



**Ambiro v Wanyande (Civil Application E468 of 2023)
[2023] KECA 1657 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1657 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E468 OF 2023
DK MUSINGA, JA
DECEMBER 15, 2023**

BETWEEN

MAURICE ODUOR AMBIRO APPLICANT

AND

JAMES ODUOR WANYANDE RESPONDENT

(Being an application for extension of time to file a notice of appeal and record of appeal from the judgment and decree of the Environment and Land Court at Nairobi (L. Mbugua, J.) dated 2nd February 2023 in ELC Case No. 224 of 2017)

RULING

1. The applicant by way of a Notice of Motion dated 11th October 2023 and which is brought pursuant to the provisions of rule 4 of this Court's Rules seeks extension of time to file the notice of appeal and record of appeal from the judgment and decree of the Environment and Land Court at Nairobi (L. Mbugua, J.) dated 2nd February 2023 in ELC Case No. 224 of 2017.
2. The grounds in support of the application are borne on the face therefore and in the affidavit in support sworn by the applicant. He contends that the trial court delivered an ex- parte judgment against him on 2nd February 2023; that he immediately instructed his advocate on record to file an application to set aside the exparte judgement, which he did, but was dismissed by the trial court vide a ruling dated 20th April 2023. Upon dismissal of the said application, he approached this Court vide an application dated 17th May 2023 seeking to stay the decision of the trial court dated 20th April 2023. It is contended that one of the annexures in the application for stay was a notice of appeal dated 25th April 2023. The application dated 17th May 2023 was withdrawn vide an order made by this Court on 3rd October 2023.
3. The applicant contends that there was an error and/or mistake on the part of his advocate in not filing a notice of appeal against the judgment of the trial court dated 2nd February 2023 and that the delay in filing the said notice of appeal is as result of the said error and/or mistake on the part of his advocate.



4. He further states that he has an arguable appeal with high chances of success; that he is likely to suffer prejudice if the application is not allowed as he stands to lose his parcel of land which is registered in his name; and that the respondent shall not suffer any prejudice if the application is allowed.
5. The application is opposed by way of a replying affidavit sworn by the respondent. The gist of his reply is that the applicant did not file any defence to the suit before the trial court, which he interprets to mean that he did not actually have any sound defence to raise. It is further contended that the applicant had earlier filed a notice of appeal on 5th February 2023 against the judgment of the trial court but later withdrew it. In sum, he contends that the applicant has all along ignored court orders and has been abusing the court process and therefore he is undeserving of the orders sought in his application.
6. Through written submissions dated 14th November 2023, the applicant reiterates that he has met all the requirements for grant of the orders sought. He contends that mistakes of counsel should not be visited upon a client who had given instructions to his advocate. Reliance for this argument was placed on the decision of this Court in *Belinda Murai & 9 others v Amos Wainaina* [1979] eKLR. The respondent did not file any written submissions.
7. I have considered the application, the grounds in support thereof, the respondent's replying affidavit, submissions by counsel and the law. The factors to be considered in applications of this nature have been restated in numerous decisions of this Court. In *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231, the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”
8. Turning to the merits of this application, the decision which the applicant intends to appeal against was delivered on 2nd February 2023. Pursuant to the provisions of rule 77 (2) of the *Rules* of this Court, the period for filing the notice of appeal lapsed on or about 16th February 2023. Although the applicant has filed a notice of appeal dated 25th April 2023, the same is in response to the ruling of the trial court delivered on 20th April 2023 and not against the ex-parte judgment delivered on 2nd February 2023. In essence therefore, there is a delay of more than 8 months from the date of delivery of the impugned judgment and the date of the instant application.
9. The explanation given is that there was an error and/or mistake on the part of his advocate in not filing an appeal against the decision of the trial court dated 2nd February 2023. Interestingly though, the applicant has not stated when he instructed his advocate to file an appeal against that said decision. There is no evidence adduced to show that he actually gave any such instructions to his advocate. On the contrary, he has succinctly deponed that upon delivery of the ex-parte judgment he instructed his advocate to apply to have it set aside. The applicant could have procured an affidavit sworn by his advocate (who is still on record for him in these proceedings) confirming receipt of such instructions. In the absence of evidence to show that such instructions were given, the averment that the delay was occasioned by error and/or mistake on the part of the advocate does not hold water.
10. I agree with the applicant's argument that mistakes of counsel should not be visited upon an innocent client. However, absent proof that instructions were given to the advocate to lodge an appeal, it would be idle for the applicant to lay blame on his advocate for not having instituted the appeal. I am therefore



not convinced that the reasons advanced by the applicant for his delay in instituting an appeal against the ex- parte judgment is plausible. The delay of about 8 months has therefore not been satisfactorily explained and it is therefore, for all intent and purposes, inordinate and inexcusable.

11. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”

12. As the reason for the delay has not been satisfactorily explained by the applicant, it would be superfluous for me to apply my mind to the other factors to be considered in applications of this nature. In the result, I decline to exercise my discretion to grant the prayer to extend time. Accordingly, I dismiss the application dated 11th October 2023 with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

D. K.MUSINGA (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

