



Tumpes v Kinuthia & another (Sued in their Capacity as Representatives of the Estate of Stephen Kinuthia, - Deceased) & 5 others (Civil Appeal (Application) E333 of 2022) [2023] KECA 824 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 824 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E333 OF 2022
HM OKWENGU, JA
JULY 7, 2023**

BETWEEN

KERENKE OLE TUMPES APPLICANT

AND

MONICAH WAMBUI KINUTHIA, AND TIMOTHY BABU KINUTHIA (SUED IN THEIR CAPACITY AS REPRESENTATIVES OF THE ESTATE OF STEPHEN KINUTHIA, - DECEASED) 1ST RESPONDENT
KINUWA CO LTD 2ND RESPONDENT
YOUNG TRADERS LTD 3RD RESPONDENT
YOUNG TRADERS (TIGONI) LTD 4TH RESPONDENT
KINUTHIA HOLDINGS LTD 5TH RESPONDENT
THE LAND REGISTRAR, NGONG LAND REGISTRY 6TH RESPONDENT

(Being an application under Rules 4 & 82 of the Court of Appeal Rules for extension of time within which to file an appeal against the Judgment and the Order of the Environment and Land Court (M.N. Gicheru, J) delivered on 1st March 2022 in ELC Cause No. E007 of 2021)

RULING

1. Kerenke ole Tumpes has filed a notice of motion dated May 24, 2022, seeking orders that this Court be pleased to exercise its discretion in his favour and enlarge the time limited by the Court of Appeal Rules for the filing of an appeal against the judgment of the Environment and Land Court (ELC) (Gicheru, J) delivered on March 1, 2022.



2. The application is anchored on the grounds stated in the body of the motion and an affidavit sworn by the applicant's advocate Fredrick Wamalwa Nakhulo. The grounds include the applicant's advocate having applied for copies of the record of proceedings and certified copy of the Ruling on March 1, 2022, and the same having been supplied on March 15, 2022 when he realized that none of the applicant's affidavits which had been filed were contained in the record and that there were other affidavits evidence sworn by Stephen Okundi Olweya, Ruth Wamuhu Ngigi and Itotia Kamau Kihura which counsel had not seen earlier.
3. Counsel states that he made efforts to obtain the affidavits from the Registry, but he was unable to get them although he went there three times. He then sought assistance from the secretary of the Judge, who sought time to speak to the Judge and later advising that the Judge was away and will be back in May, and it is then that he was advised to file an application. Counsel maintains that, that time for appearing was lost in the numerable follow-ups in person and phone calls with the registry which was inaccessible because of Covid protocols.
4. The applicant avers that immediately after delivery of judgment, his counsel applied for leave to appeal and made an oral request for typed proceedings and certified copies of the impugned decision; that thereafter, on March 1, 2022, counsel filed a notice of appeal and formally applied for the said certified copies; that he received a copy of the record of proceedings, a certified copy of the said ruling and a certified copy of the order on March 15, 2022 well within the 60 days' time prescribed by the Court of Appeal Rules for lodging an appeal from the ruling and order of the High Court; and that upon perusing the received copies, counsel noted the absence of any of the applicant's affidavits filed.
5. Counsel maintains that he noted that there was reference to affidavit evidence sworn by Stephen Okundi Olweya, Ruth Wamuhu Ngugi, the petitioner's rejoinder, and affidavit by Itotia Kamau Kihura, which were unfamiliar to the counsel who had taken up the matter towards the end of the case before the High Court; that the counsel made attempts to follow up with the registry staff, at first unable to find the file and when eventually they found the said file expressing inability to find copies of the said affidavit evidence; and that time limited for appealing was lost in the enumerable back and forth in person and phone call follow-ups with the registry of the Superior otherwise inaccessible because of Covid Protocols, these being circumstances beyond the control of the Appellant and his Advocates.
6. The applicant further avers that the intended appeal raises serious constitutional issues of public importance in regard to fair trial, procedural and substantive justice in the hearing and determination; that the applicant's fundamental rights were denied by the Superior Court below, by issuance of writs of certiorari and prohibition without just cause; and that unless this Court exercises its discretion to enlarge time for lodging the applicant will suffer irreparable loss. In support of the motion, the applicant has filed written submissions in which he relies on the decision by Nambuye J A in *Visbva Stone Suppliers Co Ltd v RSR Stone (2006) Limited* [2020] eKLR, for the principles for exercising the Court's judicial discretion to extend time.
7. In opposing the motion, the 1st to 6th respondents have filed a replying affidavit sworn by their advocate Geoffrey Monari Orina where he deposes that the motion is in bad faith, misconceived and vexatious and the same ought to be dismissed with costs. The respondents have also filed grounds of opposition in which they oppose the motion for being an abuse of the court process and also lacking merit.
8. The respondents maintain that the application reveals the delay was due to time wastage on the part of the applicant, and that no sufficient cause has been demonstrated to show why the applicant did not make use of the time allowed to him to institute his appeal on time; that the court ought to guard itself from the risk of relying on alleged delay which has not been proved as required by law; and that negligence and inaction cannot be circumstances beyond control of the applicant. The



