Chunga v Amolo & 3 others (Civil Application E042 of 2024)
[2024] KECA 869 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KECA 869 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E042 OF 2024

HM OKWENGU, JA

JULY 19, 2024

BETWEEN

PHILIP OBONYO CHUNGA ..... APPLICANT

AND

JOSHUA CHRISTOPHER AMOLO ..... 1ST RESPONDENT

RAPHAEL JUMA ..... 2ND RESPONDENT

SIMON OTOK AMOLO ..... 3RD RESPONDENT

DICK KOLA AMOLO ..... 4TH RESPONDENT

(Being an Application for extension of time to file and serve the notice of appeal and record of appeal out of time in an extended appeal from the Ruling of the Environment and Land Court at Siaya, (A.Y. Koros, J.) dated 19th June, 2023 in ELC Case No. 005 of 2022)

RULING

1. The applicant, Philip Obonyo Chunga, who was the 1st respondent before the Environment & Land Court (ELC) at Siaya, is before me in a Notice of Motion dated 8th April, 2024, in which he seeks extension of time to file and serve the notice of appeal and record of appeal from the Ruling of the Environment and Land Court (ELC) Siaya, in ELC E005 of 2022, delivered on 19th June 2023.

2. In order to understand the motion before me, it is necessary to appreciate the background to the motion as deduced from the ruling which is the subject of the intended appeal. The applicant Philip Obonyo Chunga was the 1st defendant in ELC No. 005 of 2022, in which he was sued together with four others. The dispute was over North Sakwa/Maranda/40 (suit property). On 16th February 2023, judgment was entered in favour of the Plaintiffs who are the respondents in the motion now before me as a single Judge. The orders arising from the judgment in the ELC No 005 of 2022 have not been clearly spelt out, but by a Notice of Motion dated 10th March, 2023, the plaintiffs in that matter (who

are the respondents in the motion now before me), moved the ELC for review of the judgment entered on 16th February, 2023.

3. The grounds upon which the review was sought included inter alia that the applicant and the four defendants had in violation of the doctrine of lis pendens subdivided North Sakwa/Maranda/40 into several parcels, that is North Sakwa/Maranda/4317 to North Sakwa/ Maranda/4322, and that the subdivision was done after the ELC had reserved the suit for judgment, thus making it impossible for the respondent to execute the judgment of 16th February 2023.

4. The applicant in opposition to the respondent's motion maintained that the subdivision of North Sakwa/Maranda/40 was done pursuant to a confirmation of grant issued in Bondo PMCC No. 85 of 2017; and that the orders sought by the respondent if issued, would alter the grant, which would amount to abuse of the court process.

5. Upon considering the respondent's motion, the learned Judge found that the applicant and the three defendants, with the sole aim of defeating the cause of justice, subdivided the suit property on 27th January, 2023; and by the time the court rendered its judgment in favour of the respondent on 16th February 2023, North Sakwa/Maranda/40 was not in existence. The court rejected the applicant's contention that they were implementing the confirmation of the grant, as unstainable, because the grant was issued well before the suit was filed, which was about four years before the judgment of the court. The court found the applicants in breach of the doctrine of lis pendens; that the subdivision of North Sakwa/Maranda/40 amounted to discovery of new and important matter, which on the exercise of due diligence was not within the knowledge of the respondent, and could not be produced at the time the court rendered its judgment; and this provided justification for review of the judgment of 16th February 2023.

6. Consequently, on 19th June, 2023 the learned Judge reviewed the orders issued on 16th February 2023, and ordered the District Land Surveyor Bondo or any other designated officer to revert the subdivisions North Sakwa/Maranda/4317 to 4322 to the previous RIM; and the Land Registrar Bondo to cancel the titles to subdivisions North Sakwa/Maranda/4317 to 4322, so that the property reverts to the previous registration number, that is, North Sakwa/Maranda/40; and that the judgment rendered on 16th February, 2023 be thereafter executed. This is the ruling that the applicant wishes to appeal against.

