



**Majiwa v Otieno (Civil Appeal (Application) E016 of 2021)
[2023] KECA 1485 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1485 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E016 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
DECEMBER 8, 2023**

BETWEEN

OBARE MAJIWA APPLICANT

AND

MARTIN OOKO OTIENO RESPONDENT

*(Being a reference to a full bench from the Ruling of the Court of
Appeal at Mombasa (Gatembu, JA.) dated 3rd February 2023)*

RULING

1. By a plaint dated 30th June 2016 filed in the Environment and Land Court at Mombasa in ELC No. 179 of 2016, the respondent sought as against the applicant the following reliefs: a permanent injunction restraining the respondent from dealing in plot No. 23 Sosiani Shopping Centre, Mombasa (the suit property); a declaration that the respondent was the owner of the suit property; orders that the applicant be evicted from the suit property; and costs of the suit.
2. The respondent's case was that he purchased the suit property from the applicant's step mother, one Margaret Majiwa (deceased), on 8th October 2015; that the respondent took vacant possession thereof and undertook additional developments thereon; that the applicant forcibly removed his (the respondent's) Tenants from the suit property; and that the applicant had started renting the premises to other tenants and receiving rent from them.
3. In his defence dated 14th July 2016, the applicant denied the respondent's claim and averred that he was not aware of the alleged sale by his step mother of the suit property to the respondent; that the suit property was family land owned by his deceased father, Ogola Majiwa; and that his step mother had no power to sell and convey title to the suit property as no letters of administration had been taken out in respect of the estate of his deceased father.



4. In its judgment dated 29th June 2018, the ELC (A. Omollo, J.) allowed the respondent's claim as prayed.
5. Dissatisfied with the decision of the trial court, the applicant moved to this Court on appeal on 8 grounds set out in his memorandum of appeal dated 20th January 2021, essentially faulting the learned Judge for, inter alia, holding that the respondent was an innocent purchaser for value without notice; holding that Margaret Majiwa enjoyed constructive ownership of the suit property; and for holding that neither the applicant nor his siblings came forth to claim the suit property during the lifetime of their deceased step mother.
6. It is noteworthy that, although the applicant lodged his notice of appeal in good time on 3rd July 2018, he took no further steps in the proceedings until 16th February 2021 when he filed his memorandum of appeal dated 20th January 2021, more than two-and-a-half years later.
7. Thereafter, it took the applicant about one-and-a-half years to apply for extension of time to file and serve his record of appeal out of time vide his Notice of Motion dated 8th June 2022 and filed on 14th June 2022 pursuant to rule 4 of the Court of Appeal Rules. He also prayed that the record of appeal already filed be deemed as "properly filed". His Motion was anchored on the grounds that the delay was occasioned by his counsel on record, who took no steps to file and serve the record of appeal; that he had reminded his counsel on numerous occasions to take further steps in the proceedings, but in vain; that he lost faith in his former advocates and instructed M/s. Gikandi & Company, who lodged his Motion for extension of time; and that the consequences of his former advocates' inaction ought not to be visited on him.
8. Even though the respondent did not file any reply to the applicant's Motion, the Hon. Justice S. Gatembu Kairu, JA. declined to extend time as prayed. As the learned Judge correctly observed in his ruling dated 3rd February 2023:
 10. ... under the Rules, the applicant should have instituted his appeal by lodging his memorandum and record of appeal within sixty days from 3rd July 2018. Sixty days would have taken him to 3rd September 2018. That was not done. The next activity on the matter was on 15th February 2021 when M/s Gikandi & Company Advocates on behalf of the applicant filed the memorandum of appeal albeit the same was dated three weeks earlier on 20th January 2021.
 11. Between 3rd September 2018 and 20th January 2021 is a period of over 2 years 4 months. How does the applicant explain that delay? He says that he "made numerous inquiries" with his former advocates and was not given "proper status update." He does not state when he made those inquiries.
 14. In present case as in that case, the applicant's previous Advocates are simply accused of inaction. Moreover, beyond the statement that he made inquiries with the previous advocates, he has not supplied sufficient information in that regard as to when those inquiries were made or why he waited for over two years to change his advocates."
9. Dissatisfied with the ruling of S. Gatembu Kairu, J., the applicant comes on reference to a full bench pursuant to Rule 57 of the *Court of Appeal Rules*, 2022 vide his letter dated 7th February 2023 in compliance with the timelines, to wit, 7 days as prescribed in Rule 57(1) (b), to which we need not address ourselves.



