



**Shiti v Fanaka Capital Solutions Limited & 2 others (Environment and Land Miscellaneous Application 9 of 2023) [2024] KEELC 5891 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5891 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 9 OF 2023  
MN GICHERU, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**VINCENT MUSA SHITI ..... PLAINTIFF**

**AND**

**FANAKA CAPITAL SOLUTIONS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**DELT BUILDERS AND CONCRETE PRODUCTS LIMITED .. 2<sup>ND</sup> DEFENDANT**

**LUCAS MUSYOKI KANG'OLI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is on the notice of motion dated 20/7/2023. The motion seeks the following orders.
2. That the court be pleased to extend time within which the applicant can file and serve a fresh memorandum of appeal upon the respondents after the time allowed by Section 79 of the [Civil Procedure Act](#) has passed.
3. That the said fresh memorandum of appeal be deemed duly filed and served upon the three respondents herein.
4. That the court be pleased to grant any other or further orders as it deems fit and just.
5. That the costs of this application be in the cause.

The motion which is brought under Orders 50 rules 4 and 6, 51 rule 1 of the [Civil Procedure Rules](#) and Sections 1A, 1B, 3A and 79G of the [Civil Procedure Act](#) and all other enabling provisions of the law is based on eight (8) grounds and is supported by an affidavit by the applicant.

6. In summary, the applicant states as follows in the above mentioned material. Firstly, the applicant filed a plaint on 14/7/2021 and served it upon the respondents together with the summons to enter appearance. Secondly, the defendant did not file a defence but filed a notice of preliminary



objection which was not anchored on any law or pleadings. Thirdly, the date for the hearing of the preliminary objection was taken *ex parte* without informing or involving the applicant's counsel. Fourthly, when the applicant's counsel raised a complaint, he was advised to do so on 16/11/2021 when the case was scheduled for mention in court. Fifthly, in the meantime, the applicant's counsel was served with written submissions on 27/10/2021 by the respondents' counsel. Sixthly the respondents' counsel used the preliminary objection to circumvent the proper procedure under Section 6(1) of the *Arbitration Act*. Seventhly, this lack of transparency on the part of the respondents is dishonesty and bad faith. Eighthly, the trial Magistrate did not listen to the applicant's counsel's complaint as promised but rushed to give a ruling date on the preliminary objection without considering the complaint raised by applicant's counsel which concerned filing a preliminary objection before filing a defence and the accompanying material. Ninthly, the court did not deliver the ruling as scheduled on the 21/12/2021. It was instead delivered on 28/12/2021 in the absence of applicant's advocates because of the Christmas/New Year Holiday. Tenthly, it took long for the court to supply the applicant's counsel with the proceedings and ruling dated 28/12/2021 and when they were supplied, they had no date. Eleventhly, by the time the applicant's counsel was supplied with the certified and dated proceedings and ruling on 6/4/2022, the time for filing the appeal had expired. For the above and other reasons, the applicant prays that his application be allowed.

7. The motion is opposed by the respondents who have filed seven (7) grounds of opposition which are as follows.
  1. The application and intended appeal have been filed unreasonably late and out of time noting that the impugned ruling was delivered on 28/12/2021 and it has taken them over 20 months (over 1 ½ ) years to file this application.
  2. The application is flimsy, contains unsubstantiated claims and the applicant is verbose and has not explained the long delay.
  3. That the applicant did not oppose the preliminary objection in the primary suit hence cannot be heard to challenge the objections at this stage and no new evidence can be adduced at this stage of appeal.
  4. This court lacks jurisdiction to hear and determine this matter since any disputes between the parties was to be referred to Arbitration by a single arbitrator appointed by either parties or in default, by the Kenya Branch of Chartered Institute of Arbitrators pursuant to the provisions of the Arbitration Act or its succeeding legislation.
  5. That the entire intended appeal was misconceived *ab initio* as the appellant ought to have pursued arbitration pursuant to the arbitration agreement/clause 18 in both sale agreements dated 15/9/2020 for L.R. Kajiado/*Kaputei-North/107909* and 107910.
  6. That the entire application and intended appeal is frivolous, vexatious, scandalous and an abuse of the court process.
  7. That the application ought to be dismissed with costs to the respondents forthwith.
8. Counsel for the respondents filed written submissions dated 21/2/2024 and identified two issues for determination as follows.
  - i. Whether the plaintiff/applicant's application for extension of time should be allowed.
  - ii. Who bears the costs.

At the time of writing this ruling, I have not seen the applicant's written submissions.



9. I have carefully considered the notice of motion in its entirety including the grounds, the supporting affidavit, the grounds of opposition, the written submissions on record and the law cited thereon. I make the following findings. Firstly, this court has unfettered jurisdiction and discretion to admit an appeal out of time under the proviso to Section 79G of the Civil Procedure Act subject to the applicant satisfying the court that he has good and sufficient cause for not filing the appeal in time.

The proviso is as follows.

“Provided that an appeal may be admitted out of time if the appellant satisfies the court that he has good and sufficient cause for not filing the appeal in time”.

10. Secondly, the principles that will guide the court in the exercise of its discretion to extend time were settled by the Supreme Court of Kenya in the case of Nicholas Kiptoo arap Korir Salat -versus- IEBC and 6 others 2013 eKLR. They include:-

- i. 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.
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
- iv. Whether there is a reasonable reason for delay, it should be explained to the satisfaction of the court.
- v. Whether there will be prejudice suffered by the respondent if the extension is granted.
- vi. Whether the application has been brought without undue delay.
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

11. Thirdly, I find that the applicant has satisfied the court as to the reason for delay. Firstly, the date taken for the hearing of the preliminary objection was taken ex parte. This is contrary to practice. There is no reason given for this departure. Secondly, the ruling dated 28/12/2021 was given at a very unusual time. This is right between Christmas and the New Year when most law firms in Kenya are closed. It is also during the period when time does not run under Order 50 rule 4 Civil Procedure Rules i.e. between 21<sup>st</sup> December and 13<sup>th</sup> January. Thirdly, there is uncontroverted evidence that the proceedings were supplied late and found to be undated. This explains the delay to the satisfaction of the court. Fourthly, it is submitted, albeit in submissions and not in evidence that a notice of appeal was filed on 18/1/2022 but in the wrong court. This is proof that the applicant did not sleep on his rights and was actively pursuing them but suffering set backs which were not of his own making.

12. Fifthly, the respondents will not suffer any prejudice if the extension is allowed. They will have ample opportunity to file their response to the appeal. They have nothing to lose as currently, they have both the purchase price and the land that the applicant sought to buy from them. Again, the suit raises particulars of misrepresentation, trickery and conspiracy as well as fraud by the respondents and their agents. A defence and all the accompanying documents were necessary so that the trial court could determine whether the arbitration agreement was null and void, inoperative or incapable of being performed or whether there was in fact any dispute between the parties with regard to the matters



agreed to be referred to arbitration. This was all the more necessary because the applicant sought to see the respondents' defence before replying to the preliminary objection.

For the above stated reasons, I allow the notice of motion dated 20/7/2023 in terms of prayers 2 and 3.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**M.N. GICHERU**

**JUDGE**

