



Kehr v Busam Capital Limited & 2 others (Civil Application E222 of 2024) [2024] KECA 890 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 890 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E222 OF 2024**

SG KAIRU, JA

JULY 26, 2024

BETWEEN

REDEMPTA SUSAN CHETAMBE KEHR APPLICANT

AND

BUSAM CAPITAL LIMITED 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR, KAJIADO 2ND RESPONDENT

BRENDA JEROTICH CHEPKIYENG 3RD RESPONDENT

(Being an Application for the extension of time to file and serve the memorandum and record of appeal out of time in an intended appeal against the ruling and order of the Environment and Land Court of Kenya at Kajiado (M.N. Gacheru, J.) dated 30th May 2023 in ELC Case No. 41 of 2018)

RULING

1. In her application dated 14th May 2024 the applicant, Redempta Susan Chetambe Kehr seeks orders: that the firm of Mutua Waweru & Company Advocates be granted leave to come on record on behalf of the applicant in place of the firm of Manyonge Wanyama & Associates LLP; for extension of time for the filing and service of the Memorandum and Record of Appeal from the ruling and order of the Environment and Land Court at Kajiado delivered on 30th May 2023 in Kajiado ELC No. 41 of 2018.
2. I heard the application on 15th July 2024 when Mr. Vincent Juma, learned counsel, appeared for the applicant, and orally highlighted his written submissions. There was no appearance for the respondents despite having been served with notice of hearing on 2nd July 2024. Counsel for the 1st and 3rd respondents had however filed their respective submissions which I have duly considered. There was no response to the application by the Attorney General on behalf of the 2nd respondent.



3. Based on the material before me, including the applicant's supporting affidavit and further affidavit, the applicant's case is that her suit before the ELC in which she challenged a purported transfer of a property known as Title Number Ngong/Ngong/42046 to the 1st respondent and subsequently to the 3rd respondent was dismissed on 24th November 2022 for non-attendance; that the 3rd respondent's counterclaim in that suit proceeded for hearing ex parte and a judgment in favour of the 3rd respondent rendered on 20th December 2023; that in the meanwhile, by application dated 28th November 2022 amended on 16th December 2022, the applicant had applied for orders to set aside the order dismissing her suit which application was dismissed in a ruling, the subject of the intended appeal, delivered on 30th May 2023; that aggrieved by that ruling, she immediately lodged a Notice of Appeal dated 31st May 2023 and also applied for copies of proceedings and the ruling for purposes of her intended appeal; that despite follow ups by her advocates, the same were not supplied and the sixty days for filing the memorandum and record of appeal lapsed.
4. It is the applicant's case that the intended appeal raises triable issues as the learned Judge did not correctly or judiciously exercise his discretion in dismissing her application; that in the judgment delivered on 20th December 2023 in favour of the 3rd respondent, the ELC ordered her to vacate the property, which, she says, is her matrimonial home; that the failure to file the appeal within time was because she was not supplied with the proceedings until "sometime in January 2024" (18th January 2024 according to statement of counsel from the bar), after the ELC rendered its judgment on 20th December 2023.
5. The applicant disclosed that based on the advice of her advocates, she appealed against the judgment delivered on 20th December 2023 and applied for stay of execution of that judgment in an application before this Court which was dismissed.
6. For the 1st respondent, the firm of Philip Muoka & Company Advocates in its written submissions in opposition to the application referred to the replying affidavit of Samuel Mwangi, who says he is an accountant in the 1st respondent and depones that it was only after the applicant's application for stay of execution in Civil Application No. E021 of 2024 was dismissed by this Court that the applicant made the present application; that no reasons have been given for the delay of over one year; that the object of the application, in a matter that has been in court for over ten years, is to further delay and defeat the ends of justice by frustrating the 3rd respondent who holds a valid title having purchased the property for value, by preventing her from enjoying the occupation of the property; that the applicant is guilty of laches and the delay involved is inexcusable.
7. It was submitted that despite having filed the notice of appeal dated 31st May 2023 against the orders made on 30th May 2023, the applicant did not pursue the intended appeal until the present application made after over one year of indolence. In that regard counsel cited the case of *Mungara Mwangi v Francis Ndegwa Mwangi* (2014) eKLR, for the proposition that equity does not aid "stale demands where a party has slept upon his rights"; that instead of pursuing her appeal based on the notice of appeal dated 31st May 2023 which she had filed, the applicant opted to pursue an appeal against the judgment delivered on 20th December 2023 in favour of the 3rd respondent; that it was only after the dismissal of her application for stay of execution of that judgment was dismissed in Civil Application No. E021 of 2024 that she decided to change advocates and file the present application. Also cited was the case of *Loldia Limited vs. Kariuki Waitthaka* [1968] EA.
8. The 2nd respondent did not file any response to the application or submissions in respect of the application.



