



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, J.A.) (IN CHAMBERS)

CIVIL APPLICATION NO NYR 17 OF 2015 (UR 12/15)

BETWEEN

PETER KIMANDIU APPLICANT

AND

**LAND ADJUDICATION OFFICER TIGANIA WEST DISTRICT1ST
RESPONDENT**

**ZAVERIO MITHIKA2ND
RESPONDENT**

JAMES MWINGILIA3RD RESPONDENT

**CHARLES KINGEERE4TH
RESPONDENT**

**DANIEL M'RITHARA5TH
RESPONDENT**

(An application for extension of time to file and serve a memorandum of appeal and record of appeal out of time from the judgement of the High Court of Kenya at Meru (Njoroge, J.) dated 21st November, 2014 in

MERU HIGH COURT MISC (J.R.) APPLICATION NO. 22 OF 2010)

RULING

Introduction:

1. On the 21st day of November, 2014 the High Court at Meru (PM Njoroge J.) delivered a Judgment in **Meru High Court Misc. Application No. 22 of 2010 Republic versus Land Adjudication Officer Tigania West District (Respondent) and Zaberio (Zaverio) Mithika, James Mwingilia, Charles Kingeere and Daniel M'rithara** as the 1st, 2nd, 3rd and 4th interested parties Ex-parte **Peter Kimandiu** the ex-parte applicant was aggrieved by that judgment and he

- lodged a Notice of Appeal dated and lodged in the High Court at Meru on the 4th day of December, 2014. He also promptly applied for a copy of the proceedings for purposes of appeal through his counsel on record vide a letter dated 16th day of December, 2014. The appeal was however not lodged within the time stipulated in the Rules the application under review.
2. The application has been presented pursuant to the provisions of section 3A and 3B of the Appellate Jurisdiction Act Cap 9 Laws of Kenya, Rule 4 of the Court of Appeal Rules 2010 and Articles 105 (1) and 159 of the Constitution of Kenya. It substantively seeks an order that the court be pleased to grant the applicant extension of time within which to file a Memorandum and record of appeal against the judgment of the honourable **Justice P. M. Njoroge** in **Meru High Court Misc. (JR) Application No. 22 of 2010** delivered on 21.11.2014. It is grounded on the grounds in its body and a supporting affidavit of the applicant and two further supporting affidavits deposited separately by **Joseph Murungi Kimandiu and Peter Kimandiu** on the 15th day of June 2015 and filed in court on the same date. It has been opposed by a joint replying affidavit of **Zaverio Mithika, Charles Kingeere and Daniel M’rithara** deposited on the 10th day of June, 2015 and filed on the 11th day of June 2015.

Applicant’s Submissions

3. **Mr. Carl Peters Mbaabu** learned counsel for the applicant has urged me to allow the application on the grounds that the applicant was genuinely aggrieved by the learned trial judge’s judgment sought to be impugned; he promptly filed the Notice of Appeal on the 4th day of December, 2014 and applied for a copy of the proceedings vide a Letter dated 16th December, 2014 and served on all parties participating in the proceedings on the 17th and 18th December 2014. The applicant accessed a typed copy of the proceedings on the 17th February, 2015 upon notification that the proceedings were ready for collection. **Mr. Mbaabu** continued to urge that the application was not promptly presented to court soon after accessing the typed proceedings because of excusable financial constraints faced by the applicant then arising from unavoidable sickness of his son who eventually passed on; granting of the relief sought is purely discretionary which discretion is unfettered; the 1st and 3rd Respondents are not opposed to the applicant’s application; the applicant has given an excusable plausible explanation for the delay in lodging both the appeal and the current application. And lastly that all the factual issues raised by the 2nd, 4th and 5th Respondents in their Replying Affidavit have all been answered by the contents of the applicant’s further affidavits.
4. To buttress their argument, the applicant urged me to be guided by the decision in the case of **Julius Kamau Kithaka versus Waruguru Kithaka Nyaga and 2 others [2013] eKLR** for the propositions that **one**, the discretion under rule 4 is unfettered but it has to be exercised judicially, not on whim, sympathy or caprice; **two**, that the matters which this court takes into account in deciding whether to grant an extension of time are; first; the length of the delay; second, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly the degree of prejudice to the respondent if the application is granted. The decision in the case of **Paul Wanjohi versus Dancan Gichane Mathenge [2013] eKLR** for the proposition that where demands of justice dictate so in an application of this nature, it will be prudent for a court of law to allow such an application to enable parties ventilate their respective positions on merit because the right to a hearing has not always been a well-protected right in our Constitution but also acts as the cornerstone of the rule of law. The decision in the case of **Joseph Gachuhi Muthanji versus Mary Njuguna [2014] eKLR** for the proposition that the extension of time is not a right of a party but a discretionary remedy that is only available to a deserving party, who has discharged the burden of laying a basis to the satisfaction, of the court that the court should exercise its discretion to extend time in his or her favour; a rule the court applies on a case to case basis when determining whether a reasonable reason has been given for the delay; or otherwise; whether there will be any prejudice suffered by the respondent, if the extension is granted; and lastly whether in certain cases public interest should be a consideration for extending time. The decision in **Peter Gatahi Kamaithia versus Secretary Public Service Commission and 2 others [2014] eKLR** for the proposition that the list of matters to be taken into consideration when deciding whether to grant or withhold a relief for extension of time is not

exhaustive and so long as the discretion is exercised judicially a judge would be entitled to consider any other factor outside those envisaged under the said rule so long as the factor is relevant to the issue being considered. Lastly the decision in the case of **Dominic Musei Kombo and 2 others versus Kyule Makau [2015] eKLR** for the proposition that the merits of the intended appeal are also a relevant factor for consideration.

The Respondents' Submissions

5. **Mr. Rukioyah** learned counsel holding brief for **Mr. Rimita** for the 2nd, 4th and 5th Respondents on the other hand urged me to dismiss the applicant's application on the grounds that the Applicant has not explained the delay in filing his memorandum and record of appeal within the stipulated time; a certified copy of the proceedings was ready on 16th February, 2015 but the applicant did not apply for a certificate of delay; no decree has been extracted and attached to the application as demonstrating a serious desire to pursue his appeal; if the relief sought is granted it will occasion prejudice to the 2nd, 4th and 5th Respondents who not only have a kinship relationship with the applicant but have also developed their respective portions.
6. To buttress their opposition to the application **Mr. Rukioyah** relied on the decision in the case of **George Mwenda Muthuri versus Mama Day Nursery and Primary School Nyeri CA No. Nyr No 4 of 2014 (UR2/14)** where a request for leave to extend time was declined because inability to raise legal fees was not per se a suitable reason; and secondly the delay was inordinate as the applicant had taken a whopping twenty (20) months to raise legal fees for the filing of the appeal. The decision in the case of **Aviation Cargo Support Limited Versus St. Mark Freight Services Limited [2014] eKLR** wherein it was argued that the notice of appeal had been lodged and served within the prescribed time; the appeal was arguable, the delay was not inordinate having been occasioned partly by the High Court registry in failing to supply proceedings in time the respondent would not be prejudiced in any way if time were to be extended and lastly that it was in the best interest of justice that the time for filing and serving of the record of appeal be extended. In declining leave to extend time the learned Judge reasoned that in the circumstances of the matter before him certified copies of typed proceedings had been availed before the expiry of sixty (60) days permitted by the Rules of the Court for the lodging of the record of appeal; **two**, no explanation was given as to why the application to seek leave for the extension of time was not lodged soon after the expiry of the sixty (60) days period and instead the applicant waited for six months before presenting the application to court; **three** no explanation was given as to why the applicant had waited for six months before presenting the application for the extension of time; **four**, the unexplained delay was inordinate; **five**, an aspiring appellant ought to be zealous and to take the initiative to comply with the law; **six**, the applicant who had legal representation throughout did not even draw a decree; **seven**, the applicants conduct was inconsistent with proactiveness; **eight**, the date when the proceedings would be paid for had not been indicated; **nine**; the overriding objective principle which enjoins a court of law to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals once filed on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out does not operate to aid the indolent. Lastly the decision in the case of **Christopher Mugo Kimotho versus the Hon. Attorney General [2009] eKLR** wherein reasons for seeking leave of court to extend time given were that the original certificate of delay had been misplaced within counsels chambers; and had just been retrieved as at the time the application for extension of time was filed; it was fit and just in the circumstances of the case to grant the order sought; the interest of justice would have been served by the granting of the order sought; and that no prejudice would have been occasioned to the respondent if the order sought were to be granted. In withholding the relief sought from the applicant, the learned judge reasoned that the factors the court takes into account in extending time within which to file a notice or record of appeal were not to be applied as a matter of course but depending on the circumstances of each case; **two**, no explanation had been given as to why the applicant took 13 days after the date of judgment to apply for a certified copy of the proceedings; **three**, no explanation had been given as to why the application for extension of time had not been presented soon after the retrieving of the certificate of delay which had allegedly been misplaced in the learned counsel's office; **four**, it was doubtful as to whether the applicant had indeed applied for a certified copy of the proceedings and judgment as no letter for such a request had

been exhibited making it impossible to compute the time of delay to be taken into account in order to comply with the provisions of the courts Rules; **five**, the omission to exhibit a letter seeking a supply of a typed copy of the proceedings and judgment amounted to a serious hitch which stood in the way of the applicant such that he could not clearly explain the delay in lodging the record of appeal within the prescribed period.

Applicant's response to the Respondents' submissions

7. In response to the respondents submissions **Mr. Mbaabu** reiterated that the delay had been plausibly explained; it was not inordinate; financial constraints had also been sufficiently explained as the applicant had annexed receipts and a burial permit evidencing sickness and death of the applicant's son which matters had not been controverted by the respondents. It was further **Mr. Mbaabu's** contention that the delay was contributed to by the court which did not supply the proceedings within the stipulated period for the lodging of the appeal; conceded that a certificate of delay had not been exhibited but argued that there was no legal requirement for a party to exhibit a certificate of delay before presentation of an application for extension of time though it is a necessary document at the time of filing of the intended appeal. Turning to the merits of the intended appeal **Mr. Mbaabu** urged me to find the draft memorandum of appeal as sufficient explanation for the existence of an arguable appeal; no prejudice would be suffered by the Respondents as there is no threat of eviction from any source; it is the applicant who would suffer prejudice if the relief sought is withheld as he will lose the right to a second opinion on his grievances and lastly the authorities relied upon by the respondents are distinguishable.

Analysis

8. Rule 4 provides;

“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 or 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 a time should be construed as a reference to that time as extended”

9. **G. B. M. Kariuki JA** in his decision in **Aviation Cargo Support Limited versus St. Mark Freight Services Limited (supra)** simply put it as follows:

“The order when or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the court to exercise its discretion in favour of an applicant the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable. In normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to this fact. When this happens the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time”.

10. As for the parameters for the application of the overriding objective principle this court has expressed itself on the applicability of this principle in the decision in the case of **City Chemist (Nbi) & Another V. Oriental Bank Limited Civil Application No. Nairobi 302 of 2008(UR 199/2008)**

“The overriding objective thus confers on the court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its

discretion always with a view to achieving any of all the attributes of the overriding objective. The overriding objective does not however facilitate the granting of orders seeking leave or extension of time to file record of appeal where the applicant has not shown to the satisfaction of the court that the delay is not inordinate or has been explained to the satisfaction of the court.”

11. Applying the above principles to the rival arguments here in, all I am enjoined to do in determining whether to grant or withhold the relief sought is to determine the length of the delay the applicant has taken in seeking reprieve from the date he was capacitated to do so; the reasons for the delay; whether the applicant has an arguable appeal; the degree of prejudice to the other party if time were to be extended; the public importance of the matter in appropriate cases; and generally the requirements of the interests of justice under Article 48 of the Constitution.
12. On the length of the delay it has been undisputably demonstrated by the applicant that he acted diligently when he moved promptly to lodge a Notice of Appeal on 4th December, 2014 and then applied for a certified copy of the proceedings on the 16th December, 2014 and had these documents served on his opponents on the 17th and 18th December, 2014 thus alerting them at the earliest opportunity of his desire to get a second opinion on the High Court’s decision. It is also not disputed that it was not until the 16th day of February, 2015 when he was supplied with a certified copy of the proceedings. He concedes it took him two months from the date he received a typed copy of the proceedings to present the application under review. The explanation he has given is that he faced financial constraints arising from the sickness of his son who subsequently passed on. He has exhibited a burial permit to that effect a matter not challenged. He has asserted that as soon as he got a reprieve he presented the application under review. When the 2nd, 4th, and 5th Respondents moved to oppose his application he moved with speed to respond to their replying affidavit with the further affidavits thus fore stalling any possibility of the application being adjourned at the earliest hearing opportunity and thus contributed to the speedy disposal of the application hence this ruling. As for prejudice to be suffered by the Respondents, it is on record that the 1st and 3rd Respondents are not opposed to the applicant’s application. The 2nd, 4th and 5th Respondents who are said to have a kinship with the applicant and have allegedly developed their respective portions of land under their occupation are not facing any eviction threats although their desire to reap the fruits of the judgment delivered in their favour should not be under estimated.
13. As for the arguability of the intended appeal, the applicant has exhibited a draft memo of appeal. I have perused it. I find that it deals with issues of application of sections of the Land Adjudication Act Cap 283 Laws of Kenya by the learned trial Judge to the issues then in controversy before him. The learned trial judge expressed himself on the said application in the ruling sought to be impugned in respect of which the applicant intends to seek a second opinion from this court. To me issues of proper or otherwise application of provisions of law to facts is arguable. It is now trite that by arguable it does not mean an argument that must succeed. It simply means an argument which on the face of it justifies a court of law to call upon the opposite party to respond to the complaining party’s claims. I am therefore satisfied that indeed the applicant has an intended arguable appeal.
14. As for the public importance of the matter, it is trite a party desirous of exercising his undoubted right of appeal should not be unreasonably be prevented from doing so without good cause.
15. As for the general requirements of the interests of justice, it is my considered opinion that interests of justice in the circumstances of this application would demand that the applicant be allowed an opportunity to exercise his undoubted right of appeal in order to crystalize the rights of the competing interests herein. No doubt there has been delay in the presentation of the intended appeal within the stipulated sixty (60) days from the date of the lodging of the Notice of Appeal but this was not wholly attributable to him. It was partly attributable to the court’s failure to supply a typed copy of the proceedings before the expiry of the sixty (60) days period. Upon capacitation, he took two months to seek a reprieve. He has given a plausible explanation which has not been challenged. It is both excusable and acceptable. A period of two months which has been plausibly explained cannot be said to be inordinate. It is certainly distinguishable from the scenario in the case law that was cited to me by the Respondents act of which I find

distinguishable.

16.As for the application of the overriding objective principle to the rival arguments herein, I am satisfied that this is a proper case wherein this principle can be applied in the interests of justice to both parties considering that there has been no inordinate delay; the applicant has given a plausible and excusable explanation for the delay; it will be in the best interest of justice to both parties that issues that were in controversy between them be reassessed on appeal and lastly such an exercise of discretion in favour of the applicant in the peculiar circumstances of this case will not amount to encouraging the flouting of clearly laid down Rules of this court with impunity. In the result I am inclined to allow the application on the following conditions.

1. That the applicant does file and serve his record of appeal within the next 30 days of today.
2. That he pay costs of the application to the respondents to be agreed or assessed.

Dated at Nyeri this 24th Day of June, 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR