Cheruiyot v Barta & another (Civil Application 5 of 2017)
[2024] KECA 603 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KECA 603 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION 5 OF 2017

FA OCHIENG, JA

MAY 24, 2024

BETWEEN

JOHN KIBET CHERUIYOT ..... APPLICANT

AND

SARA CHESIELE BARTA ..... 1ST RESPONDENT

KIPLANGAT BARTA ..... 2ND RESPONDENT

(An application for extension of time to file an appeal out of time against a judgment of the High Court Kericho (M. A. Angawa, J.) delivered on 3rd August 2009 in HCCC No. 6 of 2003)

RULING

1. John Kibet Cheruiyot is the applicant in this application dated 27th January 2017. He seeks the enlargement of time within which he can file and serve a record of appeal.

2. The application is supported by an affidavit sworn by the applicant on January 27, 2017.

3. The applicant told this Court that his advocates, Messrs. Chelule & Co. Advocates had written a letter to him, informing him about the fact that a judgment had been delivered in favour of the respondents. He therefore lodged a notice of appeal, as he held the firm conviction that his intended appeal had a high chances of success.

4. The applicant further told the court that, simultaneously with the notice of appeal, his advocates filed a letter seeking copies of the proceedings.

5. Notwithstanding several visits that his advocates made to the registry, the proceedings were not yet ready. It was because of the delay in obtaining the proceedings that there was a delay in filing the record of appeal.

6. In those circumstances, as narrated by the applicant, the delay was occasioned by matters which were beyond his control. Therefore, the applicant believes that he deserves an order for an enlargement of time.

7. On the other hand, the respondents hold the view that the applicant is completely undeserving of the order he was seeking.

8. The second respondent, Kiplagat Barta swore the replying affidavit and deponed that the application was only intended to delay justice.

9. By way of historical background, the 2nd respondent pointed out that HCCC No. 6 of 2003 originally emanated from the proceedings in HCCC No. 32 of 1996, which was between the respondents herein. The original case was concluded by an arbitral award, which was in favour of the 1st respondent herein. The arbitrator, Mrs. A. C. Bett made a finding that each of the two parties was entitled to an equal share of the suit property. Accordingly, it was ordered that the property be subdivided into two portions, each measuring 5.4 hectares. The arbitral award is dated May 30, 2001.

10. The respondent drew the attention of the court to the fact that the arbitral award was upheld by G.B.M. Kariuki J. (as he then was) in HCCC No. 32 of 1996.

11. On March 16, 2011, the learned Judge noted that pursuant to the arbitral award;

> " . . . which was adopted as a judgment of this Court, the applicant was awarded 5.4 hectares of the land comprised in Land Title No.Kericho/Kimulot/514. This is the portion the respondent is obligated to transfer to the applicant. As he has refused to do so, I allow the applicant's application dated 31st August, 2010, and order that the Deputy Registrar shall sign Mutation forms and Transfer Instrument to have the subdivided and title No. L.R. Kericho/Kimulot/514 into two portions of 5.4 hectares each and do transfer one portion of 5.4 hectares to the applicant, Kiplangat Arap Barta."

12. The respondent also told this Court that on May 29, 2015, Munyao Sila J. delivered a ruling in which he rejected the applicant's application for an extension of time for filing an appeal. In the same ruling, the learned Judge dismissed the application for a stay of execution, after finding that the land parcel No. 514;

> " ... no longer exists owing to the execution of the decree in the case Kericho HCCC No. 32 of 1996. It was sub-divided into two portions, so as to bring forth the parcels No. 1551 and 1552. What then am I supposed to stay. As mentioned by Mr. Mutai for the respondent, this application has been overtaken by events."

13. A look at the application before me reveals (at the title thereof) that it was seeking an extension of time to appeal out of time against a judgment delivered on the 3rd August 2009 by Lady Justice M. A. Angawa, in HCCC No. 6 of 2003.

14. The Notice of Appeal was dated 11th August 2009. Therefore, for all intents and purposes, the said notice of appeal was filed in a timeous manner. That explains why the application only seeks an extension of time to file and serve the record of appeal.

15. The period between 11th August 2009, when the notice of appeal was lodged in court, and 27th January 2017, when this application was filed, is over six (6) years. I find that that is a considerable period of time. Nonetheless, I am alive to the fact that the court has an unfettered discretion to grant an

extension of time for filing and serving a record of appeal. However, the said discretion has to be exercised judiciously.

16. It is well settled that this discretion ought not to be exercised on a whim or grounds of sympathy or empathy. In the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231, the court laid down the parameters for the extension of time 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 in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

17. The applicant should show that he moved the court without undue delay. If the delay is deemed excessive, the court will not exercise its discretion in favour of the applicant.

18. The applicant is required to provide a plausible and reasonable explanation for the period in contention. It is a well-established principle that there is no specific maximum or minimum period of delay set out in the law. However, a prolonged and unreasonable delay is likely to result in the applicant being denied the leave. Similarly, the reasons for the delay must be reasonable and plausible. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

19. Furthermore, the court ought to be persuaded that the interests of justice were in tandem with the grant of the orders for an extension of time. In that regard, if the respondent would be prejudiced by the extension of time, the court would be inclined to reject the application.

20. In this case, I take note of the fact that the proceedings have been protracted, going as far back as 1996.

21. Secondly, although the applicant may have written to the High Court, seeking a record of the proceedings, the applicant has not provided any proof that he followed up on the matter with the Deputy Registrar. It is imperative that a party who is intent on filing an appeal should actively pursue the Deputy Registrar, to have the record of the proceedings made available to him. In this instance, the applicant has not provided even one letter, to demonstrate that he was urging the High Court to make available the proceedings.

22. Thirdly, after the applicant had lodged the notice of appeal, he filed other applications at the High Court. In my understanding,the continued filing of applications implied that the court file at the High Court had to remain available for the purposes of having those applications dealt with.

23. Ordinarily, when a court file is actively engaged through an application, it is not possible to simultaneously have the record of proceedings typed. I, therefore, find that it was, partially, the applicant's conduct (of lodging applications) that contributed to the delay in making ready the proceedings.

24. Fourthly, it is noted that the applications which were filed by the applicant, subsequent to August 3, 2009 were intended to challenge the outcome of the ruling dated 3rd August 2009. When it is borne in

mind that Munyao Sila J. came to the conclusion that the application before him had been overtaken by events, I hold the considered view that an order which could result in a re-opening of the case would be prejudicial to the respondents.

25. For all those reasons, but more particularly because the applicant failed to provide a plausible explanation for the long delay of six years, I decline to extend the time for the filing of the record for appeal.

26. Finally, I order that the applicant shall pay the respondents, the costs of the application. I so order because there is no basis upon which the court can, in the circumstances prevailing herein, deviate from the general rule, which stipulates that costs follow the event.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF MAY, 2024.

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR