Gabriel v Mali & another (Environment and Land Miscellaneous Application E007 of 2024) [2025] KEELC 884 (KLR) (17 February 2025) (Ruling)

Neutral citation: [2025] KEELC 884 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2024

JO MBOYA, J

FEBRUARY 17, 2025

BETWEEN

GRACE TUNU GABRIEL ..... APPLICANT

AND

ROBE SHITO MALI ..... 1ST RESPONDENT

LAND REGISTRAR ISIOLO/MARSABIT ..... 2ND RESPONDENT

RULING

1. The Applicant has approached the court vide a Notice of motion dated 26th September 2024; and in respect of which the Applicant seeks the following reliefs:

    i. That this Honourable court be pleased to certify this application as urgent and order that the same be heard expeditiously.

    ii. That this Honourable court be pleased to enlarge time in favour of the applicant to lodge an appeal to this court, out of time against the judgment by Hon. Mbayaki Wafula – SRM delivered on 25th April 2022; in SRMCC ELC No. 11 of 2019.

    iii. That costs of this Application do abide the outcome of the intended Appeal.

2. The subject application is premised on the grounds which have been highlighted in the body thereof. In addition, the application is supported by an affidavit of the Applicant [deponent] sworn on the even date and to which the deponent has annexed two documents, namely; the draft memorandum of appeal and the judgment which is sought to be appealed against.

3. Upon being served with the subject application, the 1st Respondent filed a Replying affidavit sworn on the 28th of January 2025 and herein the 1st Respondent has raised and canvassed diverse issues. In particular, the 1st Respondent has contended that the instant application has been filed with

unreasonable and inordinate delay, which has neither been accounted for nor explained. Furthermore, the 1st Respondent has contended that the subject application is defeated by the doctrine of Laches.

4. Moreover, the 1st Respondent has also averred that even though the Applicant has contended that same [Applicant] instructed her previous counsel to file an appeal against the impugned judgment, same [applicant] has not exhibited any evidence that the previous counsel was ever paid/instructed to mount [sic] the intended appeal.

5. Premised on the foregoing, the 1st Respondent has implored the court to find and hold that the Applicant has neither established nor demonstrated the existence of sufficient cause [basis] to warrant the exercise of discretion in her favour or at all. In any event, it has been posited that equity does not aid the indolent, but comes to the aid of the vigilant.

6. The instant application came up for hearing on the 17th of February 2025, whereupon the advocates for the parties covenanted to canvass and dispose of the application vide oral submissions. In this regard, the matter duly proceeded. For coherence, the submissions form part of the record of the court.

7. Having reviewed the Application; the response thereto and the oral submissions made on behalf of the respective parties, I come to the conclusion that the determination of the subject application turns on three [3] salient issues, namely, whether the application has been mounted with unreasonable and inordinate delay and if so, whether the delay has been accounted for; whether the mistake of counsel in the circumstances ought to found a basis for the exercise of discretion in favour of the Applicant; and whether the 1st Respondent shall be disposed to suffer undue prejudice and grave injustice or otherwise.

8. I beg to start with the first issue, namely; whether the subject application has been mounted with unreasonable and inordinate delay and if so whether the delay has been accounted for. Firstly, it is common ground that the judgment which is sought to be appealed against was rendered on the 25th April 2022; whereas the subject application was not filed until the 26th of September 2024.

9. From the foregoing factual matrix, there is no gainsaying that the application beforehand has been filed and lodged after a duration of more than 29 months [slightly more than 2 years and 5 months] from the date of the delivery of the Judgment.

10. Instructively, the duration of time that was taken by the Applicant herein, before filing/mounting the instant application is ex-facie unreasonable. In this regard, one would have expected the Applicant to venture forward and to account for the delay in filing the application beforehand.

11. Nevertheless, it is not lost on the court that the reasons that have been advanced by the applicant are twofold, namely; that the Applicant was not availed a copy of the Judgment in good time and thus same was unable to mount the appeal. Furthermore, the Applicant has also contended that same [Applicant] instructed her counsel to file the appeal, but the counsel failed to act with due diligence and thus failed to file the intended appeal.

