



Gituma & 411 others v Ministry of Lands and Physical Planning & 134 others (Environment & Land Case E005 of 2023) [2024] KEELC 13295 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E005 OF 2023
CK YANO, J
NOVEMBER 20, 2024**

BETWEEN

**BARUA GITUMA 1ST APPELLANT
GERRARD NJAGI MATUMO 2ND APPELLANT
JOSEPH MUTUGI KAMWARA 3RD APPELLANT
DELYINO MPANDA KATHENYA 4TH APPELLANT
MISHECK MITUGO KAMWARA 5TH APPELLANT
M'KUNGANI MURAUKO 6TH APPELLANT
MBAE MUCHEGE & 405 OTHERS & 405 OTHERS & 405
OTHERS 7TH APPELLANT**

AND

**MINISTRY OF LANDS AND PHYSICAL PLANNING 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
MUGAO NJAGI & 132 OTHERS & 132 OTHERS & 132
OTHERS 3RD RESPONDENT**

RULING

1. The Appellants herein filed a Notice of Motion application dated 3rd November, 2023. The Application is brought pursuant to Section 79G of the *Civil Procedure Act* seeking orders that the time for filing appeal from the determination of the National Land Commission tribunal delivered on 10th May, 2023 be extended to 3rd November, 2023, that the court be pleased to grant the appellants leave to appeal out of time and the memorandum of appeal filed on 3rd November, 2023 be deemed as properly filed and within time and costs of the application be provided for.



2. The application is based on the grounds set out on the face of the application and the supporting affidavit dated 3rd November, 2024 sworn by BARUA GITUMA. The applicants have deposed that the investigative hearing before the National Land Commission Tribunal was held on 12th March, 2021 when the appellants attended.
3. The Applicants stated that they were not represented by an advocate in the investigative hearing before the tribunal. That when the investigative hearing was concluded, the chairman of the tribunal informed them that they be notified when the determination is ready for delivery so that they can attend.
4. The Applicants state that the National Land Commission tribunal delivered its determination on 10th May, 2023. A copy of the determination is annexed. That the tribunal did not communicate to the applicants the date of delivering the determination to enable them arrange to attend.
5. The Applicants aver that they were not aware that the determination was delivered and only became aware of the determination in mid-September, 2023 through a third party. That their counsel wrote to the National Land Commission on the 20th September, 2023 requesting for proceedings in the matter but they are yet to be supplied with the same. The Applicants have annexed a copy of the letter.
6. The Applicants state that it took some time to gather the entire over 400 appellants to inform them the outcome of the determination and agree on the way forward and instruct an advocate to take up the matter. That the appellants are aggrieved by the determination of the tribunal and have filed a memorandum of appeal on 3rd November, 2023 to challenge the determination. That the appeal raises serious grounds with a probability of success.
7. The Applicants aver that it is necessary that the court allows them to appeal out of time and asked that the memorandum of appeal filed on 3rd November, 2023 be deemed to be properly filed within time.
8. The application is opposed by the respondents through a Replying Affidavit sworn by Andriano Mugwiria on 28th November, 2023. The respondents state that the application is without merit since the National Land Commission having delivered its verdict on 10th May, 2023, the applicants have not sufficiently explained the delay of over six months in filing an appeal if they were aggrieved. That the application by the applicants is an attempt to engage in endless litigation since they had filed a constitutional Petition No. 4 of 2018 which was heard and dismissed by the court for being without merit and were advised to follow up their claim with the National Land Commission which delivered its verdict on 10th May, 2023.
9. The respondents aver that a perusal of the applicants' authority to file the application indicates that only six applicants have appended their signatures out of over 400 people and therefore the applicants lack the mandate to file this application. That the appellants purported appeal does not have any chances of success at all and it is bogus and is an attempt to disturb the peace and tranquility within Gakurungu within Tunyai 'B' Adjudication Section.
10. The respondents state that the applicants have been using the suit to further their political views and disenfranchise fellow residents of Gakurungu Sub-location and to grab their land parcels.
11. The respondents aver that litigation must come to an end and urged the court to dismiss the application for lack of merit. That there is unreasonable delay in filing the application.
12. The court directed parties to file submissions and only the Applicants filed submissions dated 2nd September, 2024 through the firm of Jesse Mwitw Advocates.



