



REPUBLIC OF KENYA



KENYA LAW
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**Keigi v Mwaura (Civil Appeal (Application) E319 of 2022)
[2022] KECA 1348 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1348 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E319 OF 2022
GWN MACHARIA, JA
DECEMBER 2, 2022**

BETWEEN

RUTH WAMBUI KEIGI APPLICANT

AND

WANJIKU MWAURA RESPONDENT

((Being an application for extension of time to file an appeal and Record of Appeal out of time against the decision of (L. Gacheru, J.) dated 30th July, 2020 in Thika ELC No. 52 of 2018.))

RULING

Brief Background

1. On July 30, 2020 the Environment and Land Court (ELC) (Gacheru, J) delivered a judgment directing the Registrar of Lands in Kiambu Lands Office to cancel the registration in respect of parcel No Komothai/Kiratina/1060 and parcel No Ruiru/Ruiru East 3/308, registered in the applicant's and a respondent's names respectively.

The application

2. The applicant filed a Notice of Motion dated September 8, 2022, brought under Rule 4 of the [Court of Appeal Rules 2022](#), Article 50 and 159 of the [Constitution](#), seeking orders that this Court be pleased to enlarge time for the applicant to file appeal and Record of Appeal out of time and that the costs of this application to abide the outcome of the appeal.
3. The application is supported by the grounds on the face of it and the supporting affidavit sworn by the applicant, who avers that the ELC delivered its judgment on July 30, 2020 in favor of the Respondent directing the Registrar of Lands, Kiambu County Lands Office to rectify the register by cancelling the registration in respect of parcel No KOMOTHAI/KARATINA/1060 and RUIRU/RUIRU EAST 3/308 currently in the names of the applicant and the respondent respectively. She



immediately instructed her advocate to pursue an appeal and the Notice of Appeal was filed on August 12, 2020 which was within the stipulated period. That by a letter dated August 11, 2020 her counsel requested for the certified copies of the proceedings which were ready for collection on September 21, 2021. Her advocate wrote an email requesting for a Certificate of Delay and despite several requests, reminders and follow ups, the Certificate of Delay was not issued within the sixty days' period for filing of Appeal. An application was then filed on September 5, 2022 seeking for an order of the Court to direct or compel the Registrar to sign and issue the Certificate of Delay and that is when the applicant and her advocate learnt that the Certificate of Delay was ready and had been dated April 20, 2022. The court registry never informed the applicant's advocates that the same was ready for collection despite numerous follow ups. That the intended appeal raises weighty and arguable legal issues of law with high probability of success as the ELC failed to appreciate the equitable doctrine of constructive trust and proprietary estoppel as espoused under Article 10(2)(b) of the Constitution among other grounds. That the respondent will not suffer any prejudice if this application is allowed as she is in actual possession and peaceful enjoyment and utilization of the parcel of land No Ruiru/Ruiru East 3/308 currently registered in her name. That owing to the circumstances of this case, it is only fair and just that the orders sought be granted. Further, that the application was made without unreasonable delay.

4. The application is opposed vide a Replying Affidavit sworn on November 3, 2022 by the respondent who avers that apart from the emails alluded to, the applicant has not placed any cogent evidence before the court showing what further steps she took to get the Certificate of Delay. The application is an abuse of the court process as the court had issued orders on March 24, 2022 directing the Deputy Registrar to issue a Certificate of Delay and the allegation that the applicant's counsel realized the same had been issued in April is inexcusable.
5. That the applicant was jolted into action when the respondent's advocates wrote her a letter enquiring why they had not been served with a Record of Appeal. That in that case, the delay was occasioned by the applicant's indolence and the appeal is unmeritorious as it is well settled that oral agreements in land matters cannot be a foundation for a contract. The respondent states that she has suffered great emotional anguish and uncertainty in development which continues to be in abeyance as she awaits the court's decision. She avers that the applicant had greatly contributed to the delay and even concealed material facts, that four months' delay is inordinate. That the application should be dismissed with costs and the stay of execution in place should be vacated.

Submissions

6. The Application was canvassed by way of written submissions.
7. Both the applicant and the respondent filed submissions dated November 2, 2022 and November 3, 2022 respectively. They are a recollection of each parties' averments in the application and response and as such I will not duplicate them.

Analysis and determination

8. I have considered the application, the response thereto and the respective party's submissions. The only issue for determination is whether the application is merited.
9. Rule 4 of the Court of Appeal Rules provides as follows:
 - ' 4. 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 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.'

10. The principles that guide the exercise of discretion under the above Rule are well settled as was held by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* being: -
- a. 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;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case- to-case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.'
11. As regards the period of delay and the reason for the delay, I note that the judgment of the ELC was delivered on July 30, 2020, the Notice of Appeal was filed on August 12, 2020, which was within the stipulated period of 14 days and this motion was filed on September 8, 2022. The applicant stated that after the decision was rendered, she sought and obtained the certified proceedings on September 21, 2021. However, the Certificate of Delay was issued later and the same is dated April 20, 2022. She avers that she and her advocate came to know of its issuance on September 5, 2022 when they filed an application for its issuance.
12. The applicant has adduced evidence in the form of several emails dated September 28, 2021, October 1, 2021, October 28, 2021, November 9, 2021 and December 2, 2021 written to the registry requesting for the Certificate of Delay. She has also annexed a letter dated October 26, 2021 written to the Deputy Registrar requesting for the Certificate of Delay. She also filed an application seeking orders for the issuance of the Certificate of Delay.
13. From the above chronology, it is clear that the applicant was not indolent nor was she sitting on her hands without action but was actively pursuing the Certificate of Delay. I therefore find that the delay has been satisfactorily explained.
14. On the other side of the coin, the respondent has attached the High Court's ruling dated March 24, 2022. From its contents, it would appear that the ELC (Gacheru, J) vide a ruling dated March 25, 2021 granted a stay of its judgment pending the hearing and determination of the intended appeal with the order that the applicant herein was to deposit Kshs 200,000/= as security for costs. One year down the line the applicant has yet to deposit the said amount and the respondent filed an application dated October 25, 2021 seeking for vacation of the stay of execution orders. The court in the attached ruling gave several orders among them being, 'the defendant shall deposit in the court the sum Kshs 200,000 as ordered on March 25, 2021 within 15 days from today. In default, the stay order granted on March 25, 2021 shall be vacated automatically.'



15. In the application, Supporting Affidavit, Replying Affidavit and respective submissions, none of the parties refer to this order and it is not evident that the applicant herein has complied with it. It is trite law that the remedy sought by the applicant is an equitable one and he who seeks equity must come with clean hands. A litigant who cannot abide by court orders is undeserving of the court's discretion. This was reiterated in the case of *John Njue Nyaga v Nicholas Njiru Nyaga & Another [2013] eKLR* that:

' It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings.' The applicant has not done so and is undeserving of the orders he seeks.'

16. It is for the above reason I find and hold that the application lacks merit and the same is dismissed with costs to the respondent.

17. As to the respondents' prayer to vacate the stay of execution, the orders of March 24, 2022 by Gacheru, J were self-explanatory being that the failure to deposit the security amount automatically vacates the stay of execution. This means that the stay orders lapsed upon the expiry of 15 days on non-compliance with the conditional stay. This Court cannot give orders in vain or otherwise repetitive orders that would embarrass it. In any case, this request falls under Rule 5(2)(b) of this Court's Rules and cannot be entertained by a single judge. I say no more on this point.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 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