12. Pertinently, even though the Applicant contends that same was not availed a copy of the Judgment in good time to enable same to file the intended appeal, there is no evidence on record to demonstrate that the Applicant ever sought for a copy of the Judgment or at all. For good measure, an application for the provision of a copy of the Judgment would have been noted on the face of the proceedings. However, the proceedings and in particular, the copy of the Judgment, which has been annexed do not reflect any such request.

13. Additionally, it is also important to underscore that the applicant herein has not annexed and or exhibited any letter bespeaking a copy of the Judgment. Surely, it was incumbent upon the Applicant to seek for a copy of the Judgment, if at all, the Applicant thought it wise to do so.

14. Having neither sought for nor applied for a copy of the Judgment, in accordance with the provisions of Article 35 of *the Constitution* 2010; as read together with the provisions of sections 6 & 9 of the *Access to Information Act* 2015, the Applicant herein cannot be heard to deploy her failure and or neglect to procure discretion of the Court.

15. The other reason that has been deployed to seek for the discretion of the court is the effect that the applicant instructed her previous [erstwhile] advocate to file the intended appeal but their advocate failed and or neglected to act. Nevertheless, despite making the foregoing allegations/claims, the Applicant has not exhibited any instructions that were ever granted to her counsel.

16. Suffice it to state that if the Applicant ever instructed her previous counsel to mount and file [sic] the appeal under reference, no doubt the Applicant would be able to demonstrate by annexing a copy of the receipt underpinning payment of instruction fees or better still a copy of the cheque. In addition, the applicant would have been able to annex a copy of the M-Pesa payment voucher.

17. To my mind, it is not enough for an Applicant to hatch reasons and excuses and thereafter throw same on the face of court imagining that courts of law would believe any excuse, even where same are not anchored/verified by any document. Surely, any reason being propagated to underpin exercise of discretion of the Court must not leave doubt in the mind of the Court.

18. In my humble view, the Applicant herein has neither placed before the court any credible and or cogent reason to account for the unreasonable and inordinate delay. For good measure, it is worth reiterating that 29 months [being the duration taken] before the filing of the application beforehand is grossly inordinate and reeks of lethargy, as well as slovenliness.

19. It is important to recall and reiterate that the amount of time taken before filing an application, like the one beforehand, impacts upon the exercise of the court discretion. To this end, it suffices to take cognizance of various decisions, inter alia Nicholas Kiptoo Arap Korir Salat vs IEBC and 7 others [civil application no. 16 of 2014] [2024] eKLR; The county executive of Kisumu county vs county government of Kisumu [2017] eKLR; Nairobi bottlers Ltd vs Mark Ndumia Ndungu [2023 KESC]; Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR; Ngei vs Kibet [2021] KECA; Paul Musili Wambua vs The Attorney General [2015] eKLR and Postel Housing Cooperative societies Ltd vs The Minister of Sports Culture and social services & others [2024] KECA.

20. Next is the issue touching and concerning the contention that the failure to file the intended appeal within the set timeline[s] and the delay in filing the subject application was occasioned by the mistake of counsel. In particular, learned counsel for the Applicant contended that the Applicant duly instructed his erstwhile counsel to mount the appeal and that the failure is therefore as a result of the mistake of counsel.

21. Arising from the foregoing contention, learned counsel for the Applicant has submitted that mistake of counsel ought not to be visited upon the client. In this case, it was contended that the mistake of counsel, which culminated into the failure under reference therefore found[s] a basis for the exercise of discretion.

22. Notably, mistake of counsel ought not to be visited on a client. Nevertheless, it is worthy to state and underscore that before a particular client, the applicant herein not excepted, benefits from the principle of mistake of counsel, the applicant is obligated to demonstrate that same [applicant] has exercised due diligence in his/her endeavor in ensuring that same followed up the matter so as to avert any lethargy and or slovenliness.

