



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**LWL alias LWJ v SANL (Civil Application E010 of 2021)
[2021] KECA 29 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 29 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E010 OF 2021
DK MUSINGA, JA
SEPTEMBER 23, 2021**

BETWEEN

LWL ALIAS LWJ APPLICANT

AND

SANL RESPONDENT

(Being an application for extension of time to file the Record of Appeal out of time in an intended appeal against the part of the Ruling of Onyiego, J. given at Nairobi on 27th day of July 2018 in Nairobi Civil Suit No. 1 of 2007 (O.S))

RULING

1. Before me is a Notice of Motion dated 18th January 2021 brought under rules 4, 5 (2) (b) and 82 of the *Court of Appeal Rules*, 2010, section 71 a (d), (h) of the *Civil Procedure Act* and all other enabling provisions of the law substantively seeking an order granting leave to the applicant to file the record of appeal out of time in an intended against the ruling of Onyiego, J. delivered on 27th July 2018.
2. The application is supported by the grounds appearing on its body and a supporting affidavit sworn by the applicant on 18th January 2021. The application is opposed by the respondent by way of a replying affidavit sworn by the respondent on 29th April 2021. The application was canvassed by way of written submissions without oral highlighting. The applicant's submissions are dated 11th February 2021 while those respondent are dated 29th April 2021.
3. A brief background into this matter is that the applicant and the respondent were once in a matrimonial union as man and wife. The applicant approached the trial court by way of Originating Summons dated 9th January 2007 seeking declaratory orders and division of various matrimonial properties that she had acquired together with the respondent. On 21st January 2015, the parties recorded a consent in court on how the matrimonial property would be divided and the matter was marked as settled. Vide an application dated 20th December 2017, the applicant sought to set aside



the consent order. She argued that she entered into the consent through intimidation emanating from the respondent and further that she had obtained new evidence that was not available at the time of entering into the consent. The trial court dismissed this application stating that the applicant had not demonstrated that she had been coerced and or intimidated in any way to enter into a consent with the respondent.

4. In summary, the applicant's averments and submissions are, inter alia, that the applicant being dissatisfied with part of the ruling of the trial court was desirous of appealing the same. However, the applicant avers that she fell sick and therefore could not institute the appeal on time. In this connection, the applicant has annexed copies of two medical reports in support of her ill state of health. She added that in the month of April 2019, she instructed an advocate known as Job Kimeru of Kimeru Gichungw'a & Co. Advocates to commence the appeal process. However, the advocate did not act on the instructions and therefore did not file the appeal. The applicant appointed the advocate currently on record on 10th December 2020 and the advocate immediately requested for certified copies of proceedings on the same day which proceedings were availed to the advocate on 23rd December 2020.
5. The applicant argues that the delay in filing the record of appeal was not inordinate and that it was partly due to her ill health, and on the other, the failure of her former advocate to act on her instructions. The applicant argues that the mistake of her advocate should not be visited on her as an innocent person.
6. The applicant's plea was that she deserved an opportunity to ventilate her case, which according to the attached draft memorandum of appeal, is arguable and has high chances of success. Further, that the respondent would not suffer any prejudice if this application is allowed.
7. The respondent on his part argues that the delay in filing the record of appeal has not been sufficiently explained; that the applicant has not provided proof that indeed she instructed the advocate to begin the appeal process; and that in any case, according to the documents annexed in support of the application, the handwritten note purported to be an instruction letter to the advocate was dated 25th September 2019 which is more than a year from the date of the ruling. The respondent also argues that the applicant has not provided any proof to show that she was seriously ill as alleged. On whether the intended appeal is arguable, the respondent avers that the appeal has no merit whatsoever and that the instant application is an abuse of the court process.
8. I have considered the application, the grounds in support thereof, the submissions as well as the relevant law. The principles upon which this Court determines an application for extension of time under rule 4 are well settled. The Court considers, inter alia, the length of the delay; the reason for the delay; the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* ; *Fakir Mohammed v Joseph Mugambi & 2 Others* ; and *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*.
9. In *Njuguna v Magichu & 73 Others*, Waki, J. A. expressed himself thus:

“The discretion exercisable under Rule 4 of this Court's Rules is unfettered. The main concern of the Court is to do justice between the parties. Nevertheless, discretion has to be exercised judicially, that is on sound factual and legal basis.”
10. There is definitely inordinate delay in filing the record of appeal. The impugned ruling was delivered on 27th July 2018. The applicant was therefore required to file a notice of appeal within 14 days from the date of the ruling and the record of appeal within 60 days from the date of filing the notice of



appeal. In this case, the applicant did not file a notice of appeal. There is a time gap of about 910 days from the date of the ruling to the date the instant application was filed.

11. The applicant argues that she fell ill and therefore could not institute the appeal within the stipulated timeline. In support of this argument, the applicant has annexed copies of two medical reports prepared by Matasia Nursing Home and Gilead Mental Health Consultants dated 2nd May 2019 and 16th December 2019 respectively. Going through both medical reports, I note that they speak to the health of the applicant at different stages of her life. I note however, that none of the reports indicate that the applicant was admitted to hospital or bedridden or for that matter so incapacitated to make this Court arrive at a conclusion that the physical condition and the general well-being of the applicant could not have allowed her to pursue the appeal in good time. The burden of proof of the alleged incapacity lay on the applicant and unfortunately she has not discharged it to the satisfaction of this Court.
12. On the allegation that the applicant instructed an advocate known as Job Kimeru of Kimeru Gichungwa & Co. Advocates to commence the appeal process, I have gone through the annexures availed by the applicant in support of this argument and agree with the respondent that annexure "3a" which the applicant refers to as a handwritten instruction letter to the advocate is in fact a handwritten note which is to a great extent incoherent. The form and the state of the note cannot in any way be taken to amount to an instruction letter. Even assuming that the handwritten note was an instruction letter to the advocate, I agree with the respondent that the same is dated 25th September 2019 which is more than a year from the date of the ruling. The applicant being an advocate surely must have known and/or ought to have been aware of the stipulated timelines of instituting an appeal to this Court. For these reasons, I find that the delay in filing the record of appeal has not been sufficiently explained by the applicant.
13. On the aspect of the chances of success of the intended appeal, it is not my role at this stage to determine definitively the merits of the intended appeal. That is the duty of the full court when it is ultimately presented with the intended appeal. See *Athuman Nusura Juma v Afwa Mohamed Ramadhan* .
14. Turning to the issue of prejudice to the respondent, I take note that arising from the consent entered into by the parties, the respondent has already transferred most of the assets to the applicant. This was confirmed by the applicant before the trial court. The respondent argues that the applicant has refused to execute the transfer documents in his favour. The trial court had issued express directions on how parties were to proceed with regard to the Kitui property which had not been included under the consent agreement. When the peculiar circumstances of the case are viewed against the directions of the trial court and the inordinate delay in filing the appeal, I have no hesitation in finding that the respondent would suffer prejudice if the applicant's belated application is granted.
15. In the end the applicant has not demonstrated the existence of the parameters set out in *Leo Sila Mutiso* (supra). I therefore decline to exercise my discretion to grant the application and accordingly dismiss it with costs to the respondent.

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

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

Signed



DEPUTY REGISTRAR

