



Peterson G Chiuri, Cornelius Mureithi Gatere, Elizabeth Wangui Kariungi, Isaac Gachango Muchiri, Gerald Gichogo Mutugi (As Trustees of Kaga Self Help Water Project) & 2 others v Ikinya (Civil Application E004 of 2020) [2023] KECA 1040 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KECA 1040 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E004 OF 2020
W KARANJA, J MOHAMMED & LK KIMARU, JJA
JUNE 16, 2023**

BETWEEN

**PETERSON G CHIURI, CORNELIUS MUREITHI GATERE, ELIZABETH WANGUI KARIUNGI, ISAAC GACHANGO MUCHIRI, GERALD GICHOGO MUTUGI (AS TRUSTEES OF KAGA SELF HELP WATER PROJECT) 1ST APPLICANT
THE LAND REGISTRAR, NYERI 2ND APPLICANT
THE COMMISSIONER OF LANDS 3RD APPLICANT**

AND

CHARLES MUCHEMI IKINYA RESPONDENT

(Being a reference under rule 55 of the Court of Appeal Rules from the ruling of (D. Musinga (P) dated 17th December, 2021 in an application under Rule 4 of the COA, 2010 seeking an extension of time within which to file an appeal from the decision of the High Court at Nyeri (J. K. Sergon, J.) dated 16th July 2011 in HCC Case No. 38 of 2011)

RULING

1. This is a reference to the full Court made under rule 55 of this [Court's Rules](#) from the decision of a single Judge (D.K. Musinga, JA) dated December 17, 2021. The learned Judge's ruling was pursuant to an application for extension of time, made under rule 4 of this Court's rules, whereby the applicant sought extension of time to file an appeal out of time, against the judgment of the High Court (J. K. Sergon, J.) dated 16th July. 2012.



2. In dismissing the application, the learned Judge held in part as follows:

“the impugned judgment having been delivered on July 16, 2012 and the application for extension of time having been filed on September 28, 2020, the length of delay of 8 years, is quite inordinate delay..

...However, when it became clear to the applicants that Messrs Gori, Ombongi advocates had not fully acted on their instructions way back in April 2018, the applicants ought to have moved with speed to instruct another firm of advocates to take up the matter. They did not do so until September 2020. That delay of nearly two years has not been explained at all. This court has severally held that each and every period of delay must be explained by a party before the court can exercise its discretion in favor of the applicant. I, therefore, find that there has been an inordinate delay that has not been well explained.”

3. The above findings by the learned Judge precipitated this reference before us.

4. Both parties filed submissions which learned counsel highlighted at the plenary hearing of the application.

5. In his oral submissions, Mr. Opolo, learned counsel for the applicants urged us to find that there was a satisfactory reason for the delay contrary to what the learned Judge stated. He explained that the delay was occasioned by the referral of the matter to the Advocates Complaint Commission on April 18, 2018 whereby a decision was made on December 6, 2018. Further, that the applicants lodged a dispute at the National Land Commission on November 7, 2019 and instructed their current advocate on July 29, 2020 who filed this application on the September 28, 2020 and the learned Judge had, therefore, erred in exercising his discretion against the applicants.

6. On whether the appeal has chances of success, counsel urged that the learned Judge had already made a determination on the merits of the intended appeal in his ruling, yet the appeal had not been heard. It was his submission that being a public utility land, the suit property was not transferrable to a private entity and this is one of the issues to be determined on appeal. Counsel urged us to allow the motion.

7. Ms. Njoroge, learned counsel for the respondent opposed the application. She urged that the learned Judge had not erred in his ruling since the applicant had failed to satisfactorily give the reasons for the 8 years' delay and on the issue of merit on the intended appeal, counsel urged that the subject matter was non-existent, which issue was not pleaded or contested by the applicants during trial. Counsel urged us to dismiss this reference with costs.

8. We have considered this application, the rival submissions and the relevant law. The principles that guide the exercise of judicial discretion are now well settled. In *Githiaka v Nduriri* [2004] 1KLR 67 this court reiterated, inter alia, that judicial discretion has to be exercised judiciously, that is to say on sound reason rather than whim, caprice, or sympathy.