9. The application is also opposed by the 3rd respondent through her detailed replying affidavit and written submissions on her behalf by the firm of Ms. Mukele Moni and Company Advocates. Having set out the background of the litigation in great detail in the affidavit, it is urged for the 3rd respondent that the applicant failed to institute an appeal with respect to the ruling delivered on 30th May 2023 within the time required opting instead to file a notice of appeal dated 20th December 2023 in respect of the judgment delivered in favour of the 3rd respondent which was followed by her application for stay of execution in January 2024 in Civil Application No. E021 of 2024 which was dismissed in a ruling of this Court delivered on 12th April 2024; that the present application is yet a further attempt to frustrate the 3rd respondent from enjoying the fruits of her judgment of 20th December 2023.
10. It was submitted, on the strength of the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent and Electoral and Boundaries Commission & 7 others* [2014] eKLR, among other decisions cited, that the threshold for extension of time is not met; that despite having received the proceedings in January 2024, the applicant abandoned the pursuit of the appeal against the May order dismissing her suit and opted to pursue a different appeal; and that the grant of the orders sought will be prejudicial.
11. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. In *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR Waki, J.A stated that:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
12. Subsequently in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014* (above) the Supreme Court of Kenya pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Other considerations include whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay. Public interest is also a relevant consideration.
13. With those principles in mind, the decision the applicant intends to challenge and in respect of which extension of time to file the memorandum and record of appeal is sought was delivered on 31st May 2023. There is no contest that the applicant promptly filed and served a notice of appeal dated 31st May 2023, which on the face of it was lodged on 12th June 2023. Rule 84 of the *Court of Appeal Rules* provides for the mandatory requirement that the record of appeal should be filed within sixty (60) days from the date of lodging the notice of appeal, unless there is demonstration that the applicant falls within the proviso to the said Rule 84, which provides for exclusion from computation of the sixty



days for filing of the record of appeal, on account of time taken by the registry for preparation and supply of a certified copy of the proceedings.

14. The application for a copy of the proceedings should be made “within thirty days after the date of the decision against which it is desired to appeal.” The firm of Kanchori Mutali & Company Advocates requested the Deputy Registrar of the ELC, by a letter dated 3rd July 2023, to supply “certified copies of the proceedings to enable” preparation of “a record of appeal”. Clearly, that was outside the 30 days window envisaged under the proviso to rule 84 and the benefit that would have otherwise accrued to the applicant under that proviso is therefore lost.
15. The notice of appeal having been lodged on 12th June 2023, sixty days would have lapsed on 11th August 2023, by which time the memorandum and record of appeal should have been filed. The applicant states that in the meantime, the counterclaim by the 3rd respondent was in progress before the trial court culminating in the judgment on the counterclaim in favour of the 3rd respondent on 20th December 2023; that proceedings were eventually received from the court in January 2024. The present application dated 14th May 2024 was however not filed until May 2024. There is therefore a delay from August 2023 to 14th May 2024 of over nine months that should have been satisfactorily explained. The fact that the applicant decided to challenge the judgment of 20th December 2023 did not prevent the applicant from pursuing his appeal against the ruling of 31st May 2023.
16. The delay involved, in my view, is inordinate and is not satisfactorily explained. In the circumstance, I have no basis for exercising the Court’s discretion in favour of the applicant. Moreover, the record shows that there is already an appeal by the applicant in respect of the substantive judgment of 20th December 2023.
17. Consequently, the application fails and is dismissed with costs to the 1st and 3rd respondents.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

