



ACL v WKL; Kenya Electricity Transmission Company Limited (Interested Party) (Civil Application E105 of 2023) [2024] KECA 1725 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KECA 1725 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E105 OF 2023
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
NOVEMBER 22, 2024**

BETWEEN

ACL APPLICANT

AND

WKL RESPONDENT

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED . INTERESTED PARTY

(Being a reference to the full Court against the ruling of Korir, J.A. dated 12th April, 2024 declining to enlarge the time to file a notice of appeal, memorandum and record of appeal against the Judgment in Matrimonial Property Cause No 7 of 2016)

RULING

1. This is a reference from the decision of a single judge of this Court declining to grant the applicant AC, extension of time to file a Notice of appeal, memorandum of appeal and Record of Appeal against the judgment of the High Court (Matheka, J.) dated 30th March 2023 in Matrimonial Property Cause No 7 of 2016 wherein the court declared inter alia, that L.R No. Rongai/Rongai/x/x was not matrimonial property for purposes of distribution and L.R No. xxxx/x was matrimonial property to be shared equally between the parties.
2. The applicant placed the blame at the door of her former advocates, Messrs. Odhiambo & Odhiambo Advocates. She alleges to have instructed her former advocates to appeal the Court’s decision and was ardent in pursuing the appeal, that on various occasions she made a visit to the said advocates on the status of her appeal and she was assured her that all was well. On 30th May 2024, she visited the said advocates’ offices and was given a copy of the respondent’s Advocate’s letter to the Deputy Registrar seeking to release the title deeds and was informed that the next step was to procure a mention date



to release the documents. As a result she Messrs. Kean LLP advocates to place a caution on the suit property on 20th July 2023.

3. The appellant contends that she only became aware that the requisite appeal documents had not been lodged on 21st November 2023, when surveyors barged into the matrimonial property, with a Land Control Board consent authorising its subdivision. In her further affidavit dated 29th December 2023 she also deposed that the trial Judge was transferred and her advocates were only able to access the judgment on 27th April 2023 and could therefore not file the appeal on time. Against that background the applicant filed an application for extension of time, which ordinarily is heard by a single Judge of this Court.
4. The application was placed before Korir, J.A., who by a ruling dated 12th April, 2024 found that the applicant was undeserving of the exercise of the Court's discretion and dismissed the same with costs.
5. Aggrieved, the applicant requested for the instant reference vide a letter dated 17th April, 2024. The reference came up for hearing before us on 13th November, 2024 and parties relied on their written submissions. The applicant submitted that the Memorandum of Appeal raised distinct points of law which deserve determination by the court. It was contended that the single judge had failed to consider the applicant's further affidavit dated 29th December 2023 and that the respondent would not be prejudiced, if the orders sought are granted and that it was just that the applicant be given a chance to prosecute the appeal.
6. The respondent and the interested party vehemently opposed the reference, pointing out that the applicant's former counsel, were essential in effecting the judgment by recording a consent order for the release of Title Deeds that were in the court's custody, that the suit property no longer exists as it was long subdivided, that the appeal is of no consequence and that there was no tangible proof that the applicant had made any effort to follow up on her case.
7. We have gone through the application for extension of time, as well as the annexures and the responses thereto. The question before us is whether the Learned Judge properly exercised his discretion by declining to extend the time for the applicant to file her appeal. Here, we are guided by the decision in *Peninah Mongina & Another v Walter Masese Makori & Another* [2005] eKLR (Civil Application No. 20 of 2004), where it was held that:

“... under rule 4 of this Court's Rules, the learned single Judge [exercises] unfettered discretion. In a reference to the full court before we can interfere with that discretion, we must be satisfied that the learned single Judge misdirected himself in some matter and as a result arrived at a wrong decision or, that the learned single Judge misapprehended the law or failed to take into account some relevant matter.”
8. It is trite that an applicant seeking extension of time has the burden of laying a basis to the satisfaction of the Court. Where there is a reasonable cause for delay, the delay should be explained to the satisfaction of the Court.
9. From the record, it is apparent that there is no evidence in support of the allegations that the applicant instructed her former advocates to lodge an appeal, that she visited the offices of her erstwhile advocates severally or that the employees of the said advocates misled her to think that the appeal had been filed. However, what is clear is that the applicant was up to date with every other aspect of her case, after the impugned judgment was delivered. By virtue of the two law firms acting on her behalf (Messrs Odhiambo and Odhiambo Advocates and Kean Advocates LLP, she was provided with correspondence from the respondent's Advocates seeking to release the title deeds from the custody of the court and that a mention date would be set to effect the same, she knew that her advocates had



not obtained stay of execution of the impugned judgment and proceeded to instruct Kean Advocates LLP to put a caution over the respective property on 27th June 2024. How could someone with such abundant information not realise that the principle event- the appeal, had not been lodged?

10. We are inclined to agree with the learned Judge's conclusion that in the circumstances, the applicant, despite been keenly aware of the post judgment proceedings, was indolent in following up her appeal.
11. As for the contention by the applicant that the learned Judge failed to consider her further affidavit dated 29th December 2023, we have reviewed the said affidavit and find that the same holds no sway. The gist of the applicant's averments is that the trial judge was transferred to Makueni and went with the file after delivering the judgment on 30th March 2023 and it was not until 27th April 2023 when her Advocates received the judgment. Again, there is no material to prove that her former advocates were not present when the judgment was delivered or that they received the judgment three weeks after delivery as alleged. Again, there is no evidence or material to show that the trial Judge went with the file. In our view such contention is unwarranted and unnecessary. Having gone through all the documents, materials and affidavits filed herein, we find no basis to interfere with the Ruling of the Single Judge. In our view the single Judge considered all the issues raised and dismissed the application for extension of time, rightly so.
12. In the circumstances, we find that this reference is devoid of merit and dismiss it. Each party to bare its own costs.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF NOVEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA CIARB., FCIARB

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

