



Boru v Tadi (Civil Application E009 of 2023) [2023] KECA 1592 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KECA 1592 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E009 OF 2023
AO MUCHELULE, JA
MAY 31, 2023**

BETWEEN

HASSAN BORU APPLICANT

AND

WAKO GALGALO TADI RESPONDENT

(An application for extension of time to file and serve the Notice of Appeal and Memorandum of Appeal out of time in an intended appeal against the judgment of the Environment and Land Court at Isiolo (P.M Njoroge, J.) dated 21st November 2022 In ELC Appeal No. 008 of 2021)

RULING

1. Rule 4 of the *Court of Appeal Rules, 2022* provides as follows:-

“The 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.”

2. The decision to grant extension of time entails the exercise of the court’s discretion. The discretion is unfettered, the only interest being that the court should do justice to the parties.

The discretion has to be exercised judiciously. In *Nicholas Kiptoo Arap Korir Salat –v- IEBC & 7 Others* [2015]eKLR, the Supreme Court was dealing with an application to extend time when it observed as follows:-

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



3. This Court has distilled some of the considerations to be borne in mind while dealing with an application for extension of time. In *Imperial Bank Ltd (In Receivership) and another –v- Alnasir Popat & 18 Others* [2018]eKLR, it was indicated as follows:-

“Some of the considerations to be borne in mind.....include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of the party who has a decision in his or her favour against the interests of a party who has a constitutionally under pinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal; and whether, prima facie the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be borne in mind that it is not really the role of the single judge to determine definitely the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

4. This application was brought under Rule 4, 41, 44, 45(3) and 49 of the *Court of Appeal Rules 2022*. It arose from the judgment of the Superior Court (P.M. Njoroge, J) in ELC Appeal No. 008 of 2021 at Isiolo in which the appeal by the respondent Wako Galgalo Tadi against the applicant Hassan Boru was allowed with costs. The respondent had sued the applicant before the subordinate court at Isiolo claiming to be the legitimate owner of Plot No. R – 29 K/Asharaf which he had allegedly bought from a third party who had been allocated the same by the Isiolo County Council. The applicant filed a defence and counterclaim. He claimed to be the owner of Plot No. E Chechelesi/283 and 284 which he was occupying. He saw no relationship between the two parcels. The respondent’s claim was dismissed and the applicant’s defence and counterclaim allowed. The respondent appealed to the superior court which found in his favour. It found that the defence and counterclaim by the applicant were fatally defective for not having been accompanied by a verifying affidavit, and so on. The court allowed the respondent’s suit in the subordinate court and dismissed the applicant’s defence and counterclaim. It found that the judgment of the subordinate court was “*void ab initio*”.
5. In the application dated 6th March 2023 seeking extension of time to file and serve a notice of appeal against the judgment of the superior court, it was explained by the applicant that he did not receive a copy of the judgment until December 2, 2022, by which time the time for the filing of the appeal had elapsed by three days. Secondly, that, following the judgment, he entered into negotiation with the respondent to settle the dispute out of court. By the time the negotiations collapsed, time had passed. He stated that the intended appeal had arguable points of law that had high chances of success. The points were enumerated in paragraph 11 of his supporting affidavit to include the contention that it was erroneous for his defence and counterclaim to be found to be incurably defective for want of a verifying affidavit; it was erroneous and unfair not to consider that he had a letter of allotment for the plot; the respondent’s claim had been allowed without proof of how he had acquired the plot; and that the superior court had erred by not dealing with the substance of the dispute as commanded by Article 159(2) of the and section 1A of the *Civil Procedure Act* relating to the overriding objective principle.
6. The respondent filed a replying affidavit to oppose the application. He denied that he had been involved in any attempt to negotiate the dispute out of the court; that neither the applicant nor his advocate had reached out to him or to his advocates. He stated that the file was always available in the registry and denied the claim that the earliest the applicant had accessed a copy of the judgment was on December 2, 2022. In any case, he stated, the judgment or proceedings were not required to file the notice of appeal. He pointed out that the applicant had not annexed a draft Memorandum of Appeal to enable



this Court to assess the possible chances that the intended appeal may have. Lastly, he swore that the application was in bad faith and intended to frustrate the fact of the judgment, and his enjoyment of the right to the suit property.

7. The applicant filed written submissions in which he contended that he stood to suffer prejudice if the application was not allowed as he was still in actual possession of the land, which the impugned judgment may affect. Referring to the decision in *Kenya Commercial Bank Limited –v- Pickwell Properties Limited* [2016]eKLR, he submitted that, in determining whether the applicant’s explanation for delay in lodging of the appeal was reasonable and excusable, the parties’ attempt to settle the matter out of court, which attempt had not borne fruit, was a reasonable explanation.
8. I have considered the application, the rival affidavits and the written submissions by counsel for the applicant. On the question of the arguability of the intended appeal, it was desirable that the applicant annexes a draft Memorandum of Appeal to his supporting affidavit. However, it is now trite that where such draft Memorandum of Appeal has not been annexed, the court can discern the applicant’s grievances and grounds of complaint from his supporting affidavit to the application (*Kiu & Another –v- Khaemba 3 Others* Civil Appeal (Application) E270 of 2021 [2021]KECA 318 KLR).
9. The applicant alleged that time passed when he was engaged in an out of court settlement of the dispute, which engagement did not bear fruits. The respondent denied that there was any such attempt. He swore that the applicant had not approached him or his advocate with a proposal to settle the matter. The applicant did not swear any further affidavit. He did not say that he wrote to the respondent or to his advocate with a proposal to settle. He did not say how such negotiations were attempted. I find that he has not substantiated the claim. It would appear that there was no such attempt to settle.
10. The impugned judgment was on November 21, 2022. If the applicant accessed a copy of the judgment on December 2, 2022, he was still within time to file a notice of appeal. It is also important to point out that the applicant was represented. It was not necessary to have a copy of the judgment to file a notice of appeal.
11. Consequently, I find that the applicant has not offered any acceptable explanation for the delay in bringing the appeal.
12. I consider that the application for extension of time was brought about three months after the time for the filing of the appeal had passed. There has been no explanation why the application could not be brought earlier. On the face, however, three months would appear to be a short period of delay, although any delay has to be satisfactorily explained (*Andrew Kiplagat Chemarigo –v- Paul Kipkorir Kibet* [2018]eKLR). I have considered that the parties are disputing over the ownership of a parcel of land. I have looked at the grounds that the intended appeal seeks to raise. They are not frivolous. In the particular circumstances of this case, I allow the application. I direct that the applicant does file and serve his notice of appeal within 7 days.
13. The applicant has been indulged. He will pay the costs of the application.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF MAY 2023

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

