. M'INOTI

……………………………

JUDGE OF APPEAL MUMBI NGUGI

……………………………

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR