Ethics and Anti-Corruption Commission v Prosperity Developers & 5 others (Civil Application E016 of 2023) [2023] KECA 1196 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1196 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E016 OF 2023

WK KORIR, JA

OCTOBER 6, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION ..... APPLICANT

AND

PRIGAL LTD ..... 1ST RESPONDENT

PROSPERITY DEVELOPERS ..... 2ND RESPONDENT

NATIONAL LAND COMMISSION ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

DIRECTOR OF SURVEY ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

(Being an application for extension of time to lodge and file a record of appeal out of time against the decision of Environment and Land Court at Nakuru (J.M. Mutungi, J.) dated 27th September 2022) in ELC Petition No. 24 of 2019)

RULING

1. The applicant, the Ethics and Anti-Corruption Commission (EACC), has brought the instant application by way of notice of motion dated 23rd February 2023 pursuant to Sections 3A and 3B of the *Appellate Jurisdiction Act* and rules 4 and 47(1) and (2) of the *Court of Appeal Rules,* 2022. The application seeks orders for leave to be granted to the applicant to lodge and serve the record of appeal out of time; that the record of appeal dated 17th February 2023 and filed on 22nd February 2023 be deemed as duly filed; and that the cost of this application be in the cause. The application is supported by the affidavit of one Agosta Mecca sworn on the date of the application.

2. The applicant's case is that it was enjoined in Nakuru ELC Petition No. 8 of 2019 as an Interested Party as the property which was the subject of the petition is public land and had been set aside for utilization by the Kenya Agricultural and Livestock Research Organization (KALRO). It is averred that the Environment and Land Court in its judgment pronounced itself on the issue of ownership of the land thereby giving the land to Prosperity Developers and Prigal Ltd, the 1st and 2nd respondents respectively. Further, that the two respondents were also awarded costs of the suit against the applicant. The applicant contends that the question of ownership of the suit land was not an issue in the petition and the trial court proceeded to render itself on that question without according the applicant or any other government agency an opportunity to adduce evidence. The applicant therefore asserts that it has an arguable appeal and the present application is made in the interest of the public. According to the applicant, the respondents will not suffer any prejudice since the delay is not inordinate. The applicant prays that should leave be granted to file the appeal out of time, the record of appeal already filed be deemed as duly filed.

3. The applicant also avers that the delay in filing the suit on time was occasioned by the delay in obtaining the certified copies of the proceedings, judgment and decree as shown in the certificate of delay annexed to the application. Agosta Mecca further explains that the certified copies of the proceedings were prepared between 28th September 2022 and 25th October 2022 and the certificate of delay was availed on 31st January 2023.

   Another reason advanced by the applicant for the delay is that during the material time there was transition in its leadership hence delaying the issuance of instructions to appeal the impugned decision. The applicant has therefore urged this Court to allow the application.

4. The application was opposed by the 1st and 2nd respondents through the affidavit of James Waweru Njoroge who avers that no reasonable or sufficient reason has been given for the delay in filing the appeal. He deposes that the applicant's notice of appeal was deemed withdrawn on 24th December 2022 by virtue of Rule 85(1) of the Court of Appeal Rules. Further, that the delay between 25th December 2022 when the time for filing the appeal lapsed and 23rd February 2023 when the present application was lodged has not been explained. According to the 1st and 2nd respondents, the retirement of the applicant's chairperson cannot be good reason for the delay as the chairman was not a lawyer who would be required to prepare and file the record of appeal.

5. It is also the 1st and 2nd respondents' contention that under rules 84 and 89 of the *Court of Appeal Rules,* the certificate of delay is not a mandatory component of the record of appeal; and the applicants ought to have lodged their record of appeal and later file a supplementary record containing the certificate of delay. They also aver that the applicant has not tendered any evidence to show that they diligently followed up on the certificate of delay with the court registry. Further, that the applicant only filed this application after being served with their bill of costs and notice of taxation and the applicant's intention is purely to derail the realization of the benefits accruing from the judgment.

6. The 1st and 2nd respondents also aver that if the application is allowed, they will be subjected to great prejudice, gross injustice and irreparable loss as their right to enjoy the fruits of the judgment will be indefinitely delayed. Further, that the present application is geared towards obstructing the finalization of disputes by resurrecting an appeal which the applicant lacks the desire to prosecute. According to the 1st and 2nd respondents,there are over 300 innocent purchasers of the suit property who have been barred from freely utilizing their property since 2019 when the 3rd respondent, the National Land Commission, unlawfully revoked the mother title to the suit property. They assert that the resuscitation of the present appeal will be costly to them as they will have to instruct lawyers. Further, that allowing the application will amount to the Court assisting an indolent party.

