Karimoni v Njeru & another (Environment & Land Case 32 of 2017) [2024] KEELC 5973 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 5973 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 32 OF 2017

A KANIARU, J

APRIL 25, 2024

(FORMERLY EMBU HIGH COURT CIVIL CASE NO 174 OF 2011)

BETWEEN

WILSON NJOGU KARIMONI ..... PLAINTIFF

AND

GITHUMBU NJERU ..... 1ST DEFENDANT

EMBU FARMERS SACCO MWANGI AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. Before me for determination is a Notice of Motion dated 23.09.2023 and filed on 29.09.2023. It is expressed to be brought under Sections 3A, 3B & Section 7 of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya. The Applicant – WILSON NJOGU KARIMONI - is the plaintiff in the suit whereas the Respondents – EMBU FARMERS SACCO, MWANGI AUCTIONEERS & GITHUMBU NJERU - are the defendants. The Applicant is seeking the following orders:

    i. Spent.

    ii. Allowed by consent.

    iii. The applicant be granted leave to issue a notice of intention to appeal against the ruling of the honorable J.M Bwonwong'a delivered on 02.11.2015 out of time.

    iv. The costs of this application are provided for.

2. The grounds in support are set out on the face of the Notice of Motion and elaborated in the Supporting Affidavit sworn by the said Wilson Njogu Kalimoni on 23.09.2023. Njogu deposed that on 02.11.2015, the High Court at Embu presided over by Justice J.M Bwonwong'a delivered its ruling in Embu HC O.S no. 174 of 2011, which in essence effectively dismissed his claim for want

of prosecution. That he intends to appeal against the ruling even though the time within which he is supposed to issue a notice of appeal against the said ruling has lapsed. That he has a legitimate claim against the defendants which ought to be heard on its merits and that there has been no inordinate delay. There is also a sufficient explanation for bringing the instant application late in the day.

3. That the delay in filing this application was occasioned by a legitimate misbelief that he was on the right course of justice following the legal advice of his then advocate where he applied for a review of the ruling delivered on 02.11.2015. That the application for review was dismissed by the Hon Justice Angima vide a ruling delivered on 21.06.2018. The dismissal came about as he had not met the requisite grounds for review. That following advice of his counsel then on record he appealed against the said ruling of Hon Justice Angima at the Court of Appeal Nyeri vide Civil Appeal No. 13 of 2019, which appeal was also dismissed.

4. That he has come to learn that he ought to have appealed against the decision that dismissed his claim for want of prosecution and that he has been trailing a dead end based on wrong legal advice. That he is desirous of prosecuting the originating summons dated 21.12.2011. He urges that he is ready to abide by any directions that this court deems fit to grant.

5. The application was responded to by the 1st and 2nd Respondents via Replying Affidavit sworn by their advocate, Njeru Ithinga, on 23.10.2023. it was deposed that the instant application is an outright abuse of the court process and offends the legal principle that litigation must come to an end. That the applicant has always been represented by a competent advocate from the time the original suit was instituted to date. That the applicant did not prosecute his suit and the same was dismissed for want of prosecution. That he now purports to revive the same despite the fact that it was dismissed more than eight years ago. That the applicant's various attempts to revive the suit have been entertained and dismissed on merit by competent courts up to the court of appeal.

6. It was agreed that the application be disposed of by way of written submissions. The applicant's submissions were filed on 06.12.2023 whereas the 1st and 2nd respondents filed theirs on 29.12.2023.

7. The applicant submitted that this court has the jurisdiction to entertain this application under the provisions of section 7 of the *appellate jurisdiction act*, which gives the high court the power to extend the time within which a notice of intention to appeal may be given. The case of *Clemensia Nyanchoka Kinaro v Joyce Nyansiaboka Onchomba* (2021) Eklr was cited in support of this position. Another case, *Paul Wanjohi Mathenge v Duncan Gichane Mathenge (*2013) eklr, was cited where it was stated that whether the delay in lodging a notice of appeal was unreasonable and inordinate ought to be determined based on the explanation given for the delay.

