Ciegoki & another v Mutiga (Civil Application E092 of 2024)
[2024] KECA 1622 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KECA 1622 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E092 OF 2024

A ALI-ARONI, JA

NOVEMBER 7, 2024

BETWEEN

CATHERINE CIEGOKI ..... 1ST APPLICANT

KATHANDIKA IGUNA ..... 2ND APPLICANT

AND

LUKE KITHURE MUTIGA ..... RESPONDENT

(An application for extension of time to file an appeal out of time from the Judgment of the Environment and Land Court at Chuka (Yano, J.) delivered on 25th April 2024 in ELC Case No. 143 of 2017))

RULING

1. Before the court is a notice of motion dated September 25, 2024 brought under rules 4, 31, 39(b), 41, 42, 43, 47, and 53 of the *Court of Appeal Rules 2010*, seeking an order of inhibition on Parcel No Tharaka/Tunyai 'A'/479; and leave to file an appeal out of time against the judgment and decree of the Environment and Land Court in Case No 143 of 2017.

2. The application is predicated on the grounds on the face of the application stating that; the time to lodge and serve the record of appeal has already lapsed; the delay in making the application for extension of time is not inordinate and was occasioned by the time it took the applicants to obtain the certified copy of the judgment from the Chuka ELC registry; the respondent has extracted a decree and thus execution is foreseeable; by the time the advocate for the appellants could obtain sufficient instructions, the time for filing the appeal had run out; no prejudice will be suffered by either party if leave is granted and that the application sought be granted in the interest of equity and justice.

3. The application is further supported by the affidavit of the 2nd applicant. He deposes that he is aggrieved and dissatisfied with the judgment of Yano, J in ELC No 143 of 2017 delivered on 25th April 2024; he applied for the certified copy of the judgment and proceedings on 5th May 2024 only for them to be

made available on 23rd July 2024; the applicant has an arguable appeal with overwhelming prospects of success, which appeal is based on grounds as outlined in the annexed draft memorandum of appeal; the applicant undertakes to lodge the intended appeal and record expeditiously within such time as this Honourable Court may order; the respondent has extracted a decree and since there is no stay, execution is foreseeable.

4. The application is opposed through a replying affidavit of the respondent sworn on 31st October 2024. He deposes that it is true that the judgment of the superior court was delivered on 25th April 2024 and a typed copy of the judgment was available immediately after delivery; there is nothing to show that the applicant made any effort to ensure that the judgment which had been typed at the time of its delivery was collected in time; further the applicant did not lodge a notice of appeal within the time required by law, as a copy sent to the respondent's counsel dated 6th May 2024 was not lodged in the superior court's registry.

5. The respondent further deposes that there is no satisfactory explanation given by the applicant for failure to file a competent notice of appeal and an appeal within the time allowed by law and that the delay is inordinate; that judgment of the superior court has been fully implemented and the property subject matter is now registered in the respondent's name; it is false for the applicant to state in the motion that the instructions to appeal were given late when the applicant's advocate filed a notice of appeal on 6th May 2024, ten days after the delivery of the judgment, and wrote a letter for judgment on 3rd May 2024, eight days after judgment; that the applicants' intended appeal has no chance of success and would be a waste of judicial time.

6. Learned counsel for the applicant has filed submissions dated 5th November 2024. He urges the court to expunge the respondent's submissions for late filing of the same, further learned counsel submits that the affidavit dated 31st October 2024 is marred with falsehood, is not substantiated, and ought to be disregarded; that it is misleading as it implies that the applicants collected the certified ruling on the same date yet there is no tangible evidence to affirm that averment; that the notice of appeal dated 6th May 2024 was filed within time barely 10 days from the ruling date; that the applicants acted with great speed to secure the proceedings and judgment; that there was no inordinate delay on the part of the applicants as purported; that the applicants sought for the certified copy of the judgment and proceedings on 5th May 2024, which were only issued to him on 23rd July 2024.

7. Learned counsel further submits that the orders sought are discretionary and no harm or prejudice will be occasioned to the respondent since in any case, he has already changed the title; that based on reliable sources, the respondent is likely to dispose of the property to third parties. Learned counsel submits that the case of *Bogonko v Ndege* [2024] KECA 351 (KLR) is distinguishable since in that matter, the applicant had not filed his notice of appeal unlike in the instant matter; that the application is merited as elucidated in the supporting affidavit and it is only fair that the court disregards any technicalities on the part of the applicant as envisaged in the *Constitution* since the applicants are bound to suffer a huge loss as compared to the respondent who can await for the matter on appeal to be heard substantially. Learned counsel in persuading the court relied on the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1992] 2 EA 231. On costs, learned counsel submits that costs follow the event and prays that the costs be awarded to the applicant.

