



Omboya v Zum Zum Investments Limited & 3 others (Civil Application E024 of 2022) [2022] KECA 1120 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1120 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E024 OF 2022**

JW LESSIT, JA

OCTOBER 21, 2022

BETWEEN

TOM OTIENO OMBOYA APPLICANT

AND

ZUM ZUM INVESTMENTS LIMITED 1ST RESPONDENT

HABITAT AND HOUSING IN AFRICA (SHELTER AFRIQUE). 2ND RESPONDENT

PURITY ACHIENG OUKO 3RD RESPONDENT

MICHAEL OKACH OMONDI 4TH RESPONDENT

(An application for extension of time to file and serve a notice of appeal from the ruling and order of the Environment and Land Court at Mombasa (Matheka, J) issued on 26th October 2021 In ELC Case No. 230 of 2013)

RULING

1. The application before me is a Notice of Motion dated 12th April 2022, brought under Rule 4 of the Court of Appeal Rules [herein after the Rules]. The applicant is seeking orders granting him leave to file and serve a notice of appeal out of time, in an intended appeal from the ruling and order of Environment and Land Court [ELC] at Mombasa delivered on 26th October 2021.
2. The grounds of the application are stated on the face of the application and the supporting affidavit sworn by the applicant. The applicant contends that on 11th November 2021 the 4th respondent herein made an application before the ELC to be enjoined in the suit before that court. He stated that he fell ill in November 2021 before the ruling was delivered; that he learnt that the ruling was delivered on 26th October 2021, after recovering on 24th March 2021 and paid a visit to his advocates' office. That his advocate learnt of the ruling on 4th November 2021 when he was served with the



4th respondent's defence signifying that his application to be enjoined in the suit was allowed. In a supporting affidavit annexed to the motion, the applicant attached various medical notes. The applicant's written submissions filed by Mr. Atanche advocate cited the decision in Civil Application No. 84 of 2019 in *George Kiptabut Lelei v. Fanikiwa Limited* to advance the argument that sickness was considered a sufficient ground to allow orders for extension of time to file and serve a notice of appeal. It was submitted that the respondents will not suffer any prejudice since they will be given an opportunity to defend the intended appeal and that unless time is extended then the applicant may be occasioned injustice since there may be a party who ought not to be a party in the suit before the trial court.

3. Mr. Moses Mwakisha advocate for the 3rd respondent filed a replying affidavit where he deposed that the suit was instituted by the applicant in the ELC for specific performance to enforce a contract for the sale of land. He deposed that the 4th respondent, the interested party who was enjoined to the proceedings vide the impugned ruling was a necessary party as he held the transfer over the suit property executed in his favour by the 3rd respondent. That the 4th respondent was unable to register the suit property by virtue of a restriction registered by the applicant herein. The 3rd respondent opposed the application.
4. The 4th respondent filed an affidavit sworn in person. He deposed that he bought the suit property on 12th May 2014 from the 3rd respondent, and that he lodged the documents in the Land Registry; he could not succeed to transfer the property to his name as the applicant had placed a caution. He then decided to apply to be enjoined in the ELC suit which he succeeded. He deposed that the appeal would not succeed and that he would be prejudiced if the application was allowed.
5. The parties appeared before me and were heard virtually on the 21st June 2022. I have carefully considered the motion, the grounds in support thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties and the cited authorities. The applicant's motion is brought, under Rule 4 of the Rules. The said Rule provides:

“ 4. Extension of time

The Court may, on such terms as it thinks just, by order 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

6. The application is for leave to extend time to file a principles upon which this court exercises its discretion under Rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997 where the 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.”

7. In exercise of the Court's unfettered discretion the court must consider the length of the delay; the reason for the delay; (possibly) the chances of success of the intended appeal; and the degree of prejudice



that would be occasioned to the respondent if the application is granted. See *Fakir Mohammed vs Joseph Mugambi & 2 Other* [2005] eKLR; and *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019.

8. This Court in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2020] eKLR observed that the Court should only exercise its discretion in favour of a party if the party places before it some material to justify exercise of discretion, The applicant contends that he fell ill in November 2021 and was not able to see his advocate until he recovered in March 2021, whereby he learned that the impugned ruling was delivered in October 2021. He placed some documents from medical facilities which appear to be clinical notes. I noted however that most of them had no dates, others the dates were covered by chits of paper. Only two had dates, Moyo Clinic Card which was dated 17th February 2021, and another document which was dated March 2021.
9. The length of delay involved is 170 days. The issue is whether the reason given is plausible and reasonable. The applicant purported that he was sick and unable to attend his advocate's office. The medical chits and clinical notes he annexed to his affidavit did not support his allegation of incapacitation due to illness, or any hospitalization. In fact, a close scrutiny of the notes reveals that the applicant had been taken through various tests and found to have normal functions of his organs.
10. I do not find anything to support a finding that the reason given by the applicant was reasonable. It appears to me to be that the application was an afterthought.
11. In the result, I find the application dated 12th April 2022 has no merit and the same is dismissed with costs to the 3rd and 4th respondents who participated in this application.

Those are my orders.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER, 2022.

J. LESIIT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

