Kariuki v Njura & 3 others (Miscellaneous Application 21 of 2023) [2024] KEELC 4013 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 4013 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

MISCELLANEOUS APPLICATION 21 OF 2023

EK MAKORI, J

APRIL 25, 2024

BETWEEN

DORCAS WAMBUI KARIUKI ..... APPLICANT

AND

PETER WANJUKI NJURA ..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

LAND REGISTRAR LAMU ..... 4TH RESPONDENT

RULING

1. The applicant, in the application dated 13th April 2023, seeks for the following orders:

   i. That leave be granted to the applicant herein to file an Appeal out of time.

   ii. The annexed Memorandum of Appeal is deemed duly filed upon payment of the required court fees.

   iii. The Court is pleased to extend the time within which the applicant may file her appeal as per the attached memorandum of appeal. This extension of time is significant as it allows the applicant to proceed with her appeal despite the initial delay in filing.

2. The 1st respondent filed grounds in opposition dated 11th May 2023 while the 2nd, 3rd and 4th respondents filed their grounds of opposition dated 19th May 2023. The Court directed parties to file written submissions. They complied.

3. This Court, in its role as the arbiter of justice, will determine whether to extend the time within which to appeal. The decision will be based on a thorough review of the facts and arguments presented by all parties.

4. The applicant states that she filed a chamber summons on 14th April 2023 seeking to file a Memorandum of Appeal. She had never been served with the entry of judgment in the Lower Court. This explains the reasons for the certificate of delay dated 6th July 2023. The judgment was delivered on 22nd August 2022, and the Notice of Appeal was filed on 20th September 2022, which was 28 days late.

5. This is a land matter, and the applicant believes she needs to be heard on merit due to the significant implications of the case on her property rights.

6. The first respondent avers that judgment was delivered on 23rd August 2023. An appeal ought to have been preferred by 23rd September 2022. Instead, it was filed on 14th April 2023, approximately seven months late. It was in the presence of counsel for the parties. No compelling reasons have been proffered for the late filing of the appeal. The reasons that typed proceedings had not been obtained cannot be grounds enough because proceedings do not form part of the Memorandum of Appeal. The 1st respondent, based on these facts, calls for the dismissal of the current motion.

7. The second to fourth respondents, through the Attorney General, aver that the applicant's appeal ought to have been filed within 30 days from the date of the decree or order against it. Failure to do so makes the appeal a non-starter and should fail on arrival. In addition, the applicant has been unable to provide reasonable grounds for delay as provided for in Section 79G of the *Civil Procedure Act*.

8. The second to fourth respondents cite the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral Boundaries Commission and 7 others* [2014] eKLR, which sets out the principles to consider in determining whether to enlarge the time within which to appeal. This case is relevant as it provides a framework for considering the factors that should be considered when deciding on an application for leave to appeal out of time.

9. The second to fourth respondents believe that the applicant will not suffer prejudice if the current application is declined.

10. The principles for the grant of leave to appeal out of time are as enunciated in the cases cited by the parties and as emphasized by the Supreme Court in the case of *Mombasa County Government v Kenya Ferry Services & another* [2019] eKLR. These principles include the need for the applicant to provide a reasonable explanation for the delay, the absence of prejudice to the respondents, and the public interest in certain cases.

> " 25) Concerning extension of time, this Court has already set the guiding principles in the *Nick Salat Case* as follows:
>
> > "... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.
> >
> > "... we derive the following as the underlying principles that a Court should consider in exercising such discretion:
> >
> > 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 an 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;

5. whether there will be any prejudice suffered by the respondents if 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" [emphasis supplied]

11. Judgment in this matter was delivered on 23rd August 2023. An appeal ought to have been preferred by 23rd September 2022. Instead, it was filed on 14th April 2023, approximately seven months late. The applicant avers that no entry of judgment was served on her. There was also the issue of proceedings which were issued late. The proceedings were allegedly procured on 23rd February 2023, but it took up to 14th April 2023 to lodge the current application. These circumstances, according to the applicant, are the reasons for the delay in filing the appeal.

12. The reasons for the delay, while not seeming plausible, do demonstrate the applicant's larches and delays. This impartial assessment of the situation underscores the court's commitment to fairness and justice, leaving no room for a reasonable excuse for the late lodging of the appeal.

13. Before I pen off, I have looked at the Memorandum of Appeal. At this point, the Court is not meant to discuss the merits of the intended appeal. However, it is important to note that the applicant withdrew her plaint, and the counterclaim by the first respondent proceeded to trial, which the trial Court upheld. This means that the applicant did not significantly prosecute her case in the Lower Court, leaving a better part of the substratum of the case in the Lower Court unresolved, which this Court may not have a chance to salvage. This could potentially affect the strength of the applicant's appeal.

14. Considering I do not see any compelling reasons for delay, the application dated 13th April 2023 is dismissed with costs.

THIS RULING IS DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 25TH DAY OF APRIL 2024 IN THE ABSENCE OF PARTIES. SINCE THE COURT WAS NOT SITTING, IT WILL BE TRANSMITTED ELECTRONICALLY, AND ALL PARTIES WILL BE EMAILED THE SAME.

E. K. MAKORI

JUDGE