Njuki v Ngunjiri & 3 others (Civil Application E106 of 2024)
[2024] KECA 1700 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KECA 1700 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E106 OF 2024

GV ODUNGA, JA

NOVEMBER 28, 2024

BETWEEN

TARACIRA MICERE NJUKI ..... APPLICANT

AND

ALICE WATHITHA NGUNJIRI ..... 1ST RESPONDENT

JANE WAMBUI NJUKI ..... 2ND RESPONDENT

JOYCE WANJA NDERITU ..... 3RD RESPONDENT

SOPHIA MUTHONI GICHOMBI ..... 4TH RESPONDENT

(Being an application for extension of time to file a Memorandum of Appeal and Record of Appeal and to institute an appeal from the judgement of the Environment and Land Court at Kerugoya (E.C Cherono, J) delivered on 23rdJuly 2021 in Environment and Land Case No. 5 of 2020)

RULING

1. The Applicants moved this court by a Motion on Notice dated 25th October 2024 seeking extension of time to file a memorandum and record of appeal against the judgement delivered in Kerugoya ELC Case No. 5 of 2020 on 23rd July 2021.

2. A brief history of this matter was that the applicant got married to the deceased, James Njuki Miano and in the course of the said marriage, the deceased acquired, inter alia, land parcel no. West Baragwe/ Kariru/24 (the suit land), which was a subdivision from the ancestral land acquired by the deceased. The suit land was then jointly registered in the joint names of the deceased and the appellant. After the death of the deceased, the respondents, the deceased's daughters filed originating summons before the Kerugoya ELC seeking a declaration that 1 acre of the suit land was held in trust for the respondents by the deceased, their father. That suit was opposed on the ground that since the appellant and the

deceased owned the land as joint tenants, upon the death of the deceased, the land devolved to appellant as the sole proprietor thereof.

3. Upon hearing the suit, the learned Judge, on 23rd July 2021 granted the orders sought by the respondents and directed that 1 acre of the suit land be excised from the suit land and be registered in the names of the respondents.

4. Dissatisfied by the said decision, the applicant instructed her advocates to appeal against the decision and a Notice of Appeal was duly filed. However, according to the applicant, her advocates failed to institute the appeal within the prescribed time and despite repeated requests, failed to hand over the necessary file or the documents in their possession to enable the applicant lodge the appeal herself. According to the applicant, the delay in lodging the appeal was due to the negligence of her advocates, which ought not to be visited upon her. It was her position that the learned Judge misapplied the law on joint tenancy and hence violated her rights as the surviving spouse.

5. The application was opposed by the respondents who took the view that the application was brought after inordinate delay of 3 years after the decree sought to be appealed from had been executed and the subdivision done hence the matter had been overtaken by events. According to them the matter was decided on the basis of trust as opposed to joint proprietorship. It was disclosed that on 9th August 2021, the applicant filed an application for stay of execution of the said decision which was, on 28th February 2023, dismissed.

6. I have considered the application, affidavits in support of and in opposition to the application, the submissions and authorities relied upon. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal; and fourthly, whether the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.

7. Those principles were restated by Waki, JA in Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR as follows:

> " The exercise of this Court's discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38."

8. On its part, the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR while expressing itself on the matter opined

that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

9. In Leo Sila Mutiso v Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231 this Court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondents can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

10. The respondents' position is that since the decision intended to be appealed against has been executed, the matter has been overtaken by events. However, the mere fact that the subject matter of the dispute is nolonger in existence does not deprive a party from challenging the decision. Even in cases where execution has been completed, the Court cannot deny a party desirous of exercising his or her right to appeal from doing so. A right cannot be taken away simply because some intervening event has taken away the substratum of the matter. See *Machakos District Co-Operative Ltd. v Nzuki Kiilu Civil Application No. Nai 17 of 1997* and *Seventh Day Adventist Church East Africa Ltd. & Another v M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005*.

11. In this case, the decision sought to be appealed against was delivered on 23rd July 2021. The application is dated 25th October 2024 more than 3 years after the decision. Three years delay is prima facie inordinate. In this case the reason for the delay is that the applicant's advocates failed to act on the applicant's instructions to file the memorandum and record of appeal within the prescribed period. There is however no evidence of the steps taken by the applicant to follow up on her case with her advocates. Whereas, it is true that an advocate's mistake ought not to be visited against a client, where the client is, herself, also guilty of inaction in circumstances under which he would have ordinarily been expected to take an active role in the matter, the allegation of counsel's mistake would not avail her. This Court in Rajesh Rughani vs. Fifty Investments Limited & Another [2016] eKLR cited the holding in Habo Agencies Limited -v- Wilfred Odhiambo Musingo [2015] eKLR where it was held that;

> " it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In Mwangi -v-Kariuki (199) LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude. In the instant case, there is nothing on record to show what action the appellant took between 24th October 1998 and 7th April 2005 to ensure that the suit he had filed at the High Court was prosecuted. There is no credible explanation for the delay by the appellant's former advocate."

12. It is disclosed by the respondents that the applicant filed an application for stay of execution on 9th August 2021 which was dismissed on 28th February 2023. No explanation is given why it took the applicant a whole year to lodge the instant application. In this case, I find that there was inaction by

the applicant to take a necessary step in the proceedings and there is no satisfactory explanation to the long period of delay in taking appropriate actions.

13. On whether there will be prejudice suffered by the respondents if the extension is granted, whereas the fact of execution of a decree, does not in itself deprive a litigant of his or her right to proceed with the appeal, it is certainly a factor to be considered amongst other factors in considering the prejudice to the respondent. As regards public interest, it is my view that public interest leans towards expeditious disposal of cases. Parties who are lethargic in prosecuting their cases ought not to have discretion exercised in their favour where, as a result of such lethargy, the other party is likely to be prejudiced.

14. Having considered the issues raised before me in this application, I find it wholly unmerited and I dismiss the same but with no order as to costs since the parties are related.

15. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF NOVEMBER, 2024.

G. V. ODUNGA

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. JUDGE OF APPEAL