8. Learned counsel for the respondent has filed submissions dated 2nd October 2024. He submits on his part that before the court can consider whether or not to exercise its discretion, there is the jurisdictional prerequisite which the applicant must demonstrate to have complied with; that the applicant must have lodged a competent notice of appeal and have it served on all persons directly affected by the appeal within 7 days of its lodgment. In support of this proposition, he relies on the case of Bogonko v

Ndege (supra), where the court held that in so far as a notice of appeal is a jurisdictional pre-requisite, nothing flows from a non-existent notice to invoke the court's jurisdiction to grant the orders sought pursuant to rule 4.

9. Learned counsel for the respondent further submits that in the instant case, there is no documentary evidence to show that the applicant lodged his notice with the registrar of the superior court within 14 days as required; that it cannot be treated as a valid competent notice of appeal meaning that the court has no jurisdiction to determine the merits or otherwise of the application and should proceed to strike it out with costs.

10. Further, according to the respondent, the applicant filed the application in September 2024 while the impugned judgment was delivered on the 25th of April 2024; the delay of five months is long, inordinate and has not been sufficiently explained; the applicant's explanation given in the affidavit is unsatisfactory as he deposes that there was a delay in procuring the judgment and proceedings of the court but did not show any diligence in following up on the same, as there is no letter annexed; there is no evidence provided to show that the judgment was made available on that date and that further, the delay of two months has not been explained.

11. It is urged further, that the claim before the superior court was one of adverse possession where the court found as a fact, supported by ample evidence that the respondent's possession of the suit land was quiet, continuous, uninterrupted, and in excess of 12 years; that the respondent's evidence before the superior court was unassailable hence the appeal has no chances of success and even if it were to be filed, it would be a waste of valuable judicial time; that the judgment of the superior court has been fully implemented and there is nothing to stay; that the title is now in the name of the respondent and inhibiting the same will prevent the respondent from enjoying the fruits of his judgment, which would cause great prejudice.

12. I have considered the application, the supporting affidavit, the replying affidavit, and both parties' written submissions. The applicant has sought two prayers, one of which requires a full bench. I will for now confine myself with the prayer for extension of time as that squarely falls within the jurisdiction of a single judge. The applicant if successful may pursue the second prayer in a separate application.

13. The issue for determination before me, therefore, is whether the applicant deserves the orders sought. Rule 4 of the *Court of Appeal Rules* allows this Court to exercise discretion to extend the time limited by the rules for doing any act authorized or required by the rules. In the case of Dominic Okodoi v Republic [2021] eKLR, this Court held as follows:

> " Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to –
>
> '... 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
>
> ...' on such terms as it thinks just."

The case of *Leo Sila Mutiso v Helen Wangari Mwangi* (*supra*) set out the principles to be applied in the exercise of its discretion in determining an application under rule 4, where the court held:

> "the decision whether or not to extend time is discretional. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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."

Further, the case of *Fakir Mohammed v Joseph Mugambi & 2 others* [2005] eKLR lends clarity to the issue of the court's jurisdiction in the determination of applications under discussion where the court stated:

> " The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it 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, 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."

14. As I consider the issue before me I am aware of the factors to be taken into account as set out in the cases cited above and that the discretion has to be judiciously exercised not whimsically or capriciously, while at the same time balancing the interest of both parties. There is a notice of appeal on record, however, the respondent contends that the same was not lodged with the court registry as required by rule 77(2) of the *Court's Rules* and that without a competent notice of appeal, this Court lacks jurisdiction to handle the matter before it. Second, it is contended that the applicant did not show proof of when he obtained the certified copies of the proceedings. The respondent is right in his assertion. Nonetheless, it may be argued that if the applicant had undertaken all the necessary steps, then his matter would have been covered by the proviso to rule 84 and this application would not have been necessary. The flaws in this matter is what has led to this application and what I need is a satisfactory explanation of the delay coupled with the other factors set above.

15. The applicant contends that the delay in filing the record of appeal was due to the delay in obtaining the proceedings. Secondly, he states that the delay is not inordinate. Thirdly, the notice of appeal is properly on record, and they have an arguable appeal.

16. I find the explanation given by the applicants on the delay of five months in obtaining the proceedings to be reasonable as it is a normal phenomenon in our courts for typing of proceedings to be delayed, and 5 months cannot in the normal cause of things be said to be an inordinately long time. Secondly, I have looked at the draft grounds of appeal, the same do not appear frivolous and are worth being ventilated further. Thirdly, the applicants' counsel gave his intention to appeal but missed out or failed to show that he lodged the notice of appeal with the registry. He is in the application before me asking that he be given leave to appeal out of time.

17. The process of appeal begins with the lodging of the notice of appeal, the applicants herein are therefore well within their right to seek to rectify the anomaly of lateness including any other, hindering their pursuit of the appeal.

18. Consequently, in the interest of justice I will allow the application. Afresh notice of appeal be lodged and served upon the respondent within the next 7 days. The record of appeal be filed within the next 45 days of today's date. Costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF NOVEMBER, 2024.

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR