Samburuma v Pchemut & 2 others (Environment and Land Miscellaneous Application E003 of 2024) [2024] KEELC 6799 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6799 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2024

FO NYAGAKA, J

OCTOBER 17, 2024

BETWEEN

FRANKFURT CHERENI SAMBURUMA .... APPLICANT

AND

NICHOLAS NDIMA PCHEMUT .... 1ST RESPONDENT

ESTHER CHEMUTAI NDIEMA .... 2ND RESPONDENT

GABRIEL KIRUI CHEREN .... 3RD RESPONDENT

RULING

1. This is an Application dated 16/04/2024. It is filed under Sections 1A, 1B, 3A, 79 G and 95 of the *Civil Procedure Act*, under Order 50 Rule 6 and Order 51 Rules 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It seeks the following Orders:-

    a. ...spent

    b. That this Honorable Court be pleased to extend the time and grant leave to the applicant to appeal out of time against the judgment delivered by Honorable CM Kesse (PM) on 30th May 2023 in Kitale CMELC No. 64 of 2019.

    c. That the costs of this application be provided for.

2. The application is based on eight grounds which are summarized as hereunder. That Judgment was delivered in Kitale CMELC No. 64 of 2019 on the 30/05/2023. The Applicant was aggrieved by the judgment, however, due to the illegibility of the handwriting of the trial magistrate it was exceedingly difficult to read the reasoning and findings of the court in order to formulate the grounds of appeal, which difficulty resulted in delay in filing the Memorandum of Appeal. The time of filing the appeal had run out. The delay in filing the appeal was not excessively prolonged or egregious to the extent of being inexcusable and the Applicant had not been indolent but diligent. The Appeal

had overwhelming chances of success and the Appellant was willing to comply with any order or condition imposed by this court. The Applicant will be prejudiced if the application was not allowed. The Respondents would not suffer any prejudice if the orders were granted.

3. The application was supported by the affidavit of the Applicant which he swore on 16/04/2024. He repeated the contents of the grounds in support of the application, but in deposition form. In addition, he annexed as FCS-1 a copy of a letter dated 30/05/2023. requesting certified copies of proceedings and judgment for appeal purposes. He also annexed and marked FCS-2 a copy of another letter dated 30/11/2023, making a similar request. He annexed as FCS-3 copies of the judgment and FCS-4 a draft Memorandum of Appeal. He deposed further that there were good and sufficient reasons for this Honourable Court to exercise discretion and grant him the leave to file the appeal out of time.

4. The application was opposed through a Replying Affidavit sworn by one Nicholas Ndiema Pchemut on the 20/06/2023. He deposed that the application was frivolous, vexatious and an abuse of the process of the court. The Applicant was not keen in following up with the court registry on updates of the certified copies of the proceedings and Judgment. He only followed it up after six months through the letter dated 30/11/2023, which shows that there was a delay. He proceeded to file a Draft Memorandum of Appeal on 25/03/2024, which was a further 4-month delay. The period of six months was inordinate delay and equity does not aid the indolent. Further, the Application raised no reasonable grounds with any probability of success in his Appeal. The probability of success of the application ought to be material. The application had been brought in bad faith in order to frustrate and impede the administration of justice. They stood to suffer prejudice if the application was allowed.

5. The application was disposed of by way of written submissions. The Applicant filed his written submissions dated 09/07/2024 on 11/07/2024. The Respondents filed their written submissions dated the 12/07/2024.

6. In summary, the Applicant gave the preview of the contents of the application and reproduced Section 95 of the *Civil Procedure Act*. He relied on the case of Leo Sila Mutiso vs Helen Wangari Mwangi, Nairobi, CA No. 255 or 1997 and the Supreme Court of Kenya case of Nicholas Kiptoo Arap Korir v. Independent Electron Boundaries Commission and Seven Others [2015] eKLR. He also quoted the case of Muchungi Kirabo v James Michonne Keraga and Another 1998 eKLR, and Vaishya Stone Suppliers Company Limited v. Stone (2006) Limited [2020] eKLR. Lastly, he relied on the case of Banco Arabe v Bank of Uganda, 1999] 1 EA, 22.

7. The Respondents also summarized the application and gave two issues for determination before the court. The first one was whether the actions of the Applicant constituted inordinate delay. On this they submitted that there was delay and explained it, based on the timelines of filing the application after the delivery of the judgment. They relied on the case of Moses Mwangi Kimani v. Shammi Kanjirarapparambil [2014] eKLR. The second issue was whether the court would grant the orders as prayed. They too relied on the case of Nicolas Arap Korir (supra), and the case of Njoroge v. Kimani, [2022] EKR which decision was delivered by the Court of Appeal. They argued that the orders sought could not be granted because the Applicant had a fair opportunity to be heard within a reasonable time but did not avail himself of that opportunity. The delay was inordinate. They prayed for dismissal of the Application.

Issue, Analysis And Determination

8. I have considered the Application, the law and the rival submissions of the parties. Only two issues lie before me for determination. One is whether the Application is merited. Two is who to meet the costs of the Application. I now proceed to determine the same, starting with the first one.

9. First it is worth noting that of the provisions relied on only Sections 79 G and 95 of the *[Civil Procedure Act](https://new.kenyalaw.org)*, under Order 50 Rule 6 and Order 51 Rules 1 of the Civil Procedure Rules, 2010 would be relevant. But the Applicants did not expound on their relevance. This Court wishes not to delve into the failure to do so save to say that it is time the parties herein and all and sundry people (in matters to be filed in times to come) departed from forever using the phrase "other enabling provisions of the law" as a phrase for reliance in bringing applications or claims or petitions before courts of law since it does not help anyone. If they are aware of the other provisions then they would do well to cite them.

10. Section 95 of the *Civil Procedure Act* then provides that "Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act..." And Order 50 Rule 6 which together with the Rules are designed to give a detailed procedure reads at the relevant part that, "Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time..."

11. Both the Section and Rule relied on by the Applicant apply to acts whose time for their performance is limited. As to who or what limits the time, the two provisions interpreted purposively point to where the either the law or the Court itself fixes a period for the doing of an act. Where a party fails to do an act within that period fixed, he may move the Court to extend the time on such terms as shall be just.

12. In both instances, this Court has wide and unfettered discretion to enlarge time to enable the filing of the document(s) a party wishes to. But it has been stated times without number in courts of both this and higher levels that the discretion must be exercised judiciously and judicially. It should not be capricious but based on sound judgment and consideration of the totality of the facts and law. In the case of Thuita Mwangi v Kenya Airways Ltds [2003] eKLR the Court of Appeal held: -

> " It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly) the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted."

13. Judge Justice Wambuzi as he then was who expressed himself as follows in the case of AO Menya v Mcreas Ltd [1978[eKLR where the court held that :

> " doing the best I can in the circumstances, I find it difficult to say that sufficient reason has been shown to justify extension of time. In the words of Windham JA, "there was a lack of diligence" on the part of the advocates and their clerk in taking steps to see that the notice of appeal was filed in time. I express my sympathy to the applicant who indicated his desire to appeal at the earliest moment given him, but if a mistake of clear law or of fact without more on the part of the advocate or his clerk will not constitute sufficient reason I fail to see how inadvertence on the part of the either or both as in this case, can. Furthermore, there is no element of blame on the part of the court as in some of the cases referred to in this ruling. The application is refused, with costs."

14. In Kiptoo arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 Others [2014[eKLR which the Applicant cited, the court held that:

> " ....it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and

whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. We derive the following as the underlying principles that a court should consider in exercising such discretion:-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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; whether the courts should exercise the discretion to extend time; is a consideration to be made on a case-to-case basis; where there is a reasonable (cause) for delay, the same should be expressed to the satisfaction of the court; whether there would be any prejudice suffered by the respondent , if extension is granted; whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time."

15. Similarly, in Rufus Muriithi Nyaga v Juliet Wanja Ireri [2018] eKLR Justice Muchemi held thus:

> " when a court is considering delay, the length of delay is a relevant factor. The applicant was required to act within 21 days but he took a whole one (1) year in slumber. It is not too harsh to refer the applicant as an indolent litigant. The limited time of filing the record was not fixed in vain but to serve the purpose of expeditious disposal of cases. Litigation must come to an end.........
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> The discretion of the court to extent time must be exercised judiciously. I find one (1) year delay inexcusable and contrary to the overriding objective in regards to expeditious disposal of cases and in regard to economic use of judicial resource."

16. The Applicant laid blame on the court's handwriting which to him was illegible, making it difficult for his Advocate to read the court's reasoning and formulating the grounds of appeal. What is clear from the deposition, and as per the annexture FCS-3, is that the Applicant became aware of the judgment the same date of its delivery. That was why his advocate wrote to the Court as per annexture FCS-1 on the same date, asking for typed proceedings. The next time he writes about the proceedings is, as per annexture FCS-2, on 30/11/2023.

17. The Applicant does not state when the Advocate perused the Court file to find it difficult to read the handwriting. The allegation of perusal of the Court file is not supported by any evidence, by way of payment for or a written request for perusal of the same. Further, there is no letter from the Advocate, particularly within the time prescribed by law to appeal, indicating to the trial magistrate or court generally that the Advocate has attempted to read the handwriting and has failed to do so because it is illegible. Furthermore, what the Applicant calls consistent follow-up in the Registry for typed proceedings is only another letter written six months after the first, requesting for the proceedings. Even so, from that time to 25/03/2024 when the Memorandum of Appeal is dated as having been signed, and even a further delay of 21 days to the date when the instant Application was dated, and possibly filed it is a long unexplained delay. The Applicant, who 'consistently' followed the proceedings does not even attempt to explain why if he indeed was vigilant he did not collect the proceedings on time, soon after 28/02/2024. Needless to say, that from the time he wrote last to Court to the time he dated the Memorandum of appeal, it is admittedly four months and from when he purportedly collected the proceedings to when he filed the instant application it was another thirty (30) days delay. I agree with the Respondents, the delay was inordinate and insufficiently explained.

18. In any event, there is no supporting affidavit or any other sworn by the Applicant's learned counsel to state that the handwriting was illegible. Further, the allegation that the handwriting was illegible is the flimsiest of the depositions as reason for the delay. This is because, as explained above, the Applicant did not attempt to seek assistance from the court's abundant resources of judicial staff who know

how to read the same handwriting or from the trial magistrate to read for him the handwriting. If the handwriting was finally transcribed as it was and the certified copy of the judgment availed to him, it is inconceivable that the handwriting was illegible. In any event, if this Court were to be swayed to agree with the Applicant that the handwriting was illegible as to make it difficult to read the judgment and prepare the Memorandum of Appeal, it would mean that the handwriting is so notoriously illegible that it will go to the public records as one additional fact Section 60(1) of the *Evidence Act*, Chapter 80 of the Laws of Kenya, would permit courts to recognize. I am not prepared to open a pandoras boxes for such weak, poor or flimsy excuses.

19. The final finding is that the Application dated 16/04/2024 is devoid of merit. It is hereby dismissed with costs to the Respondents, and the file is closed.

20. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA TEAMS PLATFORM ON THIS 17TH DAY OF OCTOBER, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

At 11:20 AM, in the presence of:

Ms Nafula Advocate.........for the Applicant

Ms Mengich Advocate.....for the Respondent