7. The respondents have relied on a replying affidavit sworn by the 1st respondent Joshua Christopher (Joshua), and have also filed written submissions. Joshua depones that judgment was delivered by the ELC on 16th February 2023 and no appeal was preferred. That subsequently, a ruling was delivered on 19th June 2023 reviewing the judgment on the application of the respondents, and this ruling was delivered in the presence of counsel for both parties. Apart from taking no action to file the necessary documents to facilitate the appeal, the applicant has not demonstrated that he has applied for or received typed proceedings or prepared the record of appeal.

8. In their written submissions, the respondents contend that the applicant has not disclosed material facts such as when he learnt of the judgment and ruling, or the steps that he took. The respondent argued that the application should be dismissed as the applicant has failed to provide a reasonable explanation for the inordinate delay.

9. The applicant has cited several provisions of the law most of which are not really relevant to his motion. Nevertheless, under Rule 4 of the *Court of Appeal, Rules*, which he has cited, this Court:

> " May, on such terms as may be just, by order, extend the time limited by these rules, or by any decision of the court or of a superior court, for the doing of any act authorized or required

by these rules, whether before or after the doing of the act, and a reference in these rules to any such time shall be construed as a reference to that time as extended."

10. It is trite law that Rule 4 provides a discretionary power to the court and such power must be exercised judiciously. In *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi* [1999] 2EA 231, the court identified matters for consideration in exercising the Court's discretionary power under Rule 4 of the Court Rules. This include the length of the delay and the reasons for the delay.

11. In *Nicholas Kiptoo Arap Korir Salat -vs- Independence Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court laid out the following principles:

> "17. The court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:
>
> 1. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
>
> 2. A party who sought for extension of time had the burden of lying a basis to the satisfaction of the court;
>
> 3. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case by case basis;
>
> 4. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;
>
> 5. Whether there would be any prejudice suffered by the respondents if the extension was granted;
>
> 6. Whether the application had been brought without undue delay; ..."

12. The ruling subject of the intended appeal was issued on 19th June 2023, the applicant's motion is dated 8 April 2024. This means the applicant is seeking extension of time over nine and a half months from the time the ruling was made. Under Rule 77(2) and 84(1) of the *Court of Appeal Rules*, a party intending to appeal to this Court is required to file a notice of appeal within 14 days from the date the ruling is delivered, and a record of appeal within 60 days from the date of the notice of appeal is lodged.

13. The only explanation the applicant has given for this long delay is the fact that his former advocate failed to advise him of the virtual delivery of judgment and he only learnt of the judgment after the 14 days' period had expired. He also adds that he instructed his advocate to lodge the appeal, but he failed to do so. The applicant has not given the specific date when he learnt of the judgment, nor has he produced anything to show when and how he instructed his advocate to file the appeal. The explanation therefore remains no more than an attempt to shift the blame to his counsel. An excuse that cannot pass muster.

14. In *Habo Agencies Ltd vs Wilfred Odhiambo Musingo* [2015] eKLR, Waki JA in considering a similar application under Rule 4 of the Court of Appeal Rules, in which the applicant similarly blamed his advocate had this to say:

> "It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. It is true as submitted by Mr. Wambola that mistakes of

counsel may be excusable. The epic dicta of Madan, J.A. in *Murai v. Wainaina* (No.4) [1982] KLR 38, quickly come to mind:-

> 'A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the 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 a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.'

In this case however, the erstwhile Advocates are simply accused of inaction. In the Case of *Rajesh Rughani –Vs- Fifty Investment Ltd. & Another* (2005) eKLR the Court of Appeal held,

> 'It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy.'

Also in the Case of *Bains Construction Co. Ltd. -Vs- John Mzare Ogowe* 2011 eKLR the Court had this to observe:-

> 'It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences.'"

15. I could not have put it any better. The applicants' position is on all fours with the one addressed by Waki JA. The delay of almost ten months is inordinate and has not been reasonably explained. Other than blaming his counsel, the applicant has not demonstrated that his counsel made any mistake, nor has he shown what he himself did in an effort to protect his interest. Consequently, there is no justification for me to exercise my unfettered discretion in his favour. The application is dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JULY, 2024

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR