Mukora v Mukora & 3 others (Environment and Land Miscellaneous Application E004 of 2024) [2024] KEELC 5687 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5687 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2024

FO NYAGAKA, J

JULY 25, 2024

BETWEEN

JAMES NGANGA MUKORA ..... APPLICANT

AND

JOB MURIUKI MUKORA ..... 1ST RESPONDENT

ANTONY NYONGESA WAFULA ..... 2ND RESPONDENT

CELINA KAMBURA MBAKA ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

RULING

1. By an Application dated 24/04/2024 the Applicant moved this Court under Order 42 Rule 6 of the Civil Procedure Rules, Section 1A. 1B, 3A and 79G of the *Civil Procedure Act* and all enabling provisions of the law. He sought the following Orders:-

    a. ...spent

    b. ...spent

    c. That there be stay of execution of judgment entered and delivered on 15th May, 2023 and the degree thereof in CMEL No. 31 of 2022 pending the hearing and determination of the applicants intended Appeal.

    d. That this Honourable Court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by Hon. S. K. K. Mutai (Senior Principal Magistrate) vide Kitale CMEL No. 31 of 2022.

    e. That costs of this application being the cause.

2. The application was based on eight (8) grounds being that the applicant was desirous of appealing the judgment delivered on 15/05/2022 by Honourable S. K. K. Mutai in CMEL No. 31 of 2022. The thirty (30) days within which to appeal had since lapsed. The delay was not caused deliberately but because the Applicant lost contact with his previous advocate and there was loss of communication. And the Applicant learnt of the judgment in January, 2024 upon visiting the court registry to see the court file. The Applicant, being a layman, did not understand that he was required by the law to appeal within 30 days from the judgment. He says he did not have the benefit of counsel. The Applicant had a plausible and meritorious appeal. If the application was not granted he would suffer repairable damage. The Applicant was apprehensive that if orders of stay or appeal out of time were not granted the intended appeal would be rendered nugatory. The Respondents would not suffer any prejudice if the orders were granted.

3. The application was supported by the affidavit sworn by the Applicant, one James Nganga Mukora on 24/04/2024. In it the Applicant repeated the grounds of the application in deposition form, thus this court shall not repeat the content thereof but will consider the said content as summarized above as the disposition of the Applicant. In addition, the Applicant stated that he was not able to attend the chambers of his then Advocate or even Court because he did not know of the dates and he had lost the mobile contact of the Advocate and the lawyers had since relocated their chambers thus making it impossible for him to trace them. That he learned that the advocate had since joined the state law office and no longer in active practice. This forced him to visit the court registry and upon browsing the file he discovered that the judgment was delivered on the 15/05/2023, and a decree issued. Since then, he began the journey of appointing another advocate, hence the one currently on record. Further, the mistakes of his previous or former advocate of failing to inform him and advise him accordingly should not be visited upon him.

4. In conformity with the rules of natural justice, he had since lodged a letter with the court requesting certified copies of proceedings and judgment. He annexed and marked as JNM 1 a copy of the letter. He had an arguable appeal, of which he annexed a draft memorandum of appeal as JNM 2. He prayed for this Court to exercise discretion in his favour for the above reasons.

5. The application was opposed through replying affidavit sworn by the 1st Respondent Job Muiruri Mukora on 02/05/2024. He deposed the application was misconceived, scandalous, vexatious, frivolous and an abuse of the court's process. The affidavit in support of the motion was false, oppressive, irrelevant, inadmissible, and an afterthought and should be struck out. The Applicant was merely indolent in following up the case as he had instructed an advocate who duly represented him in court until the conclusion of the matter on the 15/05/2023 when judgment was delivered. He deposed further that as a client the Applicant had an obligation to follow his matter with his advocate and to ensure that the advocate carries out the instructions as given. Litigation does not belong to an Advocate but the applicant or client.

6. Further, the Applicant was awakened from this slumber when he was served with the Notice of Motion dated 31/01/2024, which sought to correct an error apparent on the decree and the application was not opposed. It was allowed on 08/02/2024. He annexed under marked JMM 1, a copy of an Affidavit of Service. Despite the foregoing the Applicant did not take any action or appeal the judgment. Therefore, the application was brought in bad faith and brought almost one year after the judgment was entered against the Applicant who duly participated in the proceedings and acted only when execution was levied against him. This was what signaled his action only with the intent to frustrate the Respondent and defeat him from enjoying the fruits of his judgment. The delay of almost one year was inordinate hence the court's discretion not to be exercised. Furthermore, the explanation for the delay was not reasonable or plausible and amounted to false information.

