



Naaman (Suing as Legal Representative of the Estate of Naaman M'Tuera) v Kimathi & 3 others (Civil Application E040 of 2021) [2022] KECA 60 (KLR) (4 February 2022) (Ruling)

Neutral citation: [2022] KECA 60 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E040 OF 2021
AK MURGOR, JA
FEBRUARY 4, 2022**

BETWEEN

JAPHET KINYUA NAAMAN (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF NAAMAN M'TUERA) APPLICANT

AND

SILAS KIMATHI 1ST RESPONDENT

BERNARD KIMATHI 2ND RESPONDENT

DISTRICT ADJUDICATION/SETTLEMENT OFFICER TIGANIA EAST DISTRICT 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

(Being an application for extension of time to file and serve a Memorandum and Record of Appeal out of time against the judgment of High Court at Meru Kimei, J. delivered on 8th April 2019 in Meru Environment and Land Court Case No. 3 of 2015)

RULING

1. The applicant, Japheth Kinyua Naaman is seeking leave under rule 4 of this Court's rules to extend time to serve a Notice of appeal dated 12th April 2019 and to file and serve a memorandum and record of appeal out of time against a ruling of Kimei, J. delivered on 8th April 2019.
2. The motion is brought on the grounds that there was inadvertent oversight on the applicant's advocate's part that resulted in the late service of a Notice of appeal upon the respondents; that the delay was also occasioned by the Covid – 19 pandemic that's paralyzed operations within the applicant's advocate's office.



3. It was further contended that the dispute revolves around the applicant's family or ancestral land known as land parcel No. 1123, 1657 and 3045 Antuamburi Adjudication Section (the suit property) and that the applicant stands to suffer untold loss and prejudice if the application is not granted. It was further deponed that the Notice of appeal was filed on time on 12th April 2019, but had not been served on the respondents owing to his advocate, Mr. Ndubi's indisposition since 2019; that the intended appeal has overwhelming chances of success.
4. In a further supporting affidavit sworn on 30th June 2021 by Mr. Harun Ndubi, Advocate it was deponed that the applicant instructed the law firm soon after the judgment was delivered, and that he thereafter filed a Notice of appeal; that one Doreen was instructed to serve it on the respondents advocates, but failed to do so; that it was while preparing the instant application that counsel noticed that the Notice of appeal was not served upon the respondents' advocates; that the failure to serve the Notice of appeal was not intentional but a genuine mistake on the part of his office for which he was truly apologetic; that in the interest of justice the applicant's application be allowed as the delay occurred through no fault of the applicant.
5. Under rule 4 of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997 where this Court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”
6. In response to the motion, by a replying affidavit sworn by Christine Mukami, Advocate sworn on 7th September 2021 together with their submissions, it was deponed that the respondent had filed a Notice of Motion under the provisions of rules 75 (2), 77 (1) and 84 seeking to have the Notice of appeal struck out for being hopelessly out of time,, that the applicant has failed to disclose that such application has been filed; that further, the application for extension of time was not merited for the reasons that the delay was for a period of over 23 months or 717 days, which delay has not in any way been explained. In addition, the explanations that the Covid-19 pandemic and Mr. Ndubi's indisposition are not supported by evidence and merely amount to flimsy excuses.
7. It was also asserted that the respondents had already obtained title to the suit land and will be greatly prejudiced if time were to be extended to file the appeal; that no prejudice will be suffered by the applicant since the 1st respondent purchased the suit land from the applicant's father a long time ago. The respondent's contention is that the applicant's application is simply intent on defeating the ends of justice and to preserve Nyeri Civil Appeal No 33 of 2021 in which the respondent has since sought to have the applicant's Notice of appeal struck out; that the intended appeal has no chances of success having arisen from a constitutional petition that concerned a dispute over land adjudication, where the trial court concluded that there was nothing constitutional about the applicant's petition, and that the applicant had failed to exhaust the applicable remedies stipulated under the [Land Adjudication Act](#) Cap 284 Laws of Kenya.



8. As to whether the delay has been adequately explained. The ruling was delivered on 8th April 2019, and this application was filed on 12th April 2021 giving rise to a delay of 24 months and 4 days.
9. The applicant explained that the delay was occasioned by several factors, firstly, the failure by his counsel to serve the Notice of appeal on the respondents; secondly that his counsel was indisposed during the period and thirdly, due to the ravages of the Covid -19 Pandemic on the operations of his advocate's office.
10. In the further supporting affidavit Mr. Ndubi the applicant's advocate explained that the delay was occasioned and by inadvertence on the part of one Doreen who was instructed to serve the notice of appeal, but failed to do so, which omission was not discovered until he was preparing this application.
11. In interrogating the different explanations for delay, of note is that Doreen did not provide any affidavit taking responsibility for the mistake on her part. I am not therefore persuaded to find that she was the cause of the delay. As concerns Mr. Ndubi's indisposition, since no mention of it is made in his sworn affidavit I find the applicant's claim of Mr. Ndubi's indisposition to be incongruent with Mr. Ndubi's explanation, and cannot be relied on as the cause of the delay. And finally, there is nothing to substantiate the claim that the Covid -19 pandemic has a part to play in the delay.
12. Furthermore, much as the applicant seeks to attribute the delay to the mistakes of his counsel, to which Mr. Ndubi has not owned up, and there is nothing to point to Doreen as having been responsible for the delay, it has not been demonstrated what really caused the inordinately excessive delay of nearly two years. I would have been preparing to find that there was delay on the counsel's part if the applicant had been able to demonstrate that he had done all that was within his power to ensure that his counsel filed the appeal, but there is nothing that shows that the applicant took any steps in the intervening period to pursue his appeal. In the case of *Habo Agencies Limited vs Wilfred Odhiambo Musingo* [2015] eKLR the Court had this to say;

“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”.
13. Turning to whether the intended appeal has any chance of success, a consideration of the draft memorandum of appeal shows that the applicant's complaint turns on whether or not the learned judge rightly found that the applicant had failed to demonstrate that the suit land was properly instituted as a constitutional reference. A cursive analysis of the judgment of the trial court shows that a sale and transfer of the suit land from the applicant's father to the 1st respondent took place in 1973 and 1980. Upon his father's demise, the applicant claimed that no valid sale and transfer was carried out, and that the respondents had intermeddled with his late father's estate. The dispute was adjudicated upon in different forums, including Arbitration and at the District Adjudication Office. The decisions found that the 1st respondent legitimately purchased suit lands, and there is no mention of the decisions having been appealed against, or a land dispute having been filed under the other appropriate land regimes. It therefore becomes questionable whether a constitutional petition having been brought so many years later was indeed the proper forum for a land dispute of this nature.
14. Finally, it is observed that the issues in contention date back to the 1970's, and it would seem that the land in question has since been subjected to various dealings to the extent where far too much seems to have transpired on the suit land for which any reversals would pose significant challenges. In the face



of the delay herein, there is every likelihood, that were time to be extended, it is the respondents that would be subjected to untold prejudice.

15. In sum, having taken all the requisite factors into account, I come to the conclusion that the application for extension of time is not merited, and I decline to exercise my discretion to allow it. Accordingly, the Notice of Motion dated 12th April 2021 be and is hereby dismissed with costs to the respondent.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