7. According to the 1st and 2nd respondents, the intended appeal is not arguable, frivolous and an abuse of the court process. They depose that the question of ownership of the mother title and the subdivisions arising therefrom was fundamental to the petition and the trial court could not have issued the orders sought without determining the issue of ownership. The 1st and 2nd respondents contend that there is no iota of public interest in the intended appeal as the dispute was solely about the unlawful and ultra vires revocation of their title. They also state that the proceedings in the trial court were subject to a consent order entered into by all parties on 21st September 2021 to the effect that the petition was to be heard by way of affidavits and written submissions and the trial court was not bound to accept viva voce evidence. In the end, the 1st and 2nd respondents pray that this application be dismissed with costs.

8. This application was canvassed by way of written submissions. Counsel for the applicant, Ms Judith Tabitha through submissions dated 10th May 2023 asserted that under Rule 4 of the Court of Appeal Rules, this Court has unfettered discretion to extend time upon considering the length of delay, reasons for delay, chances of the appeal succeeding and the degree of prejudice to be suffered by the respondent if the application is allowed. Counsel referred to the decisions in the cases of *Imperial Bank Ltd (in receivership) & Another vs. Alnasir Popat & 18 other*s [2018] eKLR and *Patel vs. Waweru & 2 others* [2003] KLR 361, among others, as enunciating the considerations upon which time may be enlarged. Counsel explained that the delay of 40 days in filing the record of appeal was occasioned by administrative changes as the applicant's then chairman was exiting and handing over. According to counsel, the administrative changes occasioned a delay in strategic consultations and resolutions therefore stalling any action as the counsel on record could not proceed without proper instructions from the applicant through its secretariat.

9. As to whether the appeal is arguable, counsel submitted that they raised 9 grounds in the annexed memorandum of appeal which calls for the determination of this Court.

10. Finally, on the question as to the prejudice to be suffered by the parties, counsel submitted that the public interest would be prejudiced if the application is not allowed. Counsel further argued that allowing the application will accord the parties an opportunity to have the question of ownership of the suit property resolved with finality. Counsel submitted that the public generally stand to suffer great injustice and prejudice if the orders sought are not granted thus resulting in the possibility of the loss of close to 1,000 acres of public land to the 1st and 2nd respondents. Counsel therefore urged that the application be allowed.

11. For the 1st and 2nd respondents, the law firm of Litoro & Co. Advocates filed submissions dated 22nd May 2023. Counsel set off by submitting that the applicant's supplementary affidavit as well as the purported record of appeal dated 17th February 2023 were incompetent, irregular and a nullity as they were filed without leave of the Court. Counsel urged this Court to expunge the said documents from the record. This argument was buttressed by reference to the case of *County Executive of Kisumu vs. County Government of Kisumu & 8 others* [2017] eKLR where the Supreme Court held that an appeal filed out of time and documents filed without the leave of the Court are irregular, illegal and incompetent. Counsel also submitted that the application was bereft of merit and that the submissions by the counsel for the applicant were distorted and baseless. According to counsel, the present application failed to meet the threshold set in County Executive of Kisumu vs. County Government of Kisumu & 8 others (supra). Counsel further submitted that the time for filing the record of appeal lapsed on 6th January 2023 resulting in the expiry of the notice of appeal by virtue of rule 85(1) of the *Court of Appeal Rules*. Counsel contended that the delay in filing the record of appeal was long, inordinate, inexcusable and unreasonable. Counsel also submitted that the applicant had not advanced any reasons to explain the delay in the filing of the appeal. Counsel referred to the cases of *Trade Bank*

Ltd (in liquidation) vs. L.Z. Engeneering Construction Ltd & Another, Civil Appeal No. NAI282/92 as cited in *Hezron Alloys Nyachae vs. James Obiri Oenga & Another* [2016] eKLR, as well as *Mae Properties Ltd vs. Joseph Kibe & Another* [2017] eKLR to buttress the arguments.

12. Counsel rejected the applicant's claim that the delay was caused by the change in its leadership, and submitted that as was held in *County Executive of Kisumu vs. County Government of Kisumu & 8 others* (supra) and *Karny Zahrya & Another vs. Shalom Levi* [2019] eKLR, once a notice of appeal is filed, counsel does not need any further instructions to file the record of appeal.

13. In opposition to the applicant's assertion that his clients will not suffer any prejudice if the prayers sought are allowed, counsel submitted that the 1st and 2nd respondents' rights under Article 27(1) of *the Constitution* would be trampled upon if the application is allowed as the negligence of the applicant would be overlooked. Still on the issue of negligence on the part of the applicant, counsel contended that the failure to extract the trial court's decree demonstrates that the applicant is not interested in prosecuting the intended appeal. Counsel maintained that the intended appeal is frivolous and is only meant to frustrate the 1st and 2nd respondents' right to enjoy the fruits of their judgment. According to counsel, public interest requires that there be a finality to litigation. This Court was urged to dismiss the application with costs.

14. In an application brought under rule 4 of the *Court of Appeal Rules*, the Court is called upon to exercise its unfettered discretion to extend time for doing an act that has been overtaken by time. In exercising the discretion, the Court should do so judiciously and upon reason and not arbitrarily or capriciously. It is trite that Rule 4 does not provide the factors the Court ought to take into account when rendering itself on an application for enlargement of time. The factors to be considered in determining such an application are found in case law. In *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court laid down the principles that govern the exercise of discretion in applications for extension of time as follows:

> " 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a 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
>
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
>
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
>
> 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
>
> 6. Whether the application has been brought without undue delay; and
>
> 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

15. This list is not exhaustive and at the same time, not all considerations listed therein must be applied in every case. A court seized of an application for extension of time retains the discretion to decide what

considerations are applicable to the case before it. In that regard, this Court in *Margaret Muthoni Muchiga vs. Esther Kamori Gichobi* [2010] eKLR stated that:

> " Although there is no limit to the number of factors available for consideration so long as they are relevant, there is no requirement that all these factors be considered in any application. The facts and circumstances of each application will normally dictate the exercise of the Court's discretion; see Samuel Kinyua Mutugi v. Eutychus Muthui (Civil Application No. Nai 334 of 2004 (unreported), underlining emphasized."

16. I have considered the application, the replying affidavit and the submissions of both parties in accordance with the stated principles. In my view, this application turns on the resolution of the following issues; whether the delay was inordinate, whether the applicant has tendered sufficient reasons for the delay, and whether the respondent will suffer any prejudice if the application is allowed.

17. The first issue for my determination is whether the delay was inordinate. Rule 84 of the *Court of Appeal Rules* provides the timelines within which an appeal should be filed as follows:

> " 84. Institution of appeals
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> 1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
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> a. a memorandum of appeal, in four copies;
>
> b. the record of appeal, in four copies;
>
> c. the prescribed fee; and
>
> d. security for the costs of the appeal:
>
> Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.
>
> 2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent."

18. From the record, the impugned judgment was delivered on 27th September 2022 and the notice of appeal was filed on 3rd October 2022. The letter be-speaking the proceedings was lodged in the registry on 28th September 2022. The applicant was therefore entitled to benefit from the proviso to Rule 84(1). Further, according to the certificate of delay, it took 27 days to prepare the proceedings which period ended on 25th October 2022. The certificate of delay was collected on 31st January 2023. Therefore, the 60 days period for filing the record of appeal terminated on 16th January 2023. This application having been filed on 23rd February, 2023, the period of delay was 37 days. However, by virtue of rule 3(e) of the *Court of Appeal Rules*, the period of the Christmas recess is not to be reckoned in the computation of

time. Therefore, the period of delay was even shorter. In considering the concept of inordinate delay, this Court in *Cecilia Wanja Waweru vs. Jackson Wainaina Muiruri & another* [2014] eKLR held that:

> " There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned Judge in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed."

19. Still on the issue of statutory timelines, the Supreme Court in *Hassan Nyanje Charo vs. Khatib Mwashetani & 3 others* [2014] eKLR expressed itself as follows:

> "(31) In the emerging jurisprudence, the concept of "timelines and timeliness" is generally upheld, as a vital ingredient in the quest for efficient and effective governance under *the Constitution*.
>
> (32) However, even as we take due account of that context, we remain cognizant of the Court's eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice."

20. It follows therefore that in assessing whether delay is inordinate in a particular case, the Court must bear in mind what the Supreme Court refers to as "compelling considerations of justice." Such considerations were stated by this Court (W. Ouko, (P), (as he then was)) in *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* [2020] eKLR as follows:

> " Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned 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 or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In considering the last principle, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal."

21. In my view, the delay on the part of the applicant cannot be said to be inordinate unless the explanation tendered for the said delay is unsatisfactory.

22. This then brings me to the second issue as to whether the applicant has tendered sufficient explanation for the delay. In County Executive of Kisumu vs. County Government of Kisumu & 8 others [supra], the Supreme Court held that the whole period of delay should be declared and sufficiently explained. From the record, the applicant's explanation for the delay was that the same was occasioned by the administrative changes in the office of its chairperson which led to interruptionof strategic consultations and resolutions. Another reason advanced for the delay by the applicant is that it was occasioned by the late release of the certified copies of the proceedings, judgment, decree and the certificate of delay which were issued on 31st January 2023. In my view, the main issue herein is whether the applicant has explained the further delay of 23 days after receipt of the certificate of delay. I believe the sole explanation for this is that the applicant's chairperson was in the process of handing over

and leaving office. This is a plausible explanation in the circumstances of this case. It is imperative to appreciate, and as acknowledged by the 1st and 2nd respondents, that the applicant's chairperson exited office on 17th January 2023. It would then follow that the applicant's explanation for the delay having been occasioned by their chairman's exit is reasonable and believable. The applicant is a public institution and the lodging of an appeal involves expenditure of public funds. It is therefore likely that the decision whether or not to lodge an appeal cannot be made solely by counsel. In the circumstances, I find that explanation sufficient for the short period of delay.

23. The final issue for determination is whether the respondents will suffer any prejudice. According to the 1st and 2nd respondents, their rights under Article 27(1) of *the Constitution* would be trampled upon if the application is allowed as the negligence of the applicant would be overlooked. They also contend that the applicant's intention is to subject them to prejudice, gross injustice and irreparable loss by indefinitely delaying their right to enjoy the fruits of the judgment. They further contend that if this application is allowed, it will obstruct the finalization of this dispute by resurrecting an appeal which the applicant lacks the desire to prosecute. It is also their contention that there are over 300 innocent purchasers of the suit property who have been barred from freely utilizing their property since 2019 when the 3rd respondent unlawfully revoked the mother title. They additionally assert that the resuscitation of the intended appeal will be costly to them as they will have to instruct lawyers. Finally, the 1st and 2nd respondents contend that allowing the application will amount to the Court assisting an indolent party. The applicants' counter argument is that it is the interest of the public to have the ownership of the suit property litigated on appeal as the public stands the risk of losing over 1,000 acres of land.

24. Indeed, in an application such as this one, I am called upon to balance the competing interests of the parties. This responsibility was expressed by this Court in *Kenya Railways Corporation vs. Quicklubes E.A. Limited* [2015] eKLR as follows:

> "The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case M/s Portreitz Maternity V James Karanga Kabia, Civil Appeal No. 63 OF 1997 where the Court stated:
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> "That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."

25. From the memorandum of appeal annexed, the crux of the intended appeal revolves around ownership of land parcel number 5212. That being the case, I find that the intended appeal questions the title owned by the 1st and 2nd respondents in respect of a property that the applicant claims belongs to the public. The importance of subjecting disputes touching on public land to appeals was stated by the Supreme Court holding in *Pati Limited vs. Funzi Island Development Limited & 4 others* [2019] eKLR as follows:

> "(39) We therefore find that it is in the public interest that this Court settles with finality the question whether the land subject of this matter belongs to the Applicant or whether it fraudulently acquired its title. At play also is the balancing between private interests vis-s-vis public interest. This balancing and determination is a matter of general public interests."

26. In my view, it is in the interest of justice that this appeal be canvassed so that the ownership of the parcel of land in question can be determined once and for all. The delay that the 1st and 2nd respondents will

suffer as they await the hearing and the determination of the intended appeal will be balanced out by the right of Kenyans to know if the land in question was legally acquired by the 1st and 2nd respondents. The intended appeal therefore offers the parties an opportunity to have their contradicting claims to the suit property settled once and for all. As for the alleged financial prejudice to be suffered by the 1st and 2nd respondents if the application is allowed, I only need to say that legal expenses can always be compensated by way of costs. In the end, I find that public interest in this matter outweighs the prejudice that may be suffered by the 1st and 2nd respondents.

27. In conclusion, this application has merit and is hereby allowed in the following terms;

    a. That the applicant be and is hereby granted leave to file and serve the record of appeal out of time;

    b. That the applicant's record of appeal dated 17th February, 2023 and filed on 22nd February, 2023 be deemed as duly filed;

    c. That the applicant should serve the record of appeal upon all parties within 21 days of the date of this ruling;

    d. That the costs of this application be in the cause;

28. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023

DEPUTY REGISTRAR

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR