Onsoti v Anchinga & another (Environment and Land Appeal E017 of 2024) [2024] KEELC 14152 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14152 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL E017 OF 2024

FO NYAGAKA, J

DECEMBER 17, 2024

BETWEEN

EVANS NYAMBWEGI ONSOTI ..... PLAINTIFF

AND

JERUSHA KERUBO ANCHINGA ..... 1ST RESPONDENT

DORINE NYASUGUTA ANCHINGA ..... 2ND RESPONDENT

RULING

1. The Appellant filed an application dated 26/7/2024. He brought under Section 1A, 1B, 3A, and 79G of the *Civil Procedure Act*, Order 50 Rule 7 of the Civil Procedure Rules and Sections 3, 13 and 18 of the *Environment and Land Court Act*. He sought the following orders:-

    1. ...spent

    2. The applicant be granted leave to file an appeal out of time against the ruling of Honorable C. N. Njalale, Senior Resident Magistrate, in Kitale MC ELC. No. E152 of 2023 delivered on 14th June 2024.

    3. The appeal herein be deemed duly filed and served.

    4. Costs be provided for.

2. The application was based on four grounds, the first one being that ruling in the subordinate Court suit was delivered on 14/06/2024. Counsel communicated to the applicant about the outcome. The applicant, being a driver, took time to digest the same before communicating with counsel to file an appeal. By the time of filing the appeal, time had lapsed due to the fact that counsel too was equally engaged.

3. The application was supported by the affidavit of Evans Nyambwengi Onsoti, the appellant. He stated that he filed a suit against the Respondents in the lower court in Kitale MC ELC No. E152 of 2023 in which he sought a declaration that the suit property measuring half an acre, situate at Kapkoi Sisal belongs to him and the defendants were trespassers thereon. He annexed as ENO 1, a copy of the plaint. On 12/01/2024, the defendants filed an application seeking to strike out the response (sic). He annexed as ENO 2 a copy of the application. Further, he responded to the application through an affidavit he swore on 20/02/2024. He annexed as ENO 3 a copy of his Replying Affidavit. After that the parties filed submissions and the Court delivered the ruling on 14/05/2024. He annexed as ENO 4 copies of the submissions and ruling.

4. He deposed further that counsel called him to inform him that his suit had been struck out. Being a driver with Easy Coach, he was shocked to the extent that he became confused, and his performance was affected to the extent that the employer noted it. The supervisor gave him one week to take a rest and probably seek services of a counselor whereupon he asked for a copy of the ruling. His advocate told him to give him time to follow the same up with the court. Upon consulting the family he called the Advocate who informed him that he was attending an AJS (understood to mean Alternative Justice System) Conference the whole of that week. Further, the Advocate informed him to call him during the second week of June, 2024. When he reached out to him the Advocate informed him that he was back but busy and the required time to attend to the matter. Further, as a result of several interruptions due to security issues following the death of a magistrate and demonstrations the advocate could not file the matter. In early July the advocate informed him to avail himself to his office to swear an affidavit but he too was held up in Nairobi due to the nature of his work. Further, he was unsure of the events in the country. On 08/07/2024 he met the Advocate and went through the memorandum of appeal and signed the affidavit seeking to validate the appeal. He prayed that the application to be allowed.

5. The court record shows that the Memorandum of Appeal hearing was filed on 13/07/2024 and the instant application on 03/08/2024. The Defendants filed a Reply to the Application on 20/09/2024. They did this through a deposition made by the 2nd defendant on 19/09/2024. Accompanying the deposition was an Authority to Plead dated the same date.

6. The 2nd Defendant deposed that the application was fatally incompetent, baseless, and a total waste of judicial time. It was a mere afterthought since no sufficient reason had been advanced to justify the delay in filing the appeal in time. The explanation given by the appellant was an empty narrative which had not been substantiated with evidence to justify the lapse in acting within the stipulated time of filing an intended appeal. No information had been given by the appellant that he was a bus driver with Easy Coach company and that the issue had caught the attention of the employer as deponed. Further, Easy Coach Bus Company was not a long-distance road service provider which would take one away from contact by counsel for more than 24 hours. No documentation had been given to demonstrate a wave of conditions that altered the appellant's normal state of nature leading to his absence from employment as alleged. The deposition by the applicant that learned counsel was very busy was complete deceit as legal representation calls at all times for the exercise of vigilance by counsel on matters that may prejudice his client. The explanation by the applicant was a stack of baseless ground which did not meet the requirements of Section 79G of the *Civil Procedure Act*. The orders sought were malicious and in utter bad faith since they went to the very tenets of the rights of the Respondents as beneficiaries of the deceased's Estate. Fairness called for the dismissal of the application.

7. The application was disposed of by will written submissions. The respondent opted not to file any. On his part, the applicant filed his dated 26/09/2024 on 01/10/2024. He summarized the application. He then gave three issues for determination. The first one was the reason for the delay in filing the appeal. He explained it by summarizing the facts as deposed in the Supporting Affidavit. He summed it that

the delay was neither deliberate nor inordinate and it was in the interest of justice the application be considered favorably based on that explanation. The second issue was whether their intended appeal was merited. He argued that he had an arguable appeal with a high likelihood of success and he should be given an opportunity to challenge the decision of the lower court since denying him the opportunity would put him through undue hardship and undermine his access to justice as guaranteed under Article 50 of *the Constitution* of Kenya. The last issue was on prejudice to the Respondent. He stated that none would be suffered by him since they could be adequately compensated by way of costs. He relied on the case of Nicholas Kiptoo Arap Korir Salat v. Independent Electoral And Boundaries Commission & 7 others [2014] eKLR wherein the Supreme Court held that extension of time was a discretionary power to be exercised judiciously and not arbitrarily. He prayed that the application be allowed.

8. When a court is called upon to decide whether or not to grant leave to file an appeal out of time, it should not lose sight of the important legal principle that it ought to exercise discretion judiciously and widely. It should be clear that an aggrieved party has to seek leave of the Court and obtain it before filing an intended appeal against the decision sought to be appealed from. Prior filing of an appeal and then seeking leave to validate it is of no avail to the applicant. This is because a document filed without leave of the Court is improperly before the Court and a nullity ab initio. This has been held by several courts. The guiding one from the apex court is the Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, where the Court held:-

> "By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.
>
> To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court."

9. Thus, without going far, the Memorandum of Appeal dated 08/06/2024 filed herein on 17/07/2024 was a nullity. It is hereby struck out. It follows that prayer 3 of the instant application must fail.

10. This Court is left with the determination of the merits of prayer 2 of the Application. The starting point is to acknowledge the obligation of the Court to act judiciously as stated above. In the case of Kenya Shell Limited V Kobil Petroleum Limited (2006) eKLR, the Court of Appeal held:-

> "Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however it has to be judiciously considered."

11. Also, in the case of Macharia t/a Macharia & Company Advocates vs. Mwangi & Another (2002) 2KLR 391 which was cited in the case of Showcase Property Limited V Mugambi & Company Advocates (2020) eKLR, the Court of Appeal held:-

> "the court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word "realistic" makes it clear that fanciful prospects or an unrealistic argument is not sufficient. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave if the court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the court considers should be in the public interest, be examined by this court or, to be more specific, this court may take the view that the case

raises a novel point or an issue where the law is clarifying. There must always be a ground of appeal which merits serious judicial consideration."

12. In in the Board of Trustees of African Independent Pentecostal Church Of Africa Church v Peter Mungai Kimani & 12 others [2016] eKLR Lady Justice Aburili gave a summary of factors the court ought to consider when exercising discretion. They may not have been an exhaustive laundry list but they at least give a framework to guide as a start. She stated that they:

"include:

1. Whether there has been indolence or unexplained delay on the part of the applicant.
2. Whether the applicant is guilty of abuse of the court process.
3. Whether the enlargement will prejudice the defendant.
4. Whether the denial of enlargement period will occasion prejudice to the applicant given the circumstances of the case.
5. Whether the enlargement is necessary for the effectual complete adjudication of the issues in controversy.
6. Whether it is just and fair to enlarge time in the circumstances of the case."

13. In the case of a Supreme Court of Judicature Court of Appeal, Civil Division, in Sayers V Clarke Walker (a Firm) [2002] EWCA CIV 645 at paragraph 22 observed:

"It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider "all the circumstances of the case" including:

1. the interests of the administration of justice;
2. whether the application for relief has been made promptly;
3. whether the failure to comply was intentional;
4. whether there is a good explanation for the failure;
5. the extent to which the party in default has complied with other rules, practice directions and court orders;
6. whether the failure to comply was caused by the party or his legal representative;
7. the effect which the failure to comply had on each party; and
8. the effect which the granting of relief would have on each party.

In the case of a procedural appeal the court would also have to consider item (g):

"whether the trial date or the likely trial date can still be met if relief is granted".

14. Further, in United Arab Emirates V Abdelghafar & others 1995 IRLR 243 the Employment Appeal Tribunal added four principles to guide in exercising the discretion to extend time. It stated:

1. The grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the Appeal Tribunal. The result of an exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses.

2. As Sir Thomas Bingham M R pointed in Costellow v Somerset CC (supra) at 959C, time problems arise at the intersection of two principles, both salutary, neither absolute.

> " ... The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met..."

The second principle is that:

> "...a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. ..."

3. The approach indicated by these two principles is modified according to the stage which the relevant proceedings have reached. If, for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice to the other party, justice will usually favour the action proceeding to a full trial on the merits. The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. An extension may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.

4. An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default."

15. Lastly, I would add that the Court ought to consider the possibility of the success of the intended appeal. That possibility must be real in the mind of the Court granting the leave, as was stated in the

Canadian case of Ravelston Corporation Limited (Re), 2007 ONCA 268 (CanLii). In the case, the Court stated thus:

> "A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal."

16. But the point is that the intended appeal should not be one that must succeed on appeal. It only needs to be arguable, which means that the grounds it proposes to present are those that a reasonable judge applying his mind to them as they appear vis-à-vis the circumstances of the decision of the lower court lead the judge to be persuaded that they hold water or substance. This may be dislodged by stronger arguments at the hearing of the appeal and they be defeated. As this Court held in Onindo Onindo & Associates Advocates V Gatatha Farmers Co Limited & another [2022] eKLR:

> "13. In my view, the reason why the law was specific that leave has to be granted first before filing the Appeal was for the aggrieved party to set before the Judge exceptional circumstances of points that would entitle him or her for leave to appeal. That is why the Court of Appeal stated in the case of Macharia t/a Macharia and Co. Advocates (cited above) had to explain the term "realistic" in regard to the intended appeal having realistic chances of success. The term realistic moves the parameter the Court should consider in analyzing the chances of success of the appeal from "high" and "arguable" to a higher pedestal of concreteness: that which a Judge applying his/her mind to the grounds presented is convinced that they have a somewhat definitive success. By so doing the judge is neither being called to sit on appeal over his decision nor lay a stumbling block to or bar a party desirous of appealing from his decision."

17. Turning to the instant application, the applicant argued that the reason for the delay was that he was engaged in long-distance driving, hence he could not be able to get in touch with his learned counsel to give instructions. He stated that he worked with Easy Coach Bus Company which duty prevented him from meeting his learned counsel. Further, he was not able to travel to meet his Advocate because of interruptions of court processes because of the fact that a Magistrate had been murdered. Again, that another reason was what he termed as uncertainty in the country's situation. He did not explain what he meant by the latter reason. Nevertheless, he added that that learned counsel too was engaged in other business that made him not attend to his matter in time.

18. I have considered the reasons advanced by the applicant vis-a-vis the current times of litigation in the country. First, I noticed that the memorandum of appeal which this Court struck out earlier was dated 08/06/2024. It means it was drawn within the period allowed by law to file an appeal given that the decision sought to be appealed from was rendered on 24/05/2024. Secondly, in this era of modern technology communication has improved drastically to the extent that delivery of instructions to learned counsel by a client may be via electronic means and not necessarily physical. This includes the delivery of documents such as Affidavits to a party who then takes it to the nearest commissioner for oaths or notary public and commissions or notarizes it, scans and mails it back to the learned counsel to file it. Even where it has to do with the signing witness statements, drafts may be done and mailed or sent to clients electronically, they sign, scan and send back to the lawyer to deal while the originals are sent via other means such as courier for delivery. Again, since the 11/03/2024, filing of documents in Court is electronic (E-Fling), including assistance being given at cybers and Huduma centres. Essentially, the Court is stating here that the explanation given by the Applicant is too weak to support a basis for the Court to exercise discretion in favour of the Applicant. His conduct is demonstrative of a party who was not serious in taking steps to file an appeal. It was casual. Worse was when he does not explain when

he was informed by counsel about the ruling, from when he was affected by it, how that impacted his action or inaction (in any event, if it affected him that was the more reason he should have acted quickly than he purported to do), from when to when the employer gave him time off to take a step, and so on. This Court was left with more questions than answers by the Applicant's explanation of the events prior to the filing of the instant application. It is therefore unable to exercise its discretion in the Applicant's favour.

19. The upshot is that the application is not merited. It is dismissed, but with no order as to costs.

20. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 17TH DAY OF DECEMBER, 2024

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Mwango Mandere holding brief for Ombongi for Respondent

No appearance for Appellant Applicant