7. He deponed that the memorandum of appeal did not release any arguable appeal grounds. This court had the discretion to strike out pleadings on the grounds that they did not disclose any reasonable cause of action or defense in law, were scandalous, vexatious, designed to embarrass, prejudice or delay the fair trial of the action or is otherwise an unusual the process of the court, and enter judgment accordingly. The discretion of the court to stay execution should be exercised judicially (sic) and should not be used to assist a personal who deliberately sought to obstruct or delay the course of justice. Litigation must end. The Applicant had not demonstrated any evidence of substantial loss that he would experience or the loss he would suffer if the court were to dismiss the instant application. The instant application did not have any merit, and the Applicant would not be prejudiced if the Court did not grant leave to extend the time to file the appeal. The Applicant had the opportunity to be heard in the subordinate court and from his conduct he had no interest in pursuing the intended appeal. The intended appeal had been overtaken by events since the Respondent had proceeded with lawful execution of the judgment, and the entries made against the suit property, being Land Reference Kapomboi/Kalongolo Block 1/Kiriita/229 had since been expunged pursuant to their lawful judgment. He annexed and marked as JMM 2 a copy of the official search.

8. When the application came up for hearing learned State Counsel indicated that his clients would not be participating in opposition to the Application. The Applicant filed written submissions and further made oral ones to support the application. In the oral submissions, counsel submitted that the former advocate had since joined the state law office, therefore his client lost contact with him and that is why there was delay in filing the application. At this submission learned counsel for the Respondent objected and stated that she was in contact with the previous learned counsel whose contacts she gave the court. She indicated that learned counsel still practiced.

9. The above clashing perspectives prompted the court to direct that the said former learned counsel appears in Court to state the true position. The following day learned counsel appeared online in presence of the counsel for the Applicant and 1st Respondent. He introduced himself as one Mr. Dan Simiyu. He stated that previously he represented the Applicant in the lower court through his law firm, M/S Simiyu Kirorei LLP based in Kitale on the 4th Floor of Ebby Towers. He gave is professional practice number. He stated that he joined the State Law Office on 09/01/2024.

10. Further, he ceased acting for the Applicant after judgment was delivered, the same having been delivered on 15/05/2023. That all along, before learned counsel ceased to act for him, the Applicant consistently attended court including mention sessions and the date judgment was delivered. He invited the court to examine the lower court record to confirm that indeed it was true that the Applicant always attended court. He stated that the matter was an emotive one and pitted family members of whom about six (6) testified in the lower court. He stated that the Applicant was duly advised and updated always and attended Court, contrary to what he wished the Court to believe. He stated then that it was misleading for the Applicant to inform the court that he was unaware of the delivery of the judgment, lost contact with him or that he was not advised properly.

11. Upon that information being given to the Court, learned counsel for the Applicant submitted that she was not aware of the date when learned counsel previous on record joined the state law office. She argued that the Applicant still was of the opinion he had an arguable appeal. She left it to the court to determine the matter.

12. Learned counsel for the 1st Respondent opposed the application indicating that the delay was inordinate and unexplained. Therefore, she prayed that the application be dismissed.

13. In the written submissions dated 07/06/2024 the Applicant submitted on a number of issues. First, he summarized the content of the application. Further, that the application was based on the fact that

there was loss of contact between learned counsel and the Applicant. The Applicant was a layman, he had unarguable appeal and the Respondent had made an application to amend the decree nine months after the judgment was delivered hence he delayed the matter. The Applicant laid out three issues. One was whether the application for extension was merited. Two, whether the application had been brought in good faith or an afterthought. Three, whether the Applicant had an arguable appeal.

14. He relied on Section 79G of the *Civil Procedure Act* about the time within which to appeal. He stated that from that 01/01/2024 when the application for amendment of the decree was made, nine (9) months after the judgment it was clear 1st Respondent occasioned the delay by impacting the availability of the decree. Again, he lost contact with learned counsel when he moved to the state law office. He also argued that there was no precise measure of what amounted to inordinate delay since each circumstance of a case would have to be considered. He argued that he was neither indolent nor asleep, but rather had clean hands. He relied on the case of *Edith Gichugu Koine V Stephen Njagi Thoithi* [2014] EKLR. Regarding whether he had an arguable appeal he submitted that that was a matter to be considered by the appellate court, but he deserved to have his day in court.

15. I have considered the Application, the law, the case law relied on and the rival submissions. Three issues lie before me for determination and I propose to deal with them in the sequence I give because the determination of the first one will form the basis for the other two. They are whether the prayer for leave to appeal out of time is merited; whether the prayer for stay of execution pending appeal is merited; and who to bear the costs of the application.