10. Learned counsel for the applicant, M/s. Gikandi & Company, filed written submissions dated 13th June 2023 citing judicial authorities to back his foundational submission that a client should not suffer from the mistake of his counsel (see *Pitbon Waweru Maina vs. Thuku Mugiria* [1983] eKLR and *Belinda Murai & 9 Others vs. Amos Wainaina* [1983] eKLR). Counsel also cited the case of *Fakir Mohammed vs. Joseph Mugambi & 2 Others* [2005] eKLR for the proposition that extension of time under rule 4 should be liberally granted; and *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, submitting that enlargement of time should be allowed if not opposed, and as long as the respondent would be compensated by an award of costs. They urged us to allow the application on Reference.
11. In response, learned counsel for the respondent, M/s. Akanga Alera & Associates, filed their written, but undated, submissions. Counsel cited this Court's decisions in *Sokoro SACCO vs. Mwamburi* [2023] KECA 381 and *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others* [2014] eKLR on the settled principles that govern the exercise of the Court's discretion in applications for extension of time under rule 4 of the Court's Rules. They urged us to dismiss the application with costs.
12. The decisive question before us is whether the circumstances of this case justify interference with the impugned decision of Gatembu Kairu, JA.? We are not so persuaded. The applicant's submission that the glaringly inordinate delay was occasioned by mistake of his counsel; that he should not suffer from the mistake of his counsel; that the respondent had not opposed his application and that, therefore, stood to suffer no prejudice from the orders sought to extend time; and that the respondent can be compensated by an award of costs, cannot hold.
13. In *Kenya Co-Operative Creameries Ltd vs. Fims Ltd* [2006] eKLR, the Court of Appeal held:

“In hearing matters brought under rule 4 of this Court's Rules, the single Judge exercises unfettered discretionary powers which in law must be exercised upon reason and not capriciously. Once the single Judge has so exercised the same discretion, and made a decision on the matter, the full bench will be very slow in interfering with the same exercise of discretion by a single Judge unless it is demonstrated that the single Judge, in the exercise of the same discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice (see the case of *Mbogo Vs. Shah* (1968) EA 93 at page 96).”
14. We find nothing on the record as put to us to suggest that the learned Judge misdirected himself in any of the matters falling to be considered; or that he arrived at a wrong decision; or that he was wrong in exercise of his unfettered discretion. In our considered view, the learned Judge correctly exercised his discretion, and his decision was by no means a misjustice.
15. In *Simeon Okingo & 4 others vs. Benta Juma Nyakako* [2021] eKLR, this Court set out the considerations to be made by the full bench in the following words:

“12. In an application under Rule 4 of this Court's Rules, as was the one before the learned single Judge of this Court, the single Judge is exercising unfettered discretion, on behalf of the whole Court; such discretion ought to be exercised based on proper principles of law. Therefore, the full bench would only interfere with the exercise of such discretion if it is apparent that the single Judge took into account an irrelevant matter which he/she ought not to have taken into account or failed to take into account a relevant matter which he/



she ought to have taken into account or that he/she misapprehended the law applicable and evidence before him or that his decision was plainly wrong.”

16. Finally, we hasten to point out that alleged mistake of counsel does not of itself cure the litigant’s own inaction. Moreover, it is a litigant’s case and not that of his counsel. The primary responsibility to act within the prescribed timelines under this Court’s Rules rests heavily on the litigant’s shoulders. With regard to the responsibility of the litigant to follow up their case, Waki, J.A. had this to say in Habo Agencies Limited vs. Wilfred Odhiambo Musingo[2015] eKLR:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

17. Having carefully considered the applicant’s reference, the rival written and oral submissions of learned counsel for the parties, the cited authorities in the backdrop of this Court’s Rules, we reach the inescapable conclusion that the applicant’s reference fails and is hereby dismissed. Accordingly, the ruling of S. Gatembu Kairu, J. dated 3rd February 2023 is hereby upheld. The costs of this reference shall be borne by the applicant. Orders accordingly.

DATED AND DELIVERED AT MALINDI THIS 8TH DAY OF DECEMBER, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar

