



Ali (as personal representative of the late Mehboob Mohamed Abdul Gafoor Mohamed Mullah also known as Mehboob Mohamed Abdulgafoor and Mehboob Mullah) v Vescon Properties Limited & another (Civil Application 6 of 2021) [2022] KECA 988 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KECA 988 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 6 OF 2021
SG KAIRU, JA
SEPTEMBER 23, 2022**

BETWEEN

SHAKILA BEGUM ALI APPLICANT

**AS PERSONAL REPRESENTATIVE OF THE LATE MEHBOOB MOHAMED
ABDUL GAFOOR MOHAMED MULLAH ALSO KNOWN AS MEHBOOB
MOHAMED ABDULGAFOOR AND MEHBOOB MULLAH**

AND

VESCON PROPERTIES LIMITED 1ST RESPONDENT

REGISTRAR OF TITLES 2ND RESPONDENT

*(An application for extension of time to file notice of appeal against
the ruling and order of the Environment and Land Court at Mombasa
(Matheka, J.) dated 1st November 2018 in ELC Case No. 171 of 2014)*

RULING

1. Before me is an application dated 14th December 2020 lodged on 19th January 2021 by which the applicant, Shakila Begum Ali (the personal representative of the estate of Mehboob Mohamed Abdul Gafoor Mohamed Mulla, deceased who died on 5th November 2001 in United Kingdom) seeks an order, under Rule 4 of the Court of Appeal Rules, 2010, for extension of time to file a notice of appeal in order to challenge a ruling of the Environment and Land Court (ELC) (N. Matheka, J.) given on 1st November 2018 dismissing her suit against the respondents, Vescon Properties Limited and Registrar of Titles.
2. The background is that the applicant filed suit before the ELC Mombasa on 9th July 2014 being Land Case No. 171 of 2014 seeking, among other reliefs, nullification of a transfer in favour of the 1st



respondent of a property known as Sub-division Number 3427, Section III, MN (C.R. No. 34109) on grounds that the transfer was fraudulent having been made after the death of the deceased, who was the registered owner. It appears that after the 1st respondent had entered appearance and filed a defence, the applicant did not take steps to prosecute the suit whereupon it was listed for hearing on 1st November 2018 for the applicant to show cause why the suit should not be dismissed for want of prosecution.

3. The applicant deposes in her affidavit in support of the present application that despite an explanation having been given to the learned Judge of the ELC that the applicant's previous advocates had assured her that the matter was ongoing yet had failed to prosecute it, the Judge nonetheless proceeded to dismiss the suit on 1st November 2018. The ruling or the order of 1st November 2018 dismissing the suit are not part of the record of the present application.
4. The suit having been dismissed on 1st November 2018; the applicant returned to the ELC with an application dated 22nd November 2018 for reinstatement of the suit. After hearing the parties on that application, the ELC (Yano, J.) in a ruling delivered on 28th November 2019 dismissed it with costs on grounds that the court was functus officio and lacked jurisdiction to entertain the application for reinstatement. It emerges from a subsequent ruling of the ELC of 6th November 2020 that upon delivery of the ruling on 28th November 2019, the advocate for the applicant applied for and was granted leave to appeal.
5. Despite the leave granted to the applicant to appeal the ruling of 28th November 2019, she did not do so. Instead, over one year later, the applicant again returned to the ELC with an application dated 6th December 2019 seeking leave of the court to appeal against the ruling of 1st November 2018. Having heard the parties on that application, in his ruling delivered on 16th November 2020 Yano, J. expressed that it was incumbent upon the applicant to offer valid and clear reasons in the form of a plausible and satisfactory explanation for the delay to warrant the exercise of the court's discretion in the applicant's favour. The Judge stated:

“Moreover, in this case the applicant was represented by counsel all through the proceedings. I find no valid reason has been offered for the delay in filing the appeal. I find that the explanation given is not plausible. In the circumstances, I am not persuaded to exercise my discretion in the applicant's favour. In any event, the application herein was not made timeously and explanation for the delay ought to have been given.”
6. Over a month later, on 19th January 2021, the applicant lodged the present application dated 14th December 2020, in which, as already indicated, the applicant seeks extension of time within which to file a notice of appeal in respect of the decision of 1st November 2018 dismissing her suit for want of prosecution.
7. In support of the application, learned counsel Mr. M. Hassan relied on his written submissions dated 21st March 2022 in which it was urged on the strength of the case of *Edward Njane Nganga & another vs. Damaris Wanjiku Kamau & another* [2016] eKLR that the Court has unfettered discretion to do justice; that the delay in filing the notice of appeal timeously was due to the applicant having filed the applications dated 22nd November 2018 and 6th December 2019 with the expectation that she would get recourse before the ELC; that even though there was misdirection by the applicant in that regard, her intention was to pursue substantive justice; that the impact of refusing to allow the present application is that the applicant will be denied an opportunity to pursue her claim in circumstances where the suit property was fraudulently transferred when the registered owner was deceased; that the matter requires



to be interrogated by way of evidence and the beneficiaries of the deceased stand to lose the property to which they are entitled without having been heard.

8. Mr. Ajigo, learned counsel for the 1st respondent in opposing the application relied on his grounds of opposition and written submissions dated 31st March 2022. It was urged that the applicant is guilty of laches; that the application is bad in law and an abuse of the process of the court and lacks merits and should be dismissed; that despite the present application having been filed on 19th January 2021 it was served on the 1st respondent a year later; that the ruling the applicant intends to challenge on appeal was delivered over four years ago; that having opted to apply for reinstatement of the suit which application was dismissed on 28th November 2019, the avenue that was available to the applicant was to challenge that decision on appeal; that litigation should come to an end and the 1st respondent is prejudiced by continued litigation; that the applicant being the owner of the litigation, cannot blame the former advocate for the delay involved.
9. Although the 2nd respondent was served with notice of hearing, there was no appearance.
10. I have considered the application and the submissions. As correctly submitted by counsel for the applicant, the Court has unfettered discretion in considering an application for extension of time. However, it is a discretion that must be exercised judicially and each case must be considered on its own facts. The principles on the basis of which the Court does so are established. In *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR Waki, JA captured the applicable principles as follows:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
11. With those principles in mind, the decision the applicant intends to challenge on appeal to this Court was made by the ELC on 1st November 2018. The present application, although dated 14th December 2020, was not filed until 19th January 2021. The explanation the applicant gives is that there was a misstep; that rather than immediately appealing the decision of 1st November 2018 dismissing her suit for want of prosecution, she instead applied to have the suit revived through her application for reinstatement dated 22nd November 2018. But even then, three weeks had lapsed after the making of the dismissal order on 1st November 2018 before that application for reinstatement was made on 22nd November 2018. Furthermore, after the rejection by the ELC on 28th November 2019 of the applicant’s application for reinstatement, and despite having been granted leave to appeal that decision, the applicant did not avail herself of that recourse but went to sleep for over one year when, on 6th December 2019, the applicant made an application for extension of time before the ELC.
12. The application for extension of time was dismissed by the ELC on 16th November 2020. It then took the applicant slightly over two months after that dismissal to present the present application on 19th January 2021. Apart from the consideration whether it is open to the applicant to trace back her steps and to disregard the orders of the ELC declining reinstatement of the suit from which she did not appeal, there is no explanation for inactivity for a period of over one year after the ELC dismissed the



application for reinstatement on 28th November 2019. There is also no explanation for the delay of over two months in making the present application after a similar application for extension of time was dismissed by the ELC on 16th November 2020.

13. As the Supreme Court of Kenya stated in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014[2014] eKLR, extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court. The party seeking extension of time has the burden to lay a basis to the satisfaction of the court. Delay should be explained to the satisfaction of the court and the application for extension of time should be brought without undue delay.
14. In the present case, the applicant has not in my view demonstrated that she is deserving of the exercise of the court's discretion in her favour. No attempt was made to explain the delays pointed out above. Furthermore, other than the general statement that the trial judge in dismissing the suit for want of prosecution "shrugged off" explanations why the suit should not have been dismissed, there is no hint of the errors to be corrected by this Court that the trial judge made in the exercise of her discretion in dismissing the applicant's suit that was filed in July 2014 and no steps taken to prosecute for over three years.
15. There is merit in the submission by counsel for the 1st respondent that it is not enough for the applicant to heap all blame on her advocates. The applicant had a duty to follow up on the matter. As the Court stated in *Rajesh Rughani vs. Fifty Investment Ltd. & Another* [2005] eKLR:

"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy."
16. In *Bains Construction Co. Ltd. vs. John Mzare Ogowe* (2011) eKLR, the Court had this to say:

"It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party, but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences."
17. In as much as I sympathize with the applicant's contention that the matter merited interrogation on merits in light of the claim that the suit property was transferred after the death of the registered owner, the indolence referred to on the part of applicant in my view militates against allowing the application. Ideally, it is a matter that should have been resolved by trial but the applicant squandered that opportunity by her inaction and there is no material placed before me on the basis of which to exercise the Court's discretion in favour of the applicant.
18. In the result, the application dated 14th December 2020 and lodged on 19th January 2021 fails and is hereby dismissed with costs to the 1st respondent only.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

