



**Ngugi v Ichahuni & 13 others (Environment & Land Case
E036 of 2023) [2024] KEELC 5745 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E036 OF 2023**

JG KEMEI, J

JULY 30, 2024

BETWEEN

MONICA WAITHERA NGUGI APPELLANT

AND

ALICE MUTHONI ICHAHUNI 1ST DEFENDANT

NYAKINYUA INVESTMENT 2ND DEFENDANT

GABRIEL NDUGA 3RD DEFENDANT

ISAAC NDARWA WAMANGU 4TH DEFENDANT

MARY WANJIRU MUHORO 5TH DEFENDANT

JOHN NJAU NDUNGU 6TH DEFENDANT

PETER GICHUKI MAINA 7TH DEFENDANT

ANNE NYAMBURA MUGO 8TH DEFENDANT

FLORENCE WAMBUI WANJURA 9TH DEFENDANT

HUMPHREY IRUNGU GACHANGO 10TH DEFENDANT

PAUL MWANIKI KAGAUONGO 11TH DEFENDANT

DAVID GATHUNGU GATUTO 12TH DEFENDANT

RUTH WAITHIRA KIMANI 13TH DEFENDANT

ELIZABETH WANGARI KARANJA 14TH DEFENDANT



RULING

1. The Appellant/Applicant through her Notice of Motion Application dated 14/9/2023 is seeking orders that;
 - a. Spent.
 - b. This Honorable Court be pleased to grant leave to the Appellant/Applicant for an extension of time to enable the filing of an Appeal out of time.
 - c. This Honorable Court be pleased to have the Appellant/Applicant's Memorandum of Appeal filed herewith as properly filed on record.
 - d. This Honorable Court be pleased to rescind, vary, vacate and/or set aside the Judgement of the Honorable Magistrate C.K Kisiangani based at Ruiru Law Courts dated 20th April 2020 and all appurtenant orders thereto.
 - e. This Honorable Court be pleased to order taking fresh evidence or a retrial of Case No. SPMCL & E No. 73 of 2019, Ruiru Law Courts.
 - f. The costs of this Application be provided for.
2. The Application supported by the Affidavit of even date of Monica Waithira Ngugi, the Applicant. She deponed that she appointed the firm of Muturi Njoroge & Co. Advocates to represent her in the trial Court but the Advocates failed to inform her of the case progress. That due to her advanced age and illness, she did not follow up her case at the trial Court and the Court proceeded to deliver Judgment on 29/4/2020 annexed as MWN 2 without taking her testimony. She urged the Court to allow her Application as prayed.
3. On behalf of the 3rd – 14th Respondents, the 11th Respondent Paul Mwaniki Kaguongo swore the Replying Affidavit dated 5/12/2023. Opposing the Notice of Motion he termed the Application as an abuse of Court process filled with falsehoods and misrepresentation of facts. That on the material day, the Appellant's son attended Court and despite being aware of the Judgment, sat on her rights. That granting prayer 3 would amount to allowing the appeal and in any event, the impugned Judgment has already been executed and as such the Application is overtaken by events. That the Applicant is in the habit of not appearing in forums to determine the dispute over the suit property and her previous attempt to set aside the Judgement was declined vide a Ruling dated 29/7/2021 annexed as INW1.
4. In a rejoinder, the Applicant filed a supplementary affidavit dated 11/6/2024. She reiterated the contents of her motion and affirmed that she relied on her Advocates for guidance in the matter. That no evidence has been tendered to show that the land has been transferred to third parties. That she has a good case that raises triable issues and evidence to prove her case beyond reasonable doubt.
5. On 25/4/2024 directions were taken for parties to canvass the Application by way of written submissions.
6. The Applicant through the firm of Shaaban Associates LLP filed submissions dated 17/6/2024. Drawing two issues for determination, on whether the prayer for time enlargement is merited, the Applicant recited Section 79G of the *Civil Procedure Act* and the guidelines on Court's discretion set out in the Court of Appeal case of *Thuita Mwangi Vs. Kenya Airways Ltd* [2003] eKLR. The plaintiff



- urged the Court to exercise discretion in her favor noting that she was not accorded an opportunity to present her case.
7. On whether the Court should stay or set aside the Judgment dated 20/4/2020, the Applicant urged the Court to invoke its powers under Order 42 Rule 6 of the *Civil Procedure Rules*. That guided by the principles for Court's exercise of discretion stated in the Court of Appeal case of *Butt Vs. Rent Restriction Tribunal* [1982] eKLR, the Court was beseeched to allow the Application as drawn.
 8. The 1st and 2nd Respondents did not file any submissions.
 9. On behalf of the 3rd – 14th Respondents, the firm of D.W Gichio & Co Advocates filed submissions dated 7/6/2024. They submitted that the Applicant was well aware of the impugned Judgment and she attempted to set it aside vide an Application dated 10/3/2021 which was dismissed on 29/7/2021 by the trial Court. That the Applicant cannot plead ignorance of the law as defence noting that she was duly represented by Counsel. That the right to appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the Judgment. That the Applicant's intended appeal does not raise any triable issues with high chances of success to warrant the denial of the Respondents' right to enjoy fruits of their Judgment.
 10. Having read and considered the rival pleadings and submissions before the Court, the main issue for determination is whether the Application is merited addressed as follows.

Leave to appeal out of time

11. Section 79G of the *Civil Procedure Act* provides for time for filing appeals from subordinate Courts to this Court to be filed within a period of thirty days from the date of the decree or order appealed against. The proviso is to the effect 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.
12. Section 95 of the *Civil Procedure Act* states that where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the 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.
13. Therefore, in considering an Application for enlargement of time, the Court exercises discretionary power. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR stipulated the following principles to guide Courts in determining exercising such discretion;
 - a. 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;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
 - c. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
 - f. Whether the Application has been brought without undue delay; and



- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
14. It is not disputed that the Applicant was duly represented by Counsel in the trial Court. Her contention is that her Advocates failed to inform her on the progress of her case hence denying her an opportunity to present her case. In explaining the delay of filing the instant Application, the Applicant has posited that her old age, illness and Covid-19 pandemic hampered her from filing the Application timeously. However, I note that the Applicant has not proffered any tangible evidence in support of her claims nor has she presented to the Court any cogent steps she took as the owner of her case to unlock the Court's discretion.
15. It is trite that a case belongs to a litigant and it is not enough to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. See the Court of Appeal decision in *Habo Agencies Limited Vs. Wilfred Odbiambo Musingo* [2015] eKLR. Further the same Court in the case of *Beltrami v Mtwapa Bay Investments Ltd* (Civil Appeal E045 of 2021) [2024] KECA 78 (KLR) emphasized that mistake of Counsel does not avail excuses to a litigant whose hands are soiled with procedural transgressions.
16. Last but not least I find that the Applicant has not explained to the satisfaction of the Court the reasons for the delay of 2 years two months from the date of the delivery of the Ruling on 29/7/2021. The Applicant had filed a similar Application in the trial Court as shown by Copy of Ruling dated 29/7/2021 marked as 'INW'. Having been dismissed in the trial Court, the Applicant's recourse was to seek review or appeal against the said Ruling. Instead she opted to file a similar Application raising issues which have already been determined by a Court of competent jurisdiction.
17. In the end the Application fails. It is dismissed with costs to the 3rd – 14th Respondents.
18. 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;

Appellant/Applicant – Absent but served

1st Respondent – Absent but served

Kimani for 2nd Respondent

3rd – 14th Respondents – Absent but served

Court Assistants – Phyllis/Oliver