16. When the Court determines an application for extension of time, it exercises discretion judiciously and not in a capricious manner. The discretion is wide. However, the Applicant must explain to the satisfaction of the Court the reasons for the delay. Further, a successful in such an Application must fulfil the conditions summarized by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. In the case, the Court stated that under-lying principles that a Court should consider in exercise of such discretion are:

    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 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."

17. Therefore, the starting point is that extension of time is not a right for a party. The Applicant must demonstrate that he/she deserves of such an equitable remedy. Among the factors that come into play vigilance, good faith, clean hands, absence of indolence, and many others. Thus, where it is clear that a party deliberately delayed to move the Court, scarcely will the court grant the prayer even where he demonstrates that he has good grounds to put forth on appeal. A demonstration of deliberate inaction

is where the party is aware of the decision he wishes to challenge on appeal and sits back, leaving other steps to be taken only to be cajoled by a step that is unfavorable to him. The situation would be compounded where the party does not approach the Court with clean hands. This might occur, for instance, where he misleads the Court with the intent to sway it to grant the prayers sought.

18. In the instant case, the Applicant stated that the reason for the delay in lodging the Appeal in time was that the delay was caused by the fact that he lost contact with the advocate who was previously on record for him. Further, that he learnt of the judgment in January, 2024 when he visited the court registry to peruse the court file, and that even after learning that he, as layman, was deprived of the benefit of learned counsel and did not understand that the law required an appeal to be lodged within 30 days of the delivery of the judgment.

19. The Respondents held the contrary view. They deponed that the Applicant was merely indolent. He had instructed an advocate who represented him until the conclusion of the matter and the delivery of judgment. That in any event the party had an obligation to follow up his matter with his learned counsel to ensure the instructions he gave him were followed.

20. When learned counsel who was previously on record for the Applicant appeared to clarify the allegations against him, he stated that he previously represented the Applicant through his now former law firm, M/S Simiyu Kirorei LLP. He had since joined the State Law Office on 09/01/2024. He only ceased acting for the Applicant after judgment was delivered on 15/05/2023. All along before he ceased acting, his client, the Applicant, consistently attended court including mention sessions and when the judgment was delivered. He invited the court to examine the lower court record to confirm that fact. He stated that in the subordinate court about six (6) testified in the lower court. He stated he duly advised and updated the Applicant always contrary to what he wished the Court to believe hence it was misleading for him to inform the court that he was unaware of the delivery of the judgment, lost contact with him or that he was not advised properly.

21. The above contention and facts as given particularly by learned counsel previously on record bring out the point that the Applicant was duly informed of the judgment, he deliberately did not appeal, and lied on oath about the knowledge of the delivery of the same, while also attempting to mislead the court that he lost contact with learned counsel. Such conduct is one of soiled hands and does not in any way warrant exercise of discretion on favour of the applicant. In any event, ignorantia juris non excusat (ignorance of the law excuses no one) in any matter. It should be clear to all and sundry that ignorance of the law is not a defence. Thus, even if the Applicant could have been deprived on the benefit of learned counsel, which was not the case herein, it is immaterial. To excuse such conduct and exercise discretion as a result would open a pandoras box and give the whole world a window to peddle an excuse which does not hold water. He who wishes not to seek legal counsel does so at his or her own risk as to the consequences thereto. That is why Kenya has provisions for National Legal Aid and Pauper Briefs to help the indigent people.

22. For the above reasons the prayer for leave to appeal out of time is not merited.

23. Having found that the Applicant does not deserve leave to appeal out of time, the next issue is whether the prayer for stay of execution pending the intended appeal is merited. In my view, since no leave has been granted to appeal out of time, it would be an academic exercise to delve into his issue. There would be no basis for determining it. I decline the invitation to consider it. Thus, the entire application is lost.

24. Regarding who to pay costs, Section 27 of the *Civil Procedure Act* is clear that they follow the event and the judge can only depart from that provision for good reasons to be recorded. I have none. Thus, although the parties herein appear to me to be family members pitting against each other, the Applicant having moved this court to the cause others to expense themselves in opposition to the

instant application shall bear the costs thereof. This file is closed, subject to the payment of the costs ordered.

25. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY VIA TEAMS PLATFORM THIS 25TH DAY OF JULY, 2024.

HON. DR. IUR NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Ms. Nanjumbia for Bedan Mwangi for Applicant

Ms. Wambura for the Njuguna for 1st Respondent