



Gisebe v Land Registrar Transmara Subcounty & another; Maroi & 2 others (Interested Parties) (Civil Application E047 of 2023) [2024] KECA 388 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KECA 388 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E047 OF 2023
WK KORIR, JA
APRIL 12, 2024**

BETWEEN

WILFRED GISEBE GISEBE APPLICANT

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE LAND REGISTRAR TRANSMARA SUBCOUNTY 2ND RESPONDENT

AND

MOIKO OLOIPUTA MAROI INTERESTED PARTY

JULIUS OLE MUKITA INTERESTED PARTY

LENKAI LE MATETA INTERESTED PARTY

(Being an application for extension of time to file a notice and record of appeal out of time to the decision of Environment and Land Court at Narok (N. Kullow, J.) dated 22nd February 2023 in ELC No. 8 of 2017 (Formerly Kisii ELC MISC APP. No. 1 of 2017 (JR))

RULING

1. The applicant, Wilfred Gisebe Gisebe, through the notice of motion dated 15th May 2023 brought under sections 3, 3A, and 3B of the [Appellate Jurisdiction Act](#) and rules 4, 5, 41 and 42 of the [Court of Appeal Rules](#) seeks an enlargement of time for filing both the notice of appeal and a record of appeal against the judgment delivered by N. Kullow, J. on 22nd February 2023 in Narok Environment and Land Court (E&LC) Case No. 8 of 2017. The applicant also seeks for an order of stay pending appeal and pray that the costs abide the outcome of the intended appeal. The application is premised on the grounds enumerated on its face together with the supporting affidavits of applicant and his son Tom Ombaba Ongaro.



2. The applicant's case is that he filed a petition dated 25th March 2014 before the E&LC which was heard between 15th October 2018 and 29th January 2019. The applicant's averment is that the judgment in the petition was not delivered for some time whereupon on 13th March 2023 he lodged a complaint over the delayed judgment against Kullow, J. with the Office of the Judiciary Ombudsman ("the Ombudsman"). It is the applicant's case that the Ombudsman later communicated that they had launched investigations against the learned Judge over similar complaints and he would be contacted by a member of the secretariat. The applicant deposes that on 14th March 2023 his son recorded a statement with the Ombudsman detailing the delay in the delivery of the judgment. The applicant deposes that on 4th April 2023 his advocate, Mr. Ongegu, received an email to which the impugned judgment was attached from Mr. Timothy Juma, a clerk at Narok E&LC. Upon perusal, his counsel realized that the judgment was dated 22nd February 2023. The applicant avers that directions issued on 7th June 2021 had indicated that the judgment would be delivered on 27th July 2021 and no further communication was issued on the delivery date of the judgment up to the time he lodged his complaint with the Ombudsman. The applicant avers that the time for appealing lapsed as a result of a mistake that was not of his own making. The applicant further deposes that because of his advanced age it took him time to consolidate his finances to enable him instruct counsel to file the present application. He concludes by averring that the intended appeal is arguable and enlargement of time will not be prejudicial to the respondents.
3. The application is opposed vide a replying affidavit sworn on 4th July 2023 by the 2nd Interested Party, Julius Ole Mokita, on his own behalf and on behalf of Moiko Oloiputa Maroi, the 1st Interested Party and Lenkai Le Mateta, the 3rd Interested Party. The interested parties aver that the applicant's advocates were duly notified of the delivery of judgment *vide* a notice dated 16th February 2023. According to them, the trial Court having notified counsel of the delivery of the judgment, the applicant is bereft of meaningful explanation for the delay in filing his notice of appeal. It is further the interested parties' averment that both the applicant and his counsel were bound to follow up on the progress and outcome of the case which obligation they absconded hence they cannot be allowed to feign ignorance of the delivery of the judgment. They also aver that the intended appeal is not arguable and is only meant to deny them an opportunity to enjoy the fruits of the judgment entered in their favour. It is additionally the interested parties' case that the applicants have not explained the delay of about 4 months prior to the filing this application. They therefore ask for the dismissal of the application with costs being awarded to them.
4. The 1st respondent, the Land Registrar, Transmara Sub-County and the 2nd respondent, the Hon. Attorney General did not participate in the application.
5. This application was disposed of by way of written submissions. The firm of Mosongo & Co. Advocates filed submissions dated 26th June 2023 in support of the applicant's case. Counsel submitted that the delay in filing of the notice of appeal was occasioned by factors beyond the applicant's control. Counsel recounted and reiterated the grounds in support of the application as well as the averments made in the supporting affidavits and submitted that the delay had been sufficiently explained and that the applicant had moved the Court at the earliest opportunity. Counsel cited *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR and *Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others* [2022] KESC 3 (KLR) and asserted that the applicant has met the conditions for enlargement of time as set down in those decisions. Counsel referred to the annexed memorandum of appeal in support of the submission that the applicant has an arguable appeal. Finally, counsel submitted that no prejudice would be suffered by the respondents or the interested parties if the orders sought are granted.



6. The firm of O.M. Otieno & Company Advocates representing the interested parties filed submissions dated 4th July 2023 in opposition to the application. Counsel submitted that both the applicant and his advocate ought to have followed up on their matter but failed to do so and cannot therefore be allowed to fault the trial Judge for their indolence. Counsel reiterated the contents of the replying affidavit and urged that the applicant and his advocate were aware of the delivery of the judgment as a notice was sent to the advocates on record. It was therefore counsel's submission that the explanations tendered by the applicant for the delay were unsatisfactory. To stress the importance of satisfactorily explaining the delay, counsel relied on the case of *Susan Ogutu Oloo & 2 others v Doris Odindo Omolo* [2019] eKLR. It was also counsel's submission that the grounds of appeal contained in the draft memorandum of appeal did not raise any arguable issues and thus the intended appeal was frivolous. Counsel further argued that the applicant had not tendered any reasons for the delay in bringing the present application and that the applicant has offended the principle that requires that even a single day's delay must be satisfactorily explained. In the end, counsel urged that the application should be dismissed with costs to the interested parties.
7. It is not lost on me that as a single judge, my jurisdiction in the instant application is limited to the application for enlargement of time brought pursuant to rule 4 of the *Court of Appeal Rules*. An application for stay pending appeal under rule 5(2)(b) as sought in prayers 4 and 5 of the motion are reserved for a bench of the Court. My determination in this application will be therefore be limited to prayers 2, 3, and 6 of the motion.
8. In dealing with an application for enlargement of time, I have unfettered discretion, which must nevertheless be exercised judiciously and subject to well-established principles. Some of the factors to be considered in exercising the discretion include the period of delay, the reasons for the delay, and the prejudice to be suffered by the respondent if time is extended. The Supreme Court enumerated the applicable principles in detail in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the 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.”



9. Applying the stated principles to this application, I am of the view that two issues arise for my consideration. First, whether the applicant has sufficiently explained the delay in filing the notice of appeal and second, whether the respondents and the interested parties will be prejudiced were the application to be allowed.
10. It is not disputed that the impugned judgment is dated 22nd February 2023. The present application is dated 15th May 2023. It is the applicant's averment that his former counsel only learned of the delivery of the judgment through email on 3rd April 2023. The applicant explains that he was not aware of the delivery of the judgment and upon being made aware, he took time to assemble his financial resources so as to be able to instruct an advocate to appeal.
11. Upon perusal of the annexed record of the trial Court, I note that on 24th April 2019 the matter was fixed for the delivery of the judgment on 25th July 2019. When the matter came up on 25th July 2019, it was indicated the judgment was not ready and would be delivered on 2nd October 2019. It is not clear what happened on the scheduled delivery date but on 11th March 2020 the matter was listed for delivery of the judgment on 16th April 2020. Everything went quiet until 9th February 2021 when the judgment was slotted for delivery on 24th April 2021. The judgment was also not delivered on 7th June 2021 but instead rescheduled for delivery on 27th July 2021. The record goes silent from that point. The respondents have on their part annexed a notice of delivery of judgment dated 16th February 2023 issued by the Deputy Registrar of Migori E&LC indicating that the judgment would be delivered virtually on 22nd February 2023. There is, however, no proof that the said notice was sent to the applicant or his advocate.
12. From the foregoing factual posture, it becomes apparent that applicant only became aware of the delivery of the judgment on 4th April 2023 that the judgement had been delivered when it was shared with his counsel by a court officer. Although the interested parties state that a delivery notice was issued for 22nd February 2022, nothing would have been easier than for them to exhibit the email trail confirming the existence of such delivery notice.
13. The next question is whether, as alleged by the interested parties, the applicant or his advocates were guilty of indolence by failing to follow up on their case. It is indeed appreciated that as was held in *Mohamed Shally Sese (Shah Sese) v Fulson Company Ltd & another* [2006] eKLR litigants are required to be vigilant in respect to their matters before court. In that regard the Court held that:

