Muthuri & another v Karigi (Civil Application 126 of 2019)
[2022] KECA 445 (KLR) (18 March 2022) (Ruling)

Neutral citation: [2022] KECA 445 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION 126 OF 2019

KI LAIBUTA, JA

MARCH 18, 2022

BETWEEN

DANIEL MUTHURI ..... 1ST APPLICANT

BENSON KINOTI ..... 2ND APPLICANT

AND

JOSHUA MWENDA IKIARA (BY SUBSTITUTION AND BEING THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE M'IKIARA KARIGI) ..... RESPONDENT

RULING

1. Before me is a Notice of Motion dated 1st August 2019 made under Rule 4 of the *Court of Appeal Rules* in which the Applicants (Daniel Muthuri and Benson Kinoti) seek extension of time pursuant to Rule 4 to file an appeal from the Ruling and Order of the Environment and Land Court at Meru (Lucy M. Mbugua, J.) in ELC Case No. 77 of 2004 delivered on 3rd October 2018. They also pray that costs of their application be provided for.

2. The Applicants' Notice of Motion is made on the following grounds: that the time to lodge and serve the record of appeal has already lapsed; that the delay in making the application is not inordinate; that the applicants have lacked the financial ability to institute the appeal within the prescribed time; that no prejudice will be suffered by either party if leave is granted; and that the application ought to be granted in the interest of equity and justice.

3. The Motion is also supported by the annexed affidavit of Daniel Muthuri sworn on 1st August 2019 in which he restates the reasons for the delay in filing the intended appeal and adds: that the applicants have an arguable appeal with overwhelming prospects of success; that he undertakes to lodge the intended appeal and record expeditiously with such time as the Court may order; and that he is willing to abide by any conditions set by the Court for the grant of the orders sought.

4. Notably, the respondent has not filed any affidavit in reply to the applicants' Motion. However, learned counsel for the respondent (M/s. Kiogora Ariithi & Associates) filed written submissions dated 25th February 2022 urging that the applicants' Motion be dismissed. According to the learned counsel: the applicants have never been diligent in prosecuting this old matter; that they took too long to file their application for extension of time; that they did not offer any justifiable explanation for their delay; that this matter was filed way back in 1993, and that the judgment of the trial court has been duly executed.

5. From the scanty record before me, I am not able to tell what the application that led to the Ruling and Order of the learned Judge delivered on 3rd October 2018 was all about. It is clear, though, that it had been filed 4 years after final determination of the substantive suit, and had been dismissed in 2017 and twice in 2018, before the present application for extension of time to appeal from the last of the final orders dismissing that application in 2018. The relevant part of the impugned ruling of the learned Judge reads:

> "1. This ruling is in respect of the application filed on 13.3.2018 whereby [the] applicant (1st Plaintiff) is seeking for the setting aside of the orders of this court given on 6.2.2018 whereby [the] applicant's application filed on 16.12.2016 was dismissed.
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> 2. There are grounds set out on the face of the application as well as a supporting affidavit.
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> 3. The application was opposed.
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> 4. I have considered all the arguments raised herein and the written rival submissions.
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> 5. I find that 6.2.2018 was not the first time the court was dismissing the application. I had dismissed this application earlier on 29.5.2017. In my ruling delivered on 6.12.2017, I reinstated the said application. It was dismissed on 6.2.2018 for want of prosecution.
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> 6. This is a case of 2004. The plaintiffs don't appear to be serious in prosecution of this suit. I find that the application of 13.3.2018 is not merited. The same is dismissed with costs to defendant.
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> 7. Pursuant to the judgment of 4.7.2013, this file is marked as closed."

6. Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to "... extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act ...," on such terms as it thinks just. However, this discretion must be exercised judiciously.

7. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi [1999] 2 EA p231* set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that "the decision whether or not to extend time is discretional. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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. The historical background and the events leading to the application before me are critical in determining the merits of the applicants' Motion. Briefly stated, the proceedings relate to an old land dispute in Meru ELC Case NO. 77 of 2004, in which judgment was delivered on 4th July 2013, almost 8 years ago. The applicants are not challenging that judgment, which has been long executed bringing the substantive dispute to an end. To my mind, the intent and purpose of the application whose Ruling and Order is now challenged remains unascertainable from the record before me.

9. With regard to the length of the delay in filing the intended appeal, I find that delay to be inordinate. Judgment having been delivered in the substantive suit on 4th July 2013, it should not have taken the applicants more than 3 years to file an application, which was dismissed 3 times, before filing the subject application on 13th March 2018 for reinstatement, but which was also dismissed leading to the impugned Ruling and Order. In the circumstances, I find the delay on the applicants' part in filing any application, for whatever it was worth, after final judgment delivered in determination of the main suit to be inordinate. More critical is the fact that the final judgment in the substantive suit, which was long executed, is not the subject of challenge. In the circumstances, it remains unclear what is sought to be achieved at the end of it all by the intended appeal.

10. The applicants attempt to explain the delay in filing the intended appeal by pleading financial incapacity, which flies in the face of the extant legal framework for legal aid and the provisions of the *Civil Procedure Act* and Rules relating to appeals by paupers. Accordingly, their explanation is untenable.

11. With regard to the length of the period of delay, the Court of Appeal in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet[2018] eKLR* observed that "... 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 favourably exercisable."

12. To my mind, the applicants have not given a plausible and satisfactory explanation for the delay in filing their appeal. Accordingly, I find that the Respondent would suffer undue prejudice by extension of time for the Applicant to lodge their intended appeal. Considering that judgment in the substantive suit has long been executed, the respondent would be unduly prejudiced by a grant of the orders sought to extend time to appeal from the ruling and order in issue, an exercise that, in my considered view, has been overtaken by events. In the circumstances, I need not set off to inquire whether the intended appeal has the possibility of success, but will do so as a matter of formality and for the avoidance of doubt as to the basis of my decision in determination of the Motion before me.

13. Annexed to the 1st applicant's supporting affidavit is a draft Memorandum of Appeal dated 1st August 2019 wherein are set 5 grounds on which the intended appeal is anchored, namely: that the Learned Judge erred in law in failing to appreciate the import of Article 159 of *the Constitution* and waived the ultimate purpose to the detriment of the appellant herein; that the Learned Judge erred in law in striking out the application of the appellant by holding that the application was unmerited thereby occasioning a miscarriage of justice; that the Learned Judge erred in law in failing to find that the application was for contempt of court where the respondent had failed to adhere to the courts orders; that the Learned Judge erred in law in awarding costs to the Respondent; and that in all the circumstances of the case, the findings of the learned Judge were insupportable in Law or on the basis of the evidence adduced.

14. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. I am not satisfied that the grounds set out in the

Applicant's draft Memorandum of Appeal point to a reasonable conclusion that the intended appeal is arguable with the possibility of success. Indeed, the application before me turns on the authority of *Joseph Wanjohi Njau v Benson Maina Kabau , Civil Application No. 97 of 2012* (Unreported),where the Hon. Mr. Justice Kathurima M'Inoti held that "the Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court."

15. Having considered the applicants' Motion and the accompanying memorandum of appeal, I find no connection between the grounds advanced for the intended appeal and the impugned ruling given in determination of an application, whose intent and purpose remains unknown. Accordingly, I find no basis for reaching a conclusion that the intended appeal is arguable, not to mention the likely prejudice that the respondent stands to suffer if orders were given to re-open the proceedings on appeal. Indeed, the applicants' action or inaction, as the case may be, is inexcusable.

16. In the case of *Muchungi Kiragu v James Muchungi Kiragu and another [1998] eKLR*, the Court held that:

> "This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it."

17. In conclusion, and having carefully considered the applicants' Motion, the supporting affidavit and the written submissions of learned counsel for the respondent, I find that the applicants' Notice of Motion dated 1st August 2019 has no merit. The same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR