



REPUBLIC OF KENYA



KENYA LAW
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Matewa Agencies Limited & 2 others v Muindi (Civil Application E410 of 2021) [2022] KECA 1099 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KECA 1099 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E410 OF 2021
GWN MACHARIA, JA
OCTOBER 7, 2022**

BETWEEN

MATEWA AGENCIES LIMITED 1ST APPLICANT

JOHNSON MATERE 2ND APPLICANT

ELIZABETH MATERE 3RD APPLICANT

AND

STANLEY THYAKA MUINDI RESPONDENT

(An appeal against the Judgment of the Environment and Land Court of Kenya at Thika (Gacheru, J.) delivered on 21st June 2021 in E.LC Case No. 729 of 2017)

RULING

The application

1. Before me is a Notice of Motion dated 27th July, 2021, brought pursuant to Sections 3A, 75, 78, 79G of the *Civil Procedure Act*, Order 42 rule 6 of the *Civil Procedure Rules* and all other enabling provisions of the law, seeking that;
 1. The court be pleased to grant leave to the defendant to appeal out of time against the judgement made by the Hon. Lucy Gacheru, J on 21st June 2019.
 2. The said leave do operate as a stay of the judgement and execution.
 3. The firm of Githaiga. B Ngari be allowed to come on record after judgement, for the 1st, 2nd and 3rd Defendants.
 4. The costs of this application be provided for.



2. The application is premised on the grounds on the face of it and on the supporting affidavit of Elizabeth Matere, the 3rd Applicant and director of the 1st appellant sworn on 27th July, 2021. She avers that judgment in the court below was delivered on 21st June, 2019 by L. Gacheru, J. and the applicants were not made aware of the judgment by their previous advocate on record one Wairimu Kiongera & Company Advocates. That they had tried getting information from their advocate but in vain and only learnt of the judgment on 23rd July, 2021 when they were contacted by the would-be auctioneers, regarding the impending execution. They immediately contacted their advocate who confirmed that there was indeed a judgment but did not offer any explanation and instead, returned to them their file. That the execution is imminent as it is scheduled for 28th July, 2021 and the time to appeal has run out. That the appeal has a high chance of success and it would be in the interests of justice that the application be allowed. Finally, that they were not complicit in the delay of filing the appeal.
3. The respondent opposed the application vide a brief affidavit sworn by himself on 22nd September, 2022, averring that there was inordinate delay in bringing this application which is an afterthought and reactionary. It is averred that the applicant's advocate was aware of the judgment having been served with the bill of costs and notice of taxation on 3rd October, 2019 and again on 12th July, 2021 with the intention to execute, to which there was no response. That the applicants are therefore economical with the truth and are unconvincing. It is thus urged that the application be dismissed.

Submissions

4. The applicants, vide written submissions dated 30th July, 2021 state that they have demonstrated the loss they will suffer if the orders sought are not granted as there are threats by auctioneers to sell their personal belongings. They submit that, as a statutory requirement, they have paid security for costs as calculated by the court. They urge the court to consider that the delay in filing the appeal timeously was occasioned by the negligence of their previous advocate particularly his failure to inform them of the impugned judgment.
5. The applicants further submit that the Respondent failed to execute the court's decree from the date of judgment which was delivered on 21st June, 2019. Thus, the respondent will suffer no prejudice if the application is allowed. They pray that the intended appeal be deemed as duly filed and the prerequisites for grant of leave to file an appeal out of time as duly satisfied. The case of *Liberato Kivanga Manga v Prime Bank Limited* [2021] eKLR was cited in support of this submission.
6. The respondent filed submissions dated 22nd September, 2022 submitting that the application is unmerited and should be dismissed. It is argued that there is a serious delay in bringing this application which is an afterthought and reactionary, that two years is a long time for a delay and the reason offered for the delay is not genuine as there is no complaint against the advocate. As regards the success of the appeal, it is submitted that the applicants did not refute the fact that they sold the parcels of land to him (respondent), which they even passed possession of. That they only blamed the Ministry of Lands for the delay in processing the title deeds yet they did not enjoin the Ministry as a third party to the suit. That in the circumstances, if orders sought are given, he will be prejudiced as he wishes to get his title deeds. That the application does not meet the threshold for extension of time and should be dismissed.

Analysis & Determination

7. I have carefully considered the Motion, the grounds thereof, the supporting affidavit, affidavit in opposition to the application, submissions by both parties and the law. The only issue is whether the application is merited?



8. Though the appellants have sought four prayers in the application, the grounds on which the application is premised as well as the supporting affidavit and their submissions only attended to one prayer, that for the extension of time to file an appeal out of time which is prayer 1.
9. It is a well settled principle that extension of time to file an appeal is a matter of discretion by the court. Such discretion should however be exercised judiciously and on a case to case basis. In *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others*, [2014] eKLR, the Supreme Court laid down the following principles for extension of time for filing an appeal: -
 - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
10. I now grapple with the question of whether the delay alluded to by the Applicants is explained or is not inordinate or inexcusable. The application herein is dated 27th July, 2021 while the judgment sought to be appealed from was delivered on 21st June, 2019. This leads to a two- year delay which I consider to be inordinate.
11. It has been held numerously that litigation belongs to a party and not his counsel and a party ought to follow up on his/her own case. The applicants aver that their advocate did not give them any information on the matter but they do not demonstrate what steps they took to try and ascertain the position of the suit. For instance, did they visit the court registry? Did they call their counsel for information? Two years is a long time to claim that one never got a response from their advocate. It only shows that the applicants were indolent and not vigilant. I find the explanation for the delay to be inexcusable, unsatisfactory and upon which discretion cannot be favorably exercisable. The court therefore finds and holds that the prayer for extension of time is unmerited.
12. Having dismissed prayer 1, the other prayers automatically fall through. I will however address one more crucial issue which is that, the applicants aver that they will suffer prejudice and loss if the orders sought are not granted as there is the imminent threat that their personal property will be auctioned on 28th July, 2021. Again, no evidence of the eminent auction was provided. For instance, there was no proclamation notice or schedule of sale that was annexed to the supporting affidavit. Furthermore, the auction is said to have been scheduled for 28th July, 2021 which is over a year ago. This date is definitely overtaken by events. There are thus no orders for stay or injunction to render to prevent the alleged sale from taking place. I would rightfully conclude as it stands that the application and in this case the prayer for stay of execution of the judgment has also been overtaken by events.



13. Having said the above, this is one clear case where the court should not exercise its discretion in favor of the applicants. If the applicants are aggrieved by the conduct of their then advocate on record, they can pursue him through other rightful channels.

14. Accordingly, the applicants' Motion dated 27th July, 2021 is without merit and the same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

