



Family Bank Kenya Limited v Omanga (Suing as the Personal Legal Representative of the Estate of Margret Adhiambo Omanga - Deceased) & 3 others (Environment and Land Appeal E021 of 2022) [2024] KEELC 1341 (KLR) (12 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E021 OF 2022
GMA ONGONDO, J
MARCH 12, 2024**

BETWEEN

FAMILY BANK KENYA LIMITED APPELLANT

AND

MARY ATIENO OMANGA (SUING AS THE PERSONAL LEGAL REPRESENTATIVE OF THE ESTATE OF MARGRET ADHIAMBO OMANGA - DECEASED) 1ST RESPONDENT

PAUL OJIGO OMANGA 2ND RESPONDENT

THE DISTRICT REGISTRAR OF LANDS HOMABAY 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. This ruling is in regard to twinned application namely;
 - a. A notice of motion dated 3rd march 2023 by the 1st respondent/applicant through Odhianbo Oronga and Company Advocates (The first application herein)
 - b. A Notice of Motion dated 23rd March 2023 by the appellant/applicant through Mukele Moni and Company Advocates (The second application herein)
2. In the first application, the 1st respondent is seeking the orders infra;
 - a. That the Applicant’s amended Record of Appeal and Supplementary Record of Appeal filed herein on 6th February, 2023 be struck out.
 - b. That the costs of this application be borne by the Appellant.



3. The foundation of the first application is the 1st respondent's supporting affidavit of twelve paragraphs sworn on even date together with a document marked as "MAO 1" being a copy of court orders given on 24th October 2022 to the appellant/applicant to amend the record of appeal and file supplementary record of appeal within sixty (60) days from that date and grounds (a) to (g) stated on the face of the same. The grounds include;
 - a. That the Appellants Amended Record of Appeal and Supplementary Record of Appeal filed herein on 6th February, 223 have been filed out of time without seeking extension of time.
 - b. That pursuant to ground(c) above the Appellant is in breach of the court order granted on the said date.
4. The first application is opposed by the appellant's replying affidavit of twenty-one paragraphs sworn on 11th April 2023 by Sylvia Wambani, the Senior Legal officer with the appellant and the accompany documents marked as "SW-1", "SW-2" and "SW-3" which include; copies of Amended Memorandum of Appeal amended on 2nd February 2023 and the supplementary Record of Appeal dated 3rd February 2023 both filed on 6th February 2023. The said officer deposed, inter alia, that failure to comply with the orders given on 24th October 2022 was inadvertent and unintentional. That the appellant has the right to be heard and access to justice in this appeal in line with the provisions of the Civil Procedure Act (Cap 21) and Constitution of Kenya, 2010.
5. The 3rd and 3rd and 4th respondents did not reply to the first application. Notably, on 20th February 2024, Sarah Counsel learned counsel for the 4th and 5th respondents told the court that the two applications involve the appellant and the other respondents only.
6. By the 2nd respondent's replying affidavit sworn on 8th September 2023, the first application is not opposed. She averred in part the appellant/respondent filed the record of appeal outside the timelines set by the court on 24th October 2022. That there is no justification for the delay thereof.
7. In the second application, the appellant/applicant has sought the following orders;
 - a. That this Honourable Court may be pleased to grant the applicant extension of time to file and serve its Amended Memorandum of Appeal and its supplementary Record of Appeal out of time.
 - b. That the Amended Memorandum of Appeal amended on the 2nd day of February 2023 and filed on the 6th day of February 2023 and the Supplementary Record of Appeal dated the 3rd day of February 2023 and filed on the 6th day February 2023 be deemed as duly filed and served out of time.
 - c. That the amended Memorandum of Appeal amended on the 2nd day of February 2023 and filed on the 6th day of February 2023 and the Supplementary Record of Appeal dated the 3rd of February 2023 and filed on the 6th day of February 2023 be deemed as properly on record.
 - d. Spent.
 - e. That the costs of this application be provided for.
8. The basis of the second application is the appellant's supporting affidavit of eighteen paragraphs sworn on even date by Sylvia Wambani, the Senior Legal officer with the appellant and the accompany documents marked as "SW-1" "SW-2" and "SW-3" including Amended Memorandum of Appeal amended on 2nd February 2023 and the supplementary Record of Appeal dated 3rd February 2023 both filed on 6th February 2023 alongside 14 grounds, inter alia;



- a. That there was an honest and inadvertent error by Mr. Macharia to comply with the directions of this court issued on the 24th day of October 2022 within time. The applicant sincerely apologizes to this honourable court for the same.
 - b. That on the 6th day of February 2023 they filed the Amended Memorandum of Appeal amended on the 2nd day of February 2023.
 - c. That on the 6th day of February 2023 they filed the Supplementary Record of Appeal dated the 3rd day of February 2023.
 - d. That the applicant's amended memorandum of Appeal amended on the 2nd day of February 2023 and the supplementary record of Appeal dated the 3rd day of February 2023 are pertinent to the determination of the instant appeal.
9. The 1st respondent opposed the second application by her replying affidavit of twenty paragraphs sworn on 20th April 2023. She averred, inter alia, that the appellant was comfortable with the timelines given by the court on 24th October 2022 and that the appellant admits to violating the timelines. That the second application was not served on the 1st respondent and brought only after being served with the first application. That the appellant has not provided any justification for the delay in mounting the second application which is brought in bad faith, devoid of merit and should be dismissed.
 10. The 2nd respondent opposed the second application by her replying affidavit sworn on 8th September 2023 and termed the same a misnomer and an abuse of the court process. She averred in part that the appellant failed to comply with the court orders of 24th October 2022 and obtained no leave thereof. That there is no justification of the application which is brought in bad faith and that the same be dismissed.
 11. Both applications were heard by way of written submissions further to this court's directions given herein.
 12. By the submissions dated 27th October 2023, learned counsel for the 1st respondent provided the background of the first application including the orders of 24th October 2022 and that the respondents did not oppose the application for those orders. Counsel cited, among others, the decision in the case of *Econet Wireless (K) Ltd v Minister for Information of Kenya and another* [2005] KLR where the Court of Appeal opined;

