Macharia v Mwangi & another (Environment and Land Miscellaneous Application E002 of 2023) [2024] KEELC 5370 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5370 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2023

YM ANGIMA, J

JULY 18, 2024

BETWEEN

MILKA WANJIKU MACHARIA ..... APPLICANT

AND

JOHN MBURU MWANGI ..... 1ST RESPONDENT

THE LAND REGISTRAR, NYANDARUA ..... 2ND RESPONDENT

RULING

A. Applicant's Application

1. By a notice of motion dated 27.10.2023 brought under Sections 79G and 95 of the *Civil Procedure Act* (Cap.21) and Order 42 rule 1 of the *Civil Procedure Rules*, 2010 the Applicant sought leave of court to appeal out of time against the judgment of Hon. Daffline N. Sure (PM) dated 31.05.2023 in Engineer SPM ELC No. E016 of 2021. She also sought for an order that the annexed draft memorandum of appeal be validated and deemed as duly filed upon payment of court fees.

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant on 27.10.2023 and the annexures thereto. The Applicant contended that she was never notified by her previous advocates when the impugned judgment was delivered hence by the time she came to know of its delivery in August, 2023 the time prescribed for lodging an appeal had already lapsed. She further contended that the delay of about 4 months in filing the instant application was not inordinate and that the Respondent shall not suffer any prejudice if the leave sought was granted.

B. Respondents' Response

3. The 1st Respondent filed a replying affidavit sworn on 02.05.2024 in opposition to the application. He asserted that the application had no merit hence it should be dismissed with costs. It was contended

that the relief she obtained pursuant to the *ex parte* hearing is one of the reliefs she had sought hence there was no justification to appeal. It was further contended that there was inordinate delay in filing the instant application which had not been adequately explained. As a result, the court was urged to dismiss the application with costs.

4. The 2nd Respondent did not file any response to the application and neither did he participate in the proceedings.

C. Directions on Submissions

5. When the application was listed for inter partes hearing, it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Applicant filed written submissions dated 10.05.2024 whereas the 1st Respondent's submissions were dated 05.06.2024. However, the 2nd Respondent did not file any submissions on the application.

D. Issues for Determination

6. The court has perused the Applicant's notice of motion dated 27.10.2023, the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion the following are the key issues for determination herein:

    a. Whether the Applicant has made out a case for extension of time to lodge an appeal out of time.

    b. Who shall bear costs of the application.

E. Analysis and Determination

a. Whether the Applicant has made out a case for extension of time to lodge an appeal out of time

7. The court has considered the material and submissions on record on this issue. Whereas the Applicant submitted that she had satisfied the requirements for extension of time, the 1st Respondent contended otherwise. The factors to be considered in an application of this nature were considered in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR as follows:

    " i. The period of delay;

    ii. The reasons for the delay;

    iii. The arguability of the appeal;

    iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted.

    v. The importance of compliance with the time limits to the particular litigation or issue; and

    vi. The effect, if any, on the administration of justice or public interest, if any is involved."

8. Similarly, in the case of *Andrew Kariuki Njoroge v Paul John Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (8 October, 2022) (Ruling) it was held, *inter alia*, that:

    " 11. In deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation therefore, and the prospects

of success. This list is not exhaustive and each case will depend on its peculiar facts and circumstances. In *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22 at para 10, the court held: -

"The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused."

12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The Applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the Applicant's prospects of success. Condonation cannot be had for the mere asking. An Applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default."

9. The court has considered the period of delay in this matter. There is no dispute that the impugned judgment was delivered by the trial court on 31.05.2023. There is also no contest that the instant application seeking extension of time was filed on 30.10.2023 even though it was dated 27.10.2023. The period of delay is exactly 5 months even though the Applicant attempted to mislead the court into believing that the delay was for 4 months in her supporting affidavit.

10. The court has also considered the reasons offered by the Appllicant for the delay. The Applicant claimed that she was unaware of delivery of judgment until "late" August, 2023. She completely avoided specifying the date she became aware of the judgment. She further claimed that her previous advocates did not notify her of the judgment date. She did not, however, disclose who ultimately notified her of the outcome of the suit before engaging the current advocates on 01.09.2023.

11. The material on record shows that the Applicant's suit was heard *ex parte* on 30.03.2023 and one wonders why she did not inquire about the judgment from her former advocates for a period of 5 months after conclusion of the hearing. There is no indication on record to show that she ever called or visited her advocates to inquire about the judgment date. It is not usual for a litigant whose suit has been heard and concluded to sit back for a whole 5 months without bothering to inquire about its outcome. The court is of the view that the Applicant was being economical with the truth. It is also evident from the material on record that although her current advocates came on record on 01.09.2023 the application for extension of time was not filed until 30.10.2023 about 2 months later. There was no credible or reasonable explanation offered for this additional delay.

12. Another curious aspect of the application is that the judgment of the trial court shows that it was delivered in the presence of Ms. Wanjiru holding brief for Mr. Wainaina for the Applicant on 31.05.2023. The material on record shows that the Applicant's former advocates were gracious enough to sign a consent for the Applicant to change advocates after judgment. If, indeed, the former advocates had failed to notify the Applicant of the judgment date how come they did not give her an affidavit or letter to that effect to assist her in the instant application? The court does not believe that the Applicant's explanation for the delay is genuine.

13. The court has considered the issue of arguability of the Applicant's intended appeal against the judgment of the trial court. It is evident that what the Applicant was seeking was an order for specific performance of the sale agreement between her and the 1st Respondent. However, the trial court declined to grant the remedy but ordered a refund of the purchase price together with costs and interest. It is well settled in law that specific performance is a discretionary, equitable remedy which may be refused even where the claimant has satisfied all the formal requirements for it. As a result, the court is not satisfied that the Applicant's intended appeal has reasonable prospects of success.

14. The court is unable to find any public interest issues which would require the Applicant's claim for specific performance to be adjudicated again before an appellate court. The Applicant's claim was a claim founded on private law hence no public interest issues would arise therefrom. In the premises, the court is not satisfied that the Applicant has met the requirements for an extension of time to lodge her intended appeal out of time. The court finds that the delay in filing the instant application was lengthy and inordinate; that there was no reasonable explanation for the delay; and that the intended appeal is not an arguable one.

b. Who shall Bear Costs of the Application

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 1st Respondent shall be awarded costs of the application.

F. Conclusion and Disposal Order

16. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 27.10.2023. As a consequence, the court makes the following orders for disposal thereof:

    a. The notice of motion dated 27.10.2023 be and is hereby dismissed in its entirety.

    b. The 1st Respondent is hereby awarded costs of the application.

    Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 18TH DAY OF JULY, 2024.

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Y. M. ANGIMA

JUDGE

In the presence of:

No appearance for the Applicant

Mr. Gachiengo for the 1st Respondent

No appearance for the 2nd Respondent

Court Assistant – Carol