13. The Applicants cited Section 79G of the *Civil Procedure Act* which provides for time for filing an appeal from subordinate courts. The Applicants submitted that the order sought to be appealed out of time was delivered by the National Land Commission on 10th May, 2023. That the appeal against the determination of the National Land Commission was filed on 24th October, 2023 out of time. That the Applicants stated that they have explained the reasons why the appeal was filed out of time in their supporting affidavit. It is submitted that the applicants have demonstrated that the appeal raises weighty and legal issues and that the appeal is not a sham.
14. The Applicants submitted that the parameters to be considered while considering an application of this nature were laid down in the case of *Imperial Bank Ltd (in receivership) & Another Vs. Alnasir Popat & 18 Others* [2018]eKLR.
15. It was submitted that the appellants have succinctly laid out the ingredients for the grant of the orders sought in the application and urged the court to consider the application together with the memorandum of appeal filed herein.
16. The Applicants prayed that the application be allowed and the time for filing of the memorandum of appeal be extended to 24th October, 2023 and the appeal be deemed properly filed within time.
17. I have considered the application, the response and the applicant's submission. The issue for determination is whether the Applicants should be allowed leave to appeal out of time and the memorandum of appeal filed on 3rd November, 2023 be deemed as properly filed and within time.
18. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The said section provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for not filing the appeal in time.”
19. An applicant for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application.
20. This discretionary power, however, is judicial in nature and must be confined to the rules of reason and justice. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 others*[2014]eKLR set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated: -"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 the delay. The delay should be explained to the satisfaction of the court; v) Whether there will be any prejudice suffered by the respondents if the extension is granted; vi) Whether the application has been brought without undue delay; and vii) Whether in certain cases, like election petitions, public interest should be a consideration for extending time."



21. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent, a position well stated in *M/S' Portreitz Maternity Vs. James Karanga Kabia Civil Appeal No 63 of 1997* thus: - "That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."
22. The main reason offered by the applicants is that they were not aware that the determination was delivered and only became aware of the determination in September, 2023 through a third party. The question here narrows to whether the delay is excusable. Excusable delays are delays that are unforeseeable and beyond the control of the party. Non- excusable delays are delays that are foreseeable or within the party's control. Obviously, the distinction between these two is significant in that it determines whether a party is liable for the delay.
23. In deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation therefor, 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 Vs. 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 therefor, 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."
24. In order to exercise its discretion whether or not to grant condonation, the court must be apprised of all the facts and circumstances relating to the delay. The applicant for the 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.
25. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.
26. I have evaluated the reason offered for the delay. The applicants aver that they were not aware of the delivery of the impugned determination until September 2023 when they learnt of it through a third party. I have perused the determination annexed to the applicants' supporting affidavit. I note that the same was delivered in the presence of all the parties. Barua Gituma, the 1st Applicant herein and the deponent of the supporting affidavit is shown to have been present together with others representing the claimants. The applicants' averment that they were not aware of the determination until September, 2023 cannot therefore be true. In addition, the applicants have alleged that they only became aware of the determination in mid-September 2023. However, the alleged third party has not even been disclosed.



27. I find and hold that the delay was inordinate and the same has not been satisfactorily explained. Not only has the 1st Applicant lied on the oath, but the applicants have for reasons only known to them deliberately failed to name the third party who made them aware of the determination. Of course, this court has noted that the applicants were aware of the determination since Barua Gituma & Others are shown to have appeared representing the claimants. I find that the application has not met the tests for the court to exercise its discretion in the applicants favour.
28. For the above reasons, it is my considered opinion that the Applicants herein have not satisfied the conditions for granting of leave to appeal out of time. Consequently, the Notice of Motion dated 3rd November, 2023 is dismissed.
29. Considering that the respondents have not filed submissions, I order that parties bear their own costs of the application.
30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF NOVEMBER, 2024.

Court Assistant – Mwangi

Mwiti for Appellants/Applicants

Ms. Mwanyika for 1st Respondent

Ms. Kendi for 2nd Respondent

No appearance for 3rd to 132nd Respondents

C. K. YANO

JUDGE

