



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCC MISC APPL. NO. E010 OF 2020**

**JOSEPH MWALE MUINDI & MBUVE KIMWELE** (*Suing as the legal representative of the estate of*  
**MANASEH GUYA MWALE DCD**.....**PLAINTIFF/RESPONDENT**

**-VERSUS-**

**P.N MASHRU**.....**DEFENDANT/RESPONDENT**

**DEDAN ONDIEKI**.....**APPLICANT/THIRD PARTY**

**RULING**

1. Before me is a Notice of Motion by the applicant/third party dated 5<sup>th</sup> October 2020 brought under Article 159 of the Constitution of Kenya 2010, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules as well as sections 1A, 1B, 3A 63(e) and 79G of the Civil Procedure Act 2010, seeking several orders, some of which have been spent as follows:-

**1) (spent)**

**2) (Spent)**

**3) That the court be pleased to grant the Applicant leave to file an appeal out of time.**

**4) That the honourable court be pleased to enlarge time to file memorandum of appeal out of time.**

**5) That any other order that the court feels fit to grant.**

**6) That costs of the application be in the cause.**

2. The application has grounds on the face of the Notice of Motion and is supported by an affidavit sworn on 5<sup>th</sup> October 2020 by Dedan Ondieki Anyansa the Applicant in which it was deponed that the Applicant was a 3<sup>rd</sup> party in Makindu SPMCC No. 182 of 2013, wherein judgment was entered on 15<sup>th</sup> March 2017 for Kshs.1,066,205/= and that he did not participate in the proceedings though the firm of Onyori Opini & Gachuba advocates purported to act for him after being instructed by Invesco Assurance Co. Ltd.

3. The application is opposed by the plaintiff/respondent through an affidavit sworn by Joseph Muindi on 14/12/2020. The Respondent's counsel M/s Mutunga & Muindi advocates on their part filed written submissions on 15<sup>th</sup> March 2021 in which they contended that a previous similar application filed by the same applicant had been dismissed on 28/01/2020 for non-attendance in court by the applicant or their advocate and that this present application was merely filed because a Notice to Show Cause had been issued. The applicant's counsel did not file written submissions nor attend court.

4. I note that though this application was filed under certificate of urgency, the Applicant and their counsel did not attend any of the mentions fixed by the court on 9<sup>th</sup> December 2020, and also on 15<sup>th</sup> March 2021 to confirm filing of written submissions and taking a ruling date.

5. In effect therefore, the applicant and his counsel have absconded their application, and this court cannot either force them to proceed with their application nor decide the application in their favour. I would thus have dismissed the application summarily for non-attendance, but since I am told by counsel for the respondent that a similar application was dismissed for non-attendance in court of the applicant, and the respondent's counsel has filed written submissions, I will consider its merits on the basis of documents filed.

6. Considering the application and submissions filed, I find that this application has no merits and is for dismissal for two reasons. Firstly, assuming that the Applicant had filed a previous application which was dismissed on 28/01/2020 for non-attendance, then they should have applied for reinstatement of that application instead of filing a fresh application, as filing a fresh application in my view amounts to an abuse of court process. The second reason why this application has to be dismissed is that having been filed under certificate of urgency, the Applicant has failed to demonstrate to the satisfaction of this court that he should be granted enlargement of time to file an appeal as required under section 79G of the Civil Procedure Act (Cap21) which provides as follows:-

***79G 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 satisfies the court that he had good and sufficient cause for not filing the appeal in time***

7. The applicant not having satisfied the court that he has good and sufficient cause as required, I dismiss the application, with costs to the respondent.

**DELIVERED, SIGNED & DATED THIS 28TH DAY OF APRIL, 2021 IN OPEN COURT AT MAKUENI.**

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**GEORGE. DULU**

**JUDGE**