Mweu & 4 others v Gapco (K) Ltd (Civil Application E002 of 2023) [2023] KECA 706 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KECA 706 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E002 OF 2023

GV ODUNGA, JA

JUNE 9, 2023

BETWEEN

MARY MWALIA KISASA MWEU MUSYOKI KISASA MWEU PAUL KISASA MWEU .... 1ST APPLICANT

MUTUKU KISASA MWEU MUTUA .... 2ND APPLICANT

KISASA MWEU KAVITI KISASA .... 3RD APPLICANT

MWEU .... 4TH APPLICANT

PAUL KISASA MWEU .... 5TH APPLICANT

AND

GAPCO (K) LTD .... RESPONDENT

(Being an Application for extension of time to file Notice of Appeal, Memorandum of Appeal and Record of Appeal out of time against the ruling of Honourable Lady Justice Omollo Judge in the Environment and Land Court at Mombasa delivered on 3rd November, 2015 in the Environment and Land Case No. 329 of 2009)

RULING

1. The Applicants moved this court by a Motion on Notice dated December 19, 2022 seeking for leave to appeal out of time against the ruling of Hon Lady Justice Omollo made on the November 3, 2015 in Mombasa ELC Case No 329 of 2009.

2. The said Motion was supported by an affidavit sworn on behalf of all the applicants by Musyoki Kisasa Mweu, the 3rd applicant herein. The gist of the said affidavit was that upon the delivery of the said ruling, the applicants applied for typed copies of the proceedings and the ruling but were not availed until after the time prescribed for the appeal ran out. According to the Applicants, the said lapse of time was also contributed to by the fact that they were summoned by the National Land Commission

which indicated that it had taken over the matter. Based on the foregoing this Court was urged to allow the application in the interest of justice so that the intended appeal, which they contended raises arguable grounds, may be heard on its merits.

3. The application was opposed by the Respondent by way of a replying affidavit sworn by Isaac Onyango, the Respondent's advocate. According to the deponent, by an application dated July 8, 2019, the applicants sought orders similar to the ones sought herein. However, when the said application came up for hearing on November 13, 2019, the same was withdrawn with no order as to costs. Subsequently, the Applicants purported to file an application dated July 15, 2021, which purported to be an amended Motion of the application that had been withdrawn seeking the very same orders in the same matter. That application came up for hearing on April 4, 2022 and was withdrawn with costs upon the realisation from the grounds of opposition that there was no pending application in the matter that could be amended.

4. It was the Respondent's position that the decision sought to be appealed against was made 8 years ago while the original application was made 4 years ago hence the applicants are guilty of inexcusable, unexplainable and inordinate delay and are undeserving of the orders sought.

5. The applicants were accused of failure to disclose the existence of the previous applications as well as failing to explain each and every delay occasioned by them in the matter. These delays were set out as the delay in filing the Notice of Appeal within time which ought to have been by latest November 17, 2015; the delay from the said November 17, 2015 to April 4, 2016 when the said letter from the National Land Commission was issued; the delay of 3 years from April 4, 2016; delay of 3 years from November 13, 2019 when the application was withdrawn to August 12, 2021 when the amended application was made; delay from April 4, 2022 when the amended application was withdrawn to January 10, 2023 when the present application was made; and the delay of almost 3 months between October 30, 2014 when the Applicants' suit was dismissed for want of prosecution and January 5, 2015 when the application to reinstate the suit was lodged by the Applicants. It was further averred that the Applicants failed to disclose when the type proceedings were paid for or availed to them; and the date of and the outcome and or the findings of the National Land Commission.

6. According to the Respondent, over the years, the Applicants have slumbered, the Respondent was acquired, merged and or transferred its affairs to a different entity, Total Energies Limited, leading to reorganisation whose effect is that the relevant personnel who were in charge of the subject matter are no longer available and that any adverse order to be made will affect the said reorganisation.

7. According to the Respondent, the ruling of November 3, 2015 was a mere re-affirmation of the ruling delivered on October 30, 2014 which dismissed the suit for want of prosecution hence the setting aside the refusal to exercise the discretion under Order 17 Rule 2 of the *Civil Procedure Rules* is unlikely to advance the Applicants' suit which remains dismissed and whose dismissal has not been challenged. It was further disclosed that the Applicants have never been in possession, occupation and or enjoyment of the suit property.

8. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the *Court of Appeal Rules* are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended

appeal from which extension is required is arguable, that is that it is not frivolous appeal; and fourthly, whether the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.

9. Those principles were restated by Waki, JA in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR as follows:

> "The exercise of this Court's discretion under Rule 4... 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, (possibly) 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: See Mutiso v Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi v Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta v Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38."

10. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No 16 of 2014[2014] eKLR while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

11. In *Leo Sila Mutiso v Helen Wangari Mwangi* Civil Application No Nai. 255 of 1997 [1999] 2 EA 231 this Court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondents can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

12. In this case, it is clear that the Applicants had, vide their Notice of Motion dated July 8, 2019, sought orders similar to the ones sought herein. When the said application came up for hearing on November 13, 2019, the same was withdrawn and the Applicants' reason for the withdrawal was that the said application as drafted was incapable of being determined by a single Judge as some of the prayers sought therein could only be granted by the full Court. As rightly stated by the Applicants, the Court advised them to either amend the application or withdraw the same. They could have also applied, under the proviso to Rule 55(1) of the *Rules* of this Court to have the matter heard by the full bench of this Court. The Applicants opted to withdraw the said application on November 13, 2019. Nearly three years later, the Applicants sought to amend that very application that had been withdrawn and upon being notified that the application was withdrawn, withdrew the same on April 4, 2022. The present application was, however, not filed till January 10, 2023, about a year later.

13. It is clear that there has been inordinate delay since the decision sought to be appealed against was made on November 3, 2015. It is telling that that decision was itself a consequence of failure to take a necessary step in the proceedings.

14. The reason advanced by the Applicants is that they were let down by their counsel. In my view the Applicants ought to have learnt from the dismissal of their case and ought to have played an active part in ensuring that the subsequent steps towards the restoration or challenge of the decision were taken without any further delay. Whereas it is true that an advocate's mistake ought not to be visited against a client, where the client himself is also guilty of inaction in circumstances under which he would have ordinarily been expected to take an active role in the matter, the allegation of counsel's mistake would not avail him. This Court in *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR cited the holding in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR where it was held that;

> " it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In Mwangi v Kariuki
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> (199) LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude. In the instant case, there is nothing on record to show what action the appellant took between 24th October 1998 and 7th April 2005 to ensure that the suit he had filed at the High Court was prosecuted. There is no credible explanation for the delay by the appellant's former advocate."

15. In this case, I find that there was both inaction by the Applicants' counsel and the Applicants' careless attitude. Accordingly, I find the long periods of delay in taking appropriate actions have not been explained to my satisfaction. No explanation in the delay at the various stages in the proceedings was given.

16. On whether there will be prejudice suffered by the respondents if the extension is granted, the Respondent has explained that its legal status has since changed and that as a result of the its reorganisation getting witnesses who were there more than 8 years ago when the litigation commenced may not be possible. As regards public interest, it is my view that public interest leans towards expeditious disposal of cases. Parties who are lethargic in prosecuting their cases ought not to have discretion exercised in their favour where, as a result of such lethargy, the other party is likely to be prejudiced.

17. Having considered the issues raised before me in this application, I find it wholly unmerited and I dismiss the same with costs.

18. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE, 2023.

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR