



REPUBLIC OF KENYA



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Kimani & another v County Government of Kiambu & 3 others (Environment & Land Case 108 of 2022) [2024] KEELC 5743 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5743 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 108 OF 2022**

JG KEMEI, J

JULY 30, 2024

BETWEEN

STEPHEN NJOROGE KIMANI 1ST APPELLANT

JOHN KINYUA AND OTHERS 2ND APPELLANT

AND

COUNTY GOVERNMENT OF KIAMBU 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

RIGAT INVESTMENT COMPANY LIMITED 3RD RESPONDENT

GEORGE KAIRIANJA NGAHU 4TH RESPONDENT

RULING

1. Vide their Notice of Motion dated 23/11/2022, the intended Appellants/Applicants seek in the main leave to file an appeal against the Judgment delivered on 20/1/2022 in 137 of 2020 formerly ELC No 687 of 2017 (sic) out of time. Further they ask the Court to deem their annexed draft Memorandum of Appeal be deemed as duly filed and served upon payment of requisite fees. The Application is supported by the Supporting Affidavit of even date of Stephen Njoroge Kimani, the 1st Appellant. He deposed that he is the chairman of Githurai Muiganania Open market group whose members are small scale traders at Githurai market. That they conduct their business on the property known as Plot No B3 Githurai market (Ruiru Kiu Block 6 Gatharaini/211) hereinafter referred to as the suit land. That they have been trading on the suit land with the consent of Kiambu Municipal Council for a period exceeding 20 years. That despite that the 3rd and 4th Respondents have been laying claims over the suit land leading to the Applicants suing them in Ruiru ELC No 687 of 2017.
2. Simultaneously, the Applicants filed another application of even date seeking temporary injunction restraining the 3rd and 4th Respondents from evicting the Applicants.



3. Both Applications are opposed.
4. George Kairianja Ngahu swore his Replying Affidavit on 6/12/2022.
5. He deposed that there were two appeals Thika E013 OF 2022 and Thika E046 of 2022 which were dismissed by Hon Justice Eboso on 2/11/2022 and 15/11/2022 respectively. He termed the Applicants as illegal encroachers on private property. That Githurai B-3 market measures 30ft by 70ft only and has never been public land. That Ruiru Kiu Block 6 Gatharaini/211 is 3 acres and one acre reserved for a market. He averred that the Kiambu County Government fully participated in ELCA E046 of 2022 and demonstrated that Plot B-3 Githurai market has never been public land. He annexed among others, copy of the Daily Nation dated 23//1/2014 showing public participation; copies of minutes of Kiambu County Council dated 6/10/1986 and Ruiru Town Council minutes dated 12/2/1991 as GKN-5, GKN-6 and GKN-7 respectively.
6. On 28/5/2024 directions were taken for parties to canvass the Application by way of written submissions.
7. The Applicants through Mwamuye, Kimathi & Kimani Advocates filed submissions dated 19/6/2024. Both parties submitted on the application seeking leave to appeal out of time.
8. The Applicants posited that the granting of leave to appeal out of time is an exercise of the Court's discretionary powers. That the Court ought not visit the mistake of Counsel on them since they were not indolent. That they have an arguable appeal with high chances of success as shown by the annexed draft Memorandum of Appeal. That if their application is allowed the Respondents will not suffer any prejudice.
9. Flowing from the two applications, the main issues for determination in my view are;
 - a. Whether the Applicants are entitled to leave to appeal out of time;
 - b. Whether the Applicants have met the threshold for grant of temporary injunction pending appeal;
 - c. Who bears costs?

Leave to appeal out of time

10. The relevant law in an application seeking leave to appeal out of time is anchored on the proviso of Section 79G of the *Civil Procedure Act* that;-

79G. Time for filing appeals from subordinate Courts

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.”



11. A reading of the above proviso indicates that such extension of time is based on the discretionary powers of the Court. Section 95 of the [Civil Procedure Act](#) empowers the Court to enlarge such time as follows;-

“95. Enlargement of time

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.”

12. The Supreme Court in the case of [Nyamboki v Gathuru](#) (Application 6 of 2019) [2019] KESC 44 (KLR) held as follows in determining an application seeking such extension;

“In determining such an application, the Court has to consider whether the explanation given for any delay is reasonable and credible; whether there also exist extenuating circumstances to enable the Court exercise its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an Applicant has been slothful, and filed such an application as an after-thought.”

13. Earlier on the Supreme Court had devised principles to be considered in an application for extension of time in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR as follows;

- “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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice to be suffered by the Respondents if the 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.” See also *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231.”

14. In this case the Applicants contend that being aggrieved with the trial Court Judgment rendered on 20/1/2022 they instructed the firm of Ndichu Associates Advocates to lodge an appeal. That it was not until May 2022 that they realized the aforesaid firm had not lodged an appeal but went ahead to file a Memorandum of Appeal in ELC A No 046 of 2022 on 26/5/2022. That this Memorandum of Appeal was struck out by the Court on 15/11/2022 on the basis that it was filed out of time and



without leave of Court. What followed was that the Applicants then instructed another firm of Alex Kibunja & Associates Advocates to take up the appeal on behalf of the Applicants.

15. In my view, besides blaming the erstwhile firm of Advocates that were allegedly acting for them, the Applicants have not led cogent and plausible explanation to unlock this Court's discretion in their favor. No evidence was tabled before Court to support the allegations leveled against their Counsel if at all, to assail a Judgment delivered over 2 ½ years ago.
16. However, considering that the 4th Respondents averments that the previous two appeals (Thika E013 of 2022 and Thika E046 of 2022) were dismissed albeit on technicalities (want of prosecution and struck out for want of leave), the Court in exercise of its inherent powers and to ensure that the Applicants have their day in Court in light of Articles 48 and 159 of the Constitution of Kenya, and purely in the interest of justice, the Applicants are granted leave to appeal out of time.

Temporary injunction pending appeal

17. The relevant law on temporary injunction is stipulated in Order 40 rule 1 of the Civil Procedure Rules that; -

“Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”
18. Appreciating that the intended Applicants are invoking the appellate jurisdiction of this Court, the principles for grant of temporary injunction pending appeal must be satisfied over and above the provisions of Order 40 of the Civil Procedure Rules. In the case of Patricia Njeri & 3 others v National Museum of Kenya [2004] eKLR, the Court laid down the principles as follows;
 - “(a) an order of injunction pending appeal is a discretionary which will be exercised against an Applicant whose appeal is frivolous.
 - (b) the discretion should be refused where it would inflict greater hardship that it would avoid.
 - (c) the Applicant must show that to refuse the injunction would render the appeal nugatory.
 - (d) the Court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358.”
 19. In the celebrated case of *Giella v Cassman Brown & Co. Ltd* [1973] EA at page 360 the Court laid down the principles to be considered in an application for temporary injunction. An Applicant must demonstrate a *prima facie* case with a probability of success; that unless an injunction is granted, the



Applicant stands to suffer irreparable harm that may not be compensated by way of damages and lastly that if the Court is in doubt, it should decide the application on balance of convenience.

20. Have the Applicants established a *prima facie* case? The *Black's Law Dictionary* 10th Edition at page 1382 defines prima case as;
 - “ 1. The establishment of a legally required rebuttal presumption.
 2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.”
21. The Applicants contend that they are small scale business men and women on the suit property which the 3rd and 4th Respondents are laying ownership claims over. That the suit property is public land necessitating them to file a suit in Ruiru ELC No 687 of 2017 against the Respondents. That the Court ruled in favor of the Respondents necessitating the instant appeal. The Applicants have not tabled any evidence in support of their occupation of the suit land. Neither have they demonstrated any irreparable harm that they will suffer which cannot be compensated by way of damages. In the event that their appeal succeeds, the suit land can revert to them. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the Applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the convenience of the parties and possible injuries to them and to third parties. See the Court of Appeal case of *Charter House Investments Ltd v Simon K. Sang & 3 others* (2010) eKLR.
22. In the end the prayer for temporary injunction pending appeal is unmerited.
23. The application dated 23/11/2022 (seeking leave to appeal out of time) is allowed on condition that;
 - a. The Appellant to file and serve the Record of Appeal within 30 days from today.
 - b. Failure to comply with (a) above, the appeal shall stand automatically dismissed with costs to the Respondents.
24. Each party to bear their own costs.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30TH DAY OF JULY 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Makobu for Appellant/Applicant

1st and 2nd Respondents – Absent

Wanyoike for 3rd and 4th Respondents

Court Assistants – Phyllis/Oliver