“.....the court will not condone deliberate disobedience of it's orders.....”
 13. As regards the second application, learned counsel relied upon the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 others* [2014] KLR on the principles of extension of time including that an applicant has to provide a reasonable reason for the delay and that extension of time is not a right of a party but an equitable remedy available to a deserving party at the court's discretion. Counsel submitted that the second application did not meet the threshold in *Salat case* (*supra*) and that the appellant does not deserve the orders sought in the same application which should be dismissed and the first application be allowed accordingly.
 14. In the submissions dated 29th May 2023, learned counsel for the appellant referred to both applications the second application and submitted that the court has the discretion to allow the second application in accordance with the overriding objective under section 1A and 3A of the *Civil Procedure Act* (*supra*). That appellant be given an opportunity to be heard in the appeal. Counsel implored the court to grant the orders sought in the second application and disallow the first application.



15. To reinforce the submissions, counsel relied on authoritative pronouncements including *Nicholas Salat case* (*supra*) and *Bank of Africa Kenya Ltd v Put Sarajevu Genereal Engineering Co. Ltd & 2 others* [2018] eKLR. Further, that in *Joseph Kiangoi v Wachira Waruru & 2 others* [2010] eKLR, the Court of Appeal held;

“.....As a tool of justice, the overriding objective principle is both procedural and substantive.....”
16. By the appellant’s supplementary submissions dated 17th November 2023, reliance was made to *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] KLR and *Joseph Kiangoi case* (*supra*) and other cases. That the 1st respondent has not demonstrated any prejudice she will suffer that cannot be appeased by costs and urged the court to allow the second application.
17. The other respondents did not file submissions in respect of both applications.
18. In the foregone, it is the duty of this court to resolve;
 - a. Whether the appellant and the 1st respondent deserve the orders sought in their respective applications and
 - b. The orders to render to meet the ends of justice herein.
19. The first and second applications arose from the session of 24th October 2022 when learned counsel for the appellant/respondent moved this court thus;

“.....We pray for time to amend the record dated 19th October 2022 and file supplementary record of appeal and serve the same.”
20. The court granted the said prayer instantly. Therefore, the court directed that the appellant’s amended record of appeal and supplementary record be filed and served within sixty days from that date.
21. It is common ground that on 24th October 2022, this court issued orders and directions which resulted in the two applications. The orders are revealed in paragraph 2 of the supporting affidavit to the first application (MAO 1) and ground 2 set out on the face of the second application.
22. Time is stipulated under Order 50 of the *Civil Procedure Rules*, 2010. Extension of time to appeal out of time is captured in the proviso to section 79G of the *Civil Procedure Act* Chapter 21 Laws of Kenya; See also *Salat* and *Econet Wireless, Bank of Africa* and *Charles Karanja* cases (*supra*).
23. The appellant failed to comply with the said court orders. Also, there was delay of five months to originate the second application.
24. It is established law that any delay must demand a plausible and satisfactory explanation; see *Andrew Kiplangat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.
25. Furthermore, delay of a day will result in dismissal of the application in question if not explained. In *Raphael Musila Mutiso & 3 others v Joseph Ndava Nthuka and another* [2019] KLR thus;

“ ..a delay of a day will result in the application being dismissed if there is no explanation..... the reason for the delay has not been furnished.....”
26. Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya provide for overriding objective, powers and inherent jurisdiction of the court. Further, this court is guided by the overriding objective under section 3 of the *Environment and Land Court Act*, 2015[2011].



27. Clearly, Article 159 (2) (b) of the *Constitution of Kenya*, 2010, reads;

“Justice shall not be delayed.”

28. The appellant has not given plausible and satisfactory reason for failure to comply with court orders. The same are not made in vain but to ensure effective, efficient and administration of justice without delay which is the ultimate goal of this court.

29. No doubt, Article 159 (2) (d) of the said *Constitution* enshrines procedural and substantive justice; see also *Joseph Kiangoi* case (*supra*).

30. Moreover, I subscribe to the decision in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] KLR, where the Court of Appeal observed;

“.....We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all, ills, misdeeds and defaults of litigation.....”

31. In the circumstances, the appellant’s failure to comply with the court’s orders of 24th October 2022 is not curable.

32. It is therefore, the finding of this court that the first application is meritorious. The second application is devoid of merit.

33. Accordingly, this court determines the two applications thus;

- a. The first application dated 3rd March 2023, is hereby allowed in terms of prayer number (1) therein thus, the Appellant’s amended record of appeal and supplementary record of appeal lodged herein on 6th February 2023, hereby struck out.
- b. The second application dated 23rd March 2023 is hereby disallowed.
- c. Costs of the first and second applications to the 1st and 2nd respondents.

34. It is so ordered.

DATED and DELIVERED at Homa Bay this 12th March 2024

G .M. A ONG’ONDO

JUDGE

Present;

1.Mr. Linda Machuma learned counsel for the appellant/applicant

2.Mr. Jack Oronga learned counsel for the 1st respondent

3. Court Assistant, Luanga.

