



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Gacheru (Civil Application 63 of 2018)
[2021] KECA 12 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 12 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 63 OF 2018
AK MURGOR, JA
SEPTEMBER 23, 2021**

BETWEEN

**MARK GICHANGA KIMANI (APPEALING AS REPRESENTATIVE OF JOHN
MWANGI KIMANI) APPLICANT**

AND

GACHUMA GACHERU RESPONDENT

*(An application for extension of time to file a Notice of Appeal from
the judgment of the High Court of Kenya at Nyeri (L. Waitbaka,
J.) delivered on 30th September, 2015 in ELC No. 132 of 2014)*

RULING

1. The applicant, Mark Gichanga Kimani, is the brother of John Mwangi Kimani (the original applicant). He is appealing as the original applicant's legal representative. He has brought this Notice of Motion dated 13th April, 2018 seeking to be granted leave to file a Notice of Appeal out of time, and for the Notice of Appeal filed on 16th December, 2015 to be deemed as filed and thereafter, to be allowed to file an appeal out of time.
2. The application was brought on the grounds on its face and the affidavit in support of the applicant sworn on 13th April, 2018, wherein it was contended that in the judgment delivered on 30th September, 2015, the learned judge declined to grant orders to direct the Land Registrar, Murang'a to rectify the register in respect of the subject land title Number Loc/Kionjoini/315 (the subject land) by cancelling the transfer that resulted in the registration of the respondent, Gachuma Gacheru, as proprietor and to instead, reinstate the first registration of Isaac Kimani Gachii alias Kabogo Gatawa (the deceased).



3. It was contended that by the time the judgment was delivered, the original applicant, was indisposed; and when he recovered, he filed an application dated 14th January, 2016 but later withdrew it on 1st March, 2016 only for him to pass on thereafter on 18th November, 2016.
4. Subsequently thereto, the applicant obtained Letters of Administration on 24th February, 2018 and now seeks to file an appeal out of time. The applicant contended that he was aggrieved by the trial court's decision and intends to appeal against that judgment. It was the applicant's case that if time was not extended to enable him file his appeal, he would be destined to suffer irreparable loss as the subject land is the deceased's ancestral land which he claimed was fraudulently transferred to the respondent. The applicant asserted that the intended appeal had a high chance of success.
5. Despite having been served with the hearing notice on 7th May, 2021, there was no response from the respondent's counsel, Jeremy Mbuthia.
6. Having considered the application and submissions, under Rule 4 of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not whimsically having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* .
7. The judgment was delivered on 30th September 2015 and a Notice of appeal was filed on 18th December 2015 which was a delay of 79 days. This motion was filed on 13th April, 2018 which resulted in a total delay of 991 days or 2 years and 5 months. The applicant has explained that, following delivery of the judgment, the original applicant had filed an application for extension on 14th January, 2016 but withdrew it on 1st March, 2016. And as fate would have it, he passed away on 18th November, 2016 without having filed another application to extend time. The applicant has attached an order of this Court dated 1st March 2016 evincing the application for extension of time that was filed, and the leave granted by this Court to original applicant to withdraw it. The motion dated 14th January 2016 was also attached. The reason for the delay given was that the original applicant was indisposed, hence the delay in lodging the appeal. With the original applicant's unfortunate passing on, on 18th November, 2016, I am prepared to find that the period upto the time of his demise has been properly explained.
8. The applicant further contended that following the death of the deceased, he immediately applied for and obtained Letters of Administration in respect of the original applicant's estate which were issued on 24th February, 2017, whereupon, this motion was filed on 13th April, 2018. From the date of issuance of the Letters of Administration upto the date of this motion is one year and two months. I have carried out a detailed and thorough examination of the application and annexures, but I am unable to find any explanation for the delay of over one year in filing the motion after the applicant obtained the Letters of Administration. Clearly, the applicant has not provided any explanation for this delay.
9. In the case of *Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another* , the Court stated thus;

“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon



reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”

10. Without any material on which to rely on, I am not satisfied that the delay has been adequately explained.
11. I now turn to whether the intended appeal is likely to succeed. As a brief background, the original applicant had filed a suit in the Murang'a SPMCC No. 288 of 2004, seeking for orders to direct the Land Registrar to rectify the Land register in respect of the subject land by cancelling the transfer and registration of the title that was registered in the respondent's name, and to reinstate Isaac Kimani Gachii (deceased) as the registered owner.
12. In the suit, he alleged that the respondent had fraudulently transferred the subject land to himself, which the respondent denied, and put the original applicant to strict proof thereof.
13. Upon considering the documentary evidence, the trial court found that fraud was not proved. And following an appeal, the Environment and Land Court upheld the trial court's decision that fraud was not proved to the required standard. In taking into account the circumstances of the case and the findings of the two courts below, I too, am skeptical about possible success of the intended appeal.
14. With respect to the likely prejudice to the respondent, the Environment and Land Court rendered the judgment in 2015. Notwithstanding the demise of the original applicant, there has been inordinate delay on the applicant's part in bringing this application which seems to me to be an afterthought, that is highly prejudicial to the respondent.
15. In view of the above, I decline to extend time to file the Notice and Record of Appeal. The Notice of Motion dated 13th April, 2018 is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