8. That the applicants main ground is that he took misleading advice from his previous advocate which culminated in an entirely wrong process. That a litigant ought not be punished for the mistakes of his counsel and that he is desirous of being heard on merit. He urges that the application be allowed with costs to him.

9. The 1st and 2nd respondents on the other hand submitted that the applicant is not seeking leave to appeal out of time but only leave to issue a notice of intention to appeal. That the decision whether or not to grant leave to file notice of intention to appeal out of time is an exercise of judicial discretion. That that discretion must be based on fixed principles and not on private opinion, sentiments, sympathy or benevolence. That must be exercised on the basis of evidence and sound legal principles. That if the applicant has a good case on merits but is out of time, and has no valid excuse for the delay in not filing the appeal within time, the court must guard itself against the danger of being led away by sympathy and the application should be dismissed even at the risk of injustice and hardship to the applicant.

10. It was submitted further that the factors to be considered in deciding whether or not to grant such an application are the explanation for the delay if any; the merits of the contemplated action and whether the matter is an arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice. That the applicant's explanation for the delay of 8 years in bringing his application which was that his advocate gave him misleading advice is not tenable. That the applicant's application is an abuse of the court process as litigation must come to an end. The case of *County Executive of Kisumu v County Government of Kisumu & 7 Others Civil Application no. 3 of 2016* was cited in support of the submissions.

11. The court was urged to dismiss the application and award costs to the 1st and 2nd respondents on a higher scale. The case of Samuel Ngungi Njenga v Coastal Kenya Enterprises Ltd (2019) Eklr was cited to support this position.

12. I have had a look at the application, responses by the opposing side, rival sub missions, and the entire court record generally. The principles applicable to an application for enlargement of time were discussed by the Supreme Court in the case of in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:

    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 ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;
    4. Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;
    5. Whether there would be any prejudices suffered by the respondent's if the extension was granted;
    6. Whether the application had been brought without undue delay; and;
    7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.

13. It is not in dispute that the applicant's suit was dismissed for want of prosecution on 02.11.2015 by my learned brother, Justice J.M Bwonwonga. The applicant then applied for a review of the ruling dismissing his suit for want of prosecution, which application was also dismissed for want of merit on 21.06.2018 by my other learned brother, Justice Y.M Angima, sitting in this court then. The applicant being aggrieved by the said ruling made an appeal to the court of appeal sitting in Nyeri vide Nyeri Appeal no. 13 of 2019 which appeal was dismissed for want of merit on 24.08.2023.

14. The applicant then came to this court and filed the instant application on 23.09.2023 seeking for leave to file a notice of appeal on the ruling of Justice J.M Bwonwonga delivered on 02.11.2015. The period between 2.11.2015 and 23.9.2023 is about 8 years. It primafacie seems odd to seek to file an appeal after 8 years. But is the option of appeal available to the applicant? It would be a futile exercise to allow the applicant to file his notice of appeal against the trial court's ruling dismissed his case for want of prosecution as he opted to pursue the remedy of review against the said ruling. The law prevents a party from exploring the option of appeal of a decision once they have made the decision to file for

review of the same decision as is the case herein. As has been rightly submitted by the respondents, litigation must come to an end.

15. In the court of appeal case of *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR the court observed as follows:

> "Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of Martha Wambui v Irene Wanjiru Mwangi & Another (2015) eKLR, the court stated that "From the above provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ..." See also the case of *Multichoice (K) Ltd V Wananchi Group (K) Ltd & 2 Others* (2020) eKLR." It is the same situation at hand here. The applicant is trying to flog a dead horse.

16. For these reasons, I find that the applicants notice of motion application dated 23.09.2023 has no merit and is indeed an abuse of the court process. The same is hereby dismissed with costs to the 1st and 2nd respondents.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF APRIL, 2024.

In the presence of Momanyi for Waititu for applicant, Njeru Ithiga for 1st and 2nd respondent.

Court Assistant – Leadys

A. KANIARU

JUDGE- ELC, EMBU

25/04/2024