23. In respect of the instant matter, there is no gainsaying that the applicant had an obligation to follow up with her erstwhile counsel [that is assuming that counsel was duly instructed] to ascertain whether or not the appeal was filed. For coherence, the applicant herein cannot go to slumber for 29 good months and thereafter wake up and invoke the principle of [sic] mistake of counsel.

24. It is not lost on this court that even where a party, the applicant not excepted, has retained counsel, same [party] still has an obligation to follow up the matter and ensure that the proceedings are being undertaken with the requisite diligence [see Section 1B of the *Civil Procedure Act* Cap 21 Laws of Kenya}].

25. The obligation cast upon a client to follow up and ensure that his/her matter is prosecuted with due diligence, has received judicial proclamation in various decisions. Suffice it to cite and reference inter alia Habo Agencies Ltd vs Wilfred Odhiambo Misingo (2015) eKLR; Tana and Athi River Authority vs Jeremiah Kimigho Mwakio and another (2015) eKLR and Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR respectively.

26. Pertinently, it is imperative to take cognizance of the dictum of the Court of Appeal in Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR; where the Court stated thus:

> " Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate.
>
> The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise, it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them".

27. The Court of Appeal ventured forward and cited with approval the decision in the case of Ketterman v Hansel Properties Ltd (1988) 4 All ER 769, where it was stated thus;

> " Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their heads..."

28. To my mind, it is no longer fashionable for an Applicant like the one beforehand, to slumber for 29 months and thereafter suddenly wake up by accusing her previous counsel. Suffice it to state that if the applicant ever instructed the erstwhile counsel to file the appeal [which was sic not filed] then the hammer ought to be left to fall where it belongs.

29. The third issue that deserves a short mention and discussion relates to the extent of prejudice that the 1st Respondent is disposed to suffer. Instructively, the 1st Respondent swore a Replying affidavit and

wherein same [1st Respondent] contended that same has been in occupation of the suit property for more than 15 years.

30. Additionally, the 1st Respondent has posited that owing to the length of time that was taken by the Applicant to approach the court, same [1st Respondent] developed a legitimate expectation that the suit/dispute herein had come to an end. In any event, the 1st Respondent posited that same has long settled his anxieties, which ordinarily arise from pending proceedings.

31. I beg to state that in an endeavor to protect the right of access to justice by the Applicant herein, it must not be lost on the court that justice is a double-edged sword. In this regard, the Applicant who delays in putting in place the mechanism for accessing justice should not be allowed to run roughshod over the other diligent person. [See the Overriding Objectives of the Court]. [See also the holding in the Case of Philip Keipto Chemwolo versus Augustine Kubende and Another [1986] eKlr; where the Court of Appeal highlighted the Legal position the discretion of the Court cannot be used to reward a person who has chosen to delay, obstruct and defeat justice].

32. To my mind the first Respondent has established and demonstrated that same shall be disposed to suffer undue prejudice and grave injustice. Indeed, the continuation of the instant proceedings shall militate against the principles underpinned by Article 159[2] [b] of *the Constitution* 2010.

33. Finally, it is important to point out that the extent of the delay, [whose details have been highlighted elsewhere herein before] brings into play the doctrine of Laches. Suffice it to state that the application by the applicant is also defeated by the doctrine of Laches. [See the decision of the Court of Appeal in the case of Chief Land Registrar and Another vs Nathan Tirop Koech & others (2019) eKLR, where the Court of Appeal expounded on the legal import and consequences of the doctrine of laches.

34. Arising from the foregoing, I come to the conclusion that the application dated 26th September 2024; is not only premature and misconceived, but same is devoid of merits. In this regard, the application courts dismissal.

35. In a nutshell the application dated 24th September 2024 be and is hereby dismissed with costs to the 1st Respondent.

36. It is so ordered.

DATED SIGNED AND DELIVERED ON THE 17TH DAY OF FEBRUARY, 2025

OGUTTU MBOYA

JUDGE.

In the presence of

Mr. Mutuma – Court Assistant

Mr. Leonard Ondari for the Applicant.

Mr. Owade for the 1st Respondent.

No appearance for the 2nd Respondent.