respondents argued that the application has been overtaken by events as the impugned ruling upheld the respondents' preliminary objection based on law, and the applicant has not sought an order to have the matter heard afresh. Relying on *Velji Shamad vs Shamji Bros and Popatlal Karman & Co* [1957] EA 438, the respondents submit that they will be prejudiced if the orders sought are granted.

9. I have considered the applicant's motion, the supporting affidavit, and submissions as well as the respondent's replying affidavit, grounds of opposition, and submissions. In *Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR the Supreme Court had laid the principles to be applied in exercising the Court's discretion in an application for extension of time. The principles are:

- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to the deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
2. Whether the Court ought to exercise the discretion to extend time is a consideration to be made on a case to case basis;
2. Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the Court;
2. Whether there will be any prejudice suffered by the respondents if the extension is granted;
2. Whether the application has been brought without undue delay;
2. Whether in certain cases like election petition, public interest ought to be a consideration for extending time.”

10. Applying these principles, the issue before me is whether the applicant has laid a basis for the exercise of this Court's discretion by demonstrating that there were satisfactory reasons for the delay in filing the appeal and that the applicant's application for extension of time has been brought without undue delay. In addition, that there will be prejudice suffered by the respondents if the extension of time is granted.

11. In this case, the reasons for the delay are actually encapsulated in paragraph 1(vi) of the applicant's written submissions wherein it is stated:

“In the intervening time counsel for the applicant had a closer look at provisions of section 13 of the Environment and Land Court when it dawned on him that leave to appeal any order of the Employment and Labour Court arising from a preliminary objection was after all not required. In the premises, time limited for appealing was lost in the enumerable back and forth, in person and phone call follow-ups at the registry of the superior (sic), otherwise inaccessible because of Covid protocols and no less by an innocent but mistaken belief by counsel that leave was required to appeal the said order. A copy of the letter requesting the said copies was promptly served by email on counsel for the 1st to 6th respondents and on the 7th respondent the same day it was made and lodged with the superior court registry by email.”

12. The ruling was delivered on March 1, 2022. The applicant filed a notice of appeal and requested for copies of proceedings which it is admitted were supplied on March 15, 2022. Although the applicant



explains that some documents were missing from the proceedings, there was nothing that prevented the applicant from filing the record of appeal, and subsequently filing the additional documents by way of a supplementary record of appeal. It is clear that the pursuit of the documents that were missing did not prevent the applicant from filing the appeal with the available records. The truth of the matter is that the delay was caused by what is contained at paragraph 1(vi) of the written submissions. That is, the unnecessary back and forth in following up the records, and counsel's effort to get advice from the trial judge instead of properly perusing the Rules. This did not provide a reasonable explanation for the delay in filing the appeal, or the delay in filing the application for extension time.

13. For these reasons, I find that the applicant has not laid a good basis for the exercise of this Court's discretion in his favour. Accordingly, the application is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

