Byrnes alias Robin Grahame Grahame Byrnes (Suing on behalf and as the Treasurer and Committee Member respectively of Robin Nest Opharnage) v Jajofa Copany Limited & 4 others (Miscellaneous Civil Application E002 of 2024) [2024] KEELC 4809 (KLR) (10 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4809 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

MISCELLANEOUS CIVIL APPLICATION E002 OF 2024

EC CHERONO, J

JUNE 10, 2024

BETWEEN

ROBIN BYRNES ALIAS ROBIN GRAHAME GRAHAME BYRNES . PLAINTIFF

SUING ON BEHALF AND AS THE TREASURER AND COMMITTEE MEMBER RESPECTIVELY OF ROBIN NEST OPHARNAGE

AND

JAJOFA COPANY LIMITED ..... 1ST DEFENDANT

ONGERI KWAMBOKA FAITH ..... 2ND DEFENDANT

GRACE ALUSA ONGERI ..... 3RD DEFENDANT

JACKSON ASUMA ONGERI ..... 4TH DEFENDANT

BRAMUEL JUMA MALANGA ..... 5TH DEFENDANT

RULING

1. By Notice of Motion dated 27th February, 2024 the Applicant sought for the following orders: -
    a. Spent
    b. That this honourable court be pleased to grant the applicant leave to appeal out of time against the judgment of Hon. Odawo Principal Magistrate in Bungoma CMCC No. 216B of 2019 delivered on 24/08/2023.
2. The application is based on the grounds apparent on the face of the application and the Supporting Affidavit sworn by Robin Grahame on 27/02/2024. The applicant deposed that judgment was entered against the applicants without Notice on 24.08/2023 in Bungoma MCELC Case No. 216B of 2019.

As such, they were unable to file their appeal on time. The applicants contend that the intended appeal has high chances of success and that no prejudice will be suffered by the respondents if the application is allowed.

3. In response to the application, the 5th respondent on behalf of the 1st, 2nd, 3rd and 4th respondents filed an undated replying affidavit in which he stated that the application is incompetent, bad in law and a non-starter and that the same ought to be dismissed since the applicant is forum shopping having filed a similar application in Bungoma High Court vide Miscellaneous Application No. E014 of 2023 which was dismissed for want of prosecution. The respondents argued that a judgment notice was posted in the courts notice board on 10.08.2023 alongside other matters and shared in other forums where the applicants counsel is a member and as such, the applicants were made aware of the judgment date. The respondent also deposed that the applicants have not explained to the satisfaction of the court why they failed to file an appeal in time and the delay in filing the current application. It was further stated that the issue of the intended appeal having high chances of success was moot since the parties herein have been engaged in litigation since 2010 in numerous cases. Lastly, the respondents argued that in the event the application is allowed, they would suffer substantial prejudice since they have been litigating for the past 14 years. They urged the court to dismiss the application.

4. Directions were taken to have the application canvassed by affidavit evidence and written submissions.

5. Pursuant to the said directions, the applicants filed their submissions dated 6th May, 2024 where they reiterated their position as deposed in supporting affidavit and the further affidavit and submitted that contrary to the averments by the respondents, this application is not *res judicata* since the application made in the High Court was found improper before that court on grounds that the court had no jurisdiction. Reliance was placed in the case of *Communications Commission of Kenya & 5 Others vs. Royal Media Services & 5 others* (2014) eKLR & *John Florence Maritime Services vs Cabinet Secretary for transport and Infrastructure & 3 Others* (2021) eKLR.

6. The applicants also submitted that their evidence as attached to their supporting affidavit and further affidavit was proper and in compliance with Section 5 of the *Evidence Act*. It was also submitted that the issue raised by the respondents that the applicants lack *locus standi* is an afterthought which ought to have been raised in the main suit and further that they have authority to sue having presented a board resolution authorizing them as such. They urged the court to allow the orders as sought in the notice of motion.

7. The Respondents filed their submissions dated 6th May, 2024 where they argued that the suit herein is *res judicata* and that the applicants herein lack the legal capacity to file this application and suit generally. The Applicants on the other hand filed submissions dated 23rd April, 2024 where they averred that by all standards, their application is not *res judicata* and that they have sufficiently explained the delay in filing of this application.

8. I have read and considered the Notice of Motion application dated 27th February 2024, the supporting affidavit and the annexures thereto as well as the replying affidavit and the annexures thereto, supplementary affidavit and submissions by the parties and the various authorities cited. In my view, the issues that commend for determination are as follows;

    a. Whether this application is *res judicata*.

    b. Whether leave can be granted to appeal out of time.

    c. Who bears the costs of the application.

9. The respondents argued that this application was *res judicata* since the applicants had filed a similar application vide Bungoma High Court Miscellaneous Application No. E014 of 2023 which was dismissed for want of prosecution. In rebuttal, the applicants argued that the court in which the said initial application was filed did not have jurisdiction since the issue in question was related to the environment and land use which is under the ambit of the Environment and Land Court.

10. The substantive law on *res judicata* is found under Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"

11. The *Black's Law Dictionary* 10th Edition defines "*res judicata*" as

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

12. In the case of *Christopher Kenyariri vs Salama Beach* (2017) eKLR, the court clarified the ingredients to be satisfied when determining res judicata as follows;

> " ...the following elements must be satisfied...in conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit
>
> b) Former suit between same parties or parties under whom they or any of them claim
>
> c) Those parties are litigating under the same title
>
> d) The issue was heard and finally determined.
>
> e) The court was competent to try the subsequent suit in which the suit is raised."

13. In order to decide whether a case is *res judicata* or not, a court of law should always look at the decision alleged to have settled the issues in question. From the foregoing, the element of the matter being raised having been determined by a court of competent jurisdiction is a key element in determining whether the doctrine of *res judicata* applies. In this case, the initial application was filed before the High Court. I note that the issue in contention as per the primary suit is ownership of Land Parcel No. East Bukusu/ North Kanduyi/2210. From the foregoing, it is clear that the issue in question relates to ownership of land.

14. Article 162(2)(b) of the *Constitution* states that this Court shall have jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. In addition, Section 13 of the *Environment and Land Court Act* expounds on the jurisdiction of this Court as follows:

> " (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with

the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land."

15. It is therefore my finding that the initial application being Bungoma High Court Miscellaneous Application No. E014 of 2023 was not properly before that court and as such, the issue of *res judicata* is not applicable in this instance.

16. The next issue for determination is whether the applicants given sufficient reason for this Court to grant them leave to file appeal out of time from the judgment of the subordinate court delivered on 24th August, 2023. Section 79G of the *Civil Procedure Act* provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said *Act* gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired. Section 79G of the *Civil Procedure Act* provides as follows;

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

17. Section 95 of the *Civil Procedure Act* provides thus: -

> " Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

18. In both instances, this Court has wide and unfettered discretion to enlarge time to enable the filing of a document(s) outside the stipulated period. However, such discretion must be exercised judicially. It should not be exercised capriciously but based on sound judgment and consideration of the totality of the facts and the law. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal held: -

> " It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary."

19. The principles to be considered in exercising the court's discretion on whether or not to enlarge time to file appeal were set out in the case of *Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi* Civil Appeal 255/ 1997, where the court, in considering the exercise of discretion to extend time, held as follows: -

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, 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."

20. These principles were also discussed in *First American Bank of Kenya Ltd -vs- Gulab P. Shah & Others* HCC 2255/2000 [2002] IEA 65 as follows: -

a. The explanation if any, for the delay;

b. The merits of the contemplated action, whether the appeal is arguable;

c. Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

d. The length of the delay and the explanation if any.

The present Application was filed on the 27th February, 2024 after the trial court delivered its judgment on the 24th of August, 2023. The Applicant has explained that the 5 months delay was occasioned by the fact that they were unaware of the delivery of the judgment which was allegedly done without notice. In rebuttal, the respondents asserted that the applicants counsel was ignorant of the judgment date since information to that effect was communicated in various forums. It also appears that the applicants filed a similar application before the High Court and the same is dated 21st November 2023, which was 3 months after delivery of the judgment. This application was dismissed on 22nd February 2024 and 3 days after, the current application was filed.

21. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must explain the cause of the delay to the satisfaction of the Court. In *Andrew Kiplagat Chemaringo v paul Kipkorir Kibet* [2018] eKLR the Court of appeal held;

> The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.

22. The delay in filing this application from the date of the impugned judgment the applicant wishes to appeal against was for a period of 5 months having initially filed a similar application before the High Court 3 months after the judgment. This in my view does not amount to inordinate delay and I therefore find that the Application was filed without inordinate delay.

23. Chances of success of the intended Appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. However, I note that the draft memorandum of appeal availed to the court raises arguable issues for determination *inter alia*, whether the trial court considered the evidence rendered in totality and whether it applied her mind to the applicable laws in arriving at its conclusion. It is noteworthy that an arguable appeal does

not necessarily mean one which must succeed. I also find that the respondent will not suffer substantial prejudice if the application herein is allowed.

24. The third limb is whether the Respondent can be sufficiently compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. In my view, I find that no prejudice would be suffered by the respondents that cannot be compensated by an award of costs if the application is allowed Furthermore, the Respondents are in possession of the suit land.

25. In the end, I find that the application for leave to file the Appeal out of time is merited and I proceed to allow the same and further direct as follows;

    a. The appeal be filed within (14) fourteen days from the date of this ruling.

    b. The Applicant to file and serve a Record of Appeal within thirty (30) days from the date of this Ruling.

    c. Costs of the application shall be costs in the intended appeal.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 10TH DAY OF JUNE, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr Anwar for the Respondent

2. Mr. Nabibia h/b for Alubala for the Applicant.

3. Bett C/A