



**Sakari v Anyumba (Civil Application E170 of 2021)
[2024] KECA 790 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 790 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E170 OF 2021
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JULY 5, 2024**

BETWEEN

CLEMENT O. SAKARI APPLICANT

AND

ROSEBELLA ANYUMBA RESPONDENT

(A reference to a full bench of this Court from a ruling delivered by a single Judge [Kiage, JA] dated 28th April, 2022 declining an extension of time to file notice and record of appeal from the Judgment of the Environment and Land Court in ELC Case No. 805 of 2017)

RULING

1. This is a reference from the decision of a single judge of this Court (Kiage, JA), declining to grant the applicant, Clement O. Sakari, extension of time to file a Notice and Record of Appeal from the judgment of the Environment and Land Court (ELC) of Kenya at Migori, (G.M.A. Ongondo, J) dated 28th September, 2021.
2. The dispute leading to the events before the Court, revolved around ownership of a portion of LR. No. Suna West/Wasweta 11/1533 (suit land) measuring 3 acres. Rosebella Anyumba (Rosebella) filed a suit against Clement Sakari (Clement), in which she sought a permanent injunction restraining him from interfering with the suit land, and an order compelling Clement to transfer the portion of the suit land to her.
3. Rosebella's claim was that in 1975, her late husband purchased the portion of the suit land from Clement's father for a consideration of Kshs 4,800. Unfortunately, Clement's father died before transferring the portion of the suit land to Rosebella's husband, who also later died in 2007. Through Kisii High Court Succession Cause No. 603 of 2009, Clement succeeded the estate of his deceased father and transferred the whole parcel of land to his name excluding Rosebella's family. This resulted in Rosebella filing the suit in the ELC claiming the portion of land that had been bought by her



- husband. Clement denied Rosebella's claim, maintaining that he had no reason to include her as a beneficiary of the estate of his deceased father's estate, as she was neither in possession nor in occupation of the suit property.
4. In its judgment delivered on 28th September 2021, the ELC found in favor of Rosebella and issued, inter alia, an order directing Clement to transfer the disputed portion to Rosebella, failing which, the Deputy Registrar of the court would execute the requisite documents to facilitate the transfer.
 5. Clement was aggrieved by the judgment of the ELC. Nevertheless, no notice of appeal was filed. By a notice of motion dated 9th December 2021, Clement filed an application before this Court under Rule 4 of the [Court of Appeal Rules](#) seeking extension of time within which to file and serve the notice and record of appeal.
 6. Clément's application was anchored on his affidavit in which he faulted his previous advocate who was on record, for failing to file the notice of appeal on time despite having instructed him to do so. Clement deposed that he only learnt that the appeal had not been filed at the end of October, 2021 when he went to enquire on the progress of the appeal, only for his previous advocate to inform him that he did not wish to continue representing him. Clement pleaded that he has an arguable appeal with good prospects of success.
 7. The application was opposed by Rosebella who termed the delay as inordinate and urged that Clement had not given a plausible explanation to warrant the exercise of the Court's discretion in his favor.
 8. Having heard the application for extension of time, the single judge dismissed it finding that the reasons given for the delay were not plausible, more so, since upon the applicant appointing a new advocate, it took the new advocate about a month after coming on record to make the application for extension of time.
 9. In accordance with Rule 55 of the [Court of Appeal Rules](#) 2010, Clement, being aggrieved by the decision of the single Judge, preferred a reference to the full bench of the Court through his letter dated 4th May, 2022. At the plenary hearing of the reference, Miss Imbaya learned counsel appeared for the applicant while Mr. Odero learned counsel appeared for the respondent. Both counsels relied on their written submissions which they highlighted.
 10. In support of the reference, Clement faulted the learned Judge for declining to grant the orders sought, contending that the reasons given provided an appropriate justification for the learned Judge to exercise his discretion in Clement's favour. He conceded that the discretion to excuse the mistake of a counsel is not automatic and depends on the circumstances of a case, but pointed out that in the matter before the single Judge, his former advocate who was on record failed to appeal despite being duly instructed by Clement to do so, and upon discovery of this, Clement instructed a new advocate who filed the application for extension of time.
 11. Clement cited [Joyce Arus Owiti v National Police Service Commission](#) (2020) eKLR, arguing that the issues raised regarding the conduct of his previous advocate were relevant and ought to have been considered by the learned Judge.
 12. In opposing the application, Rosebella relied on the holding in [Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 7 Others](#) [2014] eKLR arguing that in filing the instant reference, Clement was not coming to this Court with clean hands, because in as much as he blamed his advocate who was on record for failing to institute the appeal on time, the learned judge correctly found that Clement did not advance any evidence of the actions he took to have the appeal lodged on time.



13. We have considered the application, the submissions of the respective counsel, and the law. It is trite that under Rule 4 of the Court Rules, an extension of time is not a party's right. It is a discretionary remedy that is only available to a deserving party.

14. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2015] eKLR the Supreme Court stated that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favor of the applicant.”

15. In *Kenya Co-Operative Creameries Ltd v. Films Ltd* [2006] eKLR, this Court held:

“In hearing matters brought under rule 4 of this Court's Rules, the single Judge exercises unfettered discretionary powers which in law must be exercised upon reason and not capriciously. Once the single Judge has so exercised the same discretion and made a decision on the matter, the full bench will be very slow in interfering with the same exercise of discretion by a single Judge unless it is demonstrated that the single Judge, in the exercise of the same discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was wrong in the exercise of his discretion and that as a result there has been misjustice (see the case of *Mbogo v. Shah* (1968) EA 93 at page 96).”

16. In *Simeon Okingo & 4 others v. Benta Juma Nyakako* [2021] eKLR; this Court set out the following considerations to be made by the full bench in a reference similar to the present one:

“12. In an application under Rule 4 of this Court's Rules, as was the one before the learned single Judge of this Court, the single Judge is exercising unfettered discretion, on behalf of the whole Court; such discretion ought to be exercised based on proper principles of law. Therefore, the full bench would only interfere with the exercise of such discretion if it is apparent that the single Judge took into account an irrelevant matter which he/she ought not to have taken into account or failed to take into account a relevant matter which he/she ought to have taken into account or that he/she misapprehended the law applicable and evidence before him or that his decision was wrong.”

17. In applying the principle set out in the above cases, the question that we must address is whether the learned single Judge, in declining to extend the time for Clement to file his appeal, properly exercised his discretion. In other words, whether Clement demonstrated that the learned Judge exercised his discretion capriciously or misdirected himself in some material matter in arriving at his decision.

18. Clement took issue with the single Judge for rejecting his explanation in which he laid the blame entirely on his former advocate for failing to act on his instructions. In that regard the learned Judge rendered himself as follows:

“Even though there is no period set by the law, beyond which delay is ipso facto inordinate, anyone seeking this relief must satisfactorily explain the cause of the delay. See *Andrew Kiplagat Chemaringo v- Paul Kipkorir Kibet* [2018] eKLR. I am not convinced that the applicant has satisfactorily explained the delay. I note, in fact, that the current advocates took about a month after coming on record, to make this application. No explanation is given for that delay”.



19. We do not find that the learned Judge misdirected himself or that he failed to consider a material matter or arrived at a wrong decision; or that he was wrong in exercise of his unfettered discretion. The learned Judge considered the explanation before him, and concluded that the delay was not sufficiently explained. This was because apart from the fallout with the former counsel on record, Clement did not offer anything in substantiation of the averments set out in his affidavit in support of the application.
20. A litigant has the responsibility to act within the prescribed timelines as it is his case and not of his counsel. The alleged mistake of counsel does not of itself cure the litigant's inaction. In *Rajesh Rughani -v- Fifty Investment Ltd. & Another* (2005) eKLR which was cited by Waki, JA in *Habo Agencies Limited v. Wilfred Odhiambo Musingo* [2015] eKLR, the Court of Appeal rendered itself in this regard as follows:
- “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”.
21. We are satisfied that the learned judge properly exercised his discretion as he was alive to the applicable principles in considering an application for extension of time. The learned Judge considered the circumstances of the delay including the explanation given but was not persuaded that the explanation was satisfactory. The applicant ought to have been more vigilant in pursuing his case. It is not enough for him to shift blame to his advocate without demonstrating what he himself did. Accordingly, there is no justification for us to interfere with the exercise of discretion by the learned Judge. The application is devoid of merit and is therefore dismissed with costs.

It is so ordered

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