“A litigant must be vigilant in the conduct of his affairs and the applicant should have made efforts to find out the progress of his case from his advocate. After all, extension of time is essentially equitable [See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. NAI. 255 of 1997] and equity aids the vigilant and not the indolent.”
14. In this case, the applicant has annexed emails exchanged with the Ombudsman through which he lodged complaints regarding the delay in delivery of the judgment. The emails were in March and April 2023. In my view, these emails demonstrate that the applicant was not indolent but rather made efforts to find out about the delivery of the judgment. It is possible that it was the applicant's complaint that informed the decision to forward the judgment to his former advocates. I am therefore convinced that the explanation tendered by the applicant is satisfactory for the delay occasion between 22nd February 2023 and 4th April 2023.
15. There is the other delay occasioned between 4th April 2023 when the former advocates received the judgment and the filing of this application on 15th May 2023. This is a delay of 31 days. The applicant explains that he is of advanced age, retired, and therefore needed time to assemble the financial arsenal



to enable him to instruct the counsel currently on record. This Court has stated before that the impecuniousness of an applicant is not a ground for extending time. Thus, in *Francis Mwai Karani v Robert Mwai Karani* [2007] eKLR, it was stated that:

“I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts and that is exactly what I am doing in this application. In other words, I am not establishing any new principle different from the well known one that lack of financial resources is generally not a basis for extending time.”

16. However, this case calls for a consideration of all the factors. It is noted that the applicant pleads impecuniosity which ordinarily is not a valid reason for extension of time. He attributes his impecunious state to his advanced age and the fact that he is retired. The interested parties have not disputed the averment by the applicant that he is of advanced age. The aspect of age has been a factor that has been considered by this Court in similar applications including in the cases of *Rosemary Makena Mwangi & another v Mwangi Harun & another* [2008] eKLR and *Rhoda Ndululu Sengete & another v Tabitha Kavenge Matolo* [2019] eKLR. Another factor that I am inclined to consider is the delay of approximately 4 years on the part of the trial Judge in delivering the judgment. During the period the applicant’s financial resources may have genuinely been dissipated. All these factors compounded, lead to a favourable conclusion that the applicant’s explanation of impecuniosity is acceptable as an exception to the rule. I therefore find that the applicant has satisfactorily explained the delay. It is thus appropriate to hold that the delay is not inordinate in the circumstances.
17. The other issue for consideration is whether the interested parties stand to suffer prejudice if the application is allowed. Even though the interested parties have not made any averment as to what prejudice they will suffer if time is enlarged, it is necessary that I consider whether the applicant has put forth a case worth deferring the interested parties’ right to enjoy the fruits of their judgment. In this application, I have considered the annexed memorandum of appeal which I find to contain arguable issues as well as the applicant’s explanation for the delay, and it is my finding that there is a just cause to defer the applicant’s victory by granting the orders sought. Of course, whether or not the applicant’s intended appeal will eventually succeed is a matter firmly in the hands of the bench that will hear it. In the circumstances, I find that the interested parties will not be prejudiced if the applicant is given an opportunity to exercise his right of appeal.
18. In the penultimate, I find that the instant application has merit. Consequently, the notice of motion is allowed in terms of prayers 2 and 3 of the notice of motion dated 15th May 2023. The applicant to file and serve a notice of appeal within 7 days from the date of this ruling. Thereafter, everything else shall proceed in accordance with the timelines provided in the *Court of Appeal Rules, 2022*. The costs of this application shall abide the outcome of the intended appeal.
19. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF APRIL, 2024

W. KORIR

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