9. Expounding on the principles that guide the court when dealing with a reference to full court, such as this one, this court in *John Koyi Waluke v Moses Masika Wetangula & 2 others* [2010] eKLR stated thus:

“having considered all that has been urged before us in this reference we would say that we have stated time without number that in exercising the unfettered discretion under rule 4 of this court's rules, a single judge of the court is doing so on behalf of the whole court and



the full bench of the court would only be entitled to interfere with the exercise of discretion if it is shown that in the process of exercising the discretion, the single judge has taken into account an irrelevant matter which he ought not to have taken into account or that he failed to take into account, or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law. It is not enough, for example, to show the full court that had it been sitting in place of the single judge, it would have arrived at a different result.”

10. For purposes of determining this application, we need to consider the principles that apply when a single judge is considering an application for extension of time under rule 4 of this Court’s rules. This principles are well settled and include the following;The length of the delay;The reason for the delay;Possibly the chances of the appeal succeeding andThe degree of prejudice to the respondent if the application is granted.

See this court’s decision in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*[1999] 2 EA231.

11. The paramount starting point is to consider the delay involved and the reasons for the delay that have been proffered by the applicants, and whether the said reasons suffice to persuade the court to extend time. In this case as rightly found by the single Judge there was a delay of eight years, which in our view unless accompanied by very solid good reasons is clearly inordinate. What then were the reasons given for the delay? The applicants said they had instructed the firm of Gori, Ombogi and Company Advocates to file an appeal against the impugned decision and they believed that the appeal had been filed, only to learn much later that no appeal had been filed. Upon realizing that the appeal had not been filed the applicants lodged a complaint with the Advocates Complaints Commission on April 18, 2018. It is however worth noting that by this time there was already a delay of six years and it is incomprehensible that the applicants did not follow up with their advocates to find out the status of the appeal, which they say they believed had been filed. The applicant went on to say that the advocates complaints Commission rendered this verdict on September 28, 2020delaying the matter further. Thereafter, the applicant lodged another complaint before the National Land Commission on or about 28th of September, 2020 and they later instructed counsel now on record to pursue the matter on 29th, September, 2020 and counsel filed this application without further delay.
12. The applicants maintain that the explanation given was sufficient for the court to extend time, and the learned Judge had, therefore, not exercised his discretion properly or judicially when he declined to extend the time after a delay of eight years.
13. It is worth noting that the court sitting as full bench on reference does not sit on appeal against the decision of the single Judge. All we need to address our mind to is weather the reasons for the delay as presented to the Judge were satisfactory, or the threshold required in law for the court to allow extension of time was met. As stated earlier the impugned judgment was delivered onJuly 16, 2012 and the application for extension of time was made on September 28, 2020, a delay of eight years. We note that indeed the applicants were represented by the same counsel in an application for stay of taxation of the bill of costs before the High Court on October 31, 2012 which was slightly one year after delivery of the said judgment and they did not file the application for extension of time until two or three years later. The applicants cannot therefore, be heard to say that they not aware that the matter was in court or that they had not followed up the filing of their appeal. The court notes further that between April 27, 2018 when the applicants say they complained to the Advocates Complaints Commission they did not do anything for the next two years until the application before the single Judge was filed. We, like the single Judge don’t find merit in this explanation given for the delay of eight years.



14. Addressing a similar issue in the case of *Bi-Mach Engineers Limited engineers v James Kaboro Mwangi* [2011] eKLR the court stated as follows:

“ the applicant had a duty to pursue his advocates to find out the position on the litigation, but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. 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 an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate”

15. We are not persuaded that the learned single Judge failed to exercise his discretion judicially in finding that the delay of eight years had not been sufficiently explained.

16. Having so found, it may not be necessary to consider any of the other laid down principles because the fundament of the application, which is the length of delay and the explanation given for it do not pass muster. We may however, point out that according to counsel for the respondent, the matter has been overtaken by events as the suit property no longer exists; and also given that the impugned judgment was rendered over ten years ago, the respondents would evidently be prejudiced if this application is allowed.

17. For the foregoing reasons, we find this application devoid of merit and dismiss it with costs to the respondent.

Dated and Delivered at Nyeri this 16th day of June, 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

