



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

MISCLENEOUS ELC APPLICATION 4 OF 2021

JUMA NYATEKO.....APPELLANT

VERSUS

FREDRICK OMONDI OKETCH.....1ST RESPONDENT

RULING

Application seeking leave of the court to file an appeal out of time: application allowed.

Introduction

1. The appellant in **Siaya PM-ELC 142 of 2018** filed suit against the respondent over the ownership of EAST ALEGO NYAJUOK/2634 (**the suit property**). The respondent neither entered appearance nor filed a defence and consequently, the suit proceeded for formal proof. After hearing the appellant's case, the court by its judgement rendered on 25/04/2019 dismissed the plaintiff's suit with costs to the respondent. Dissatisfied and aggrieved by the decision of the court, the appellant filed the instant motion dated 6/08/2019 that is the subject of this ruling.

Appellant's case

2. The appellant seeks the following prayers; (i) to be granted leave to appeal out of time against the judgement of the lower court, (ii) for the draft memorandum of appeal to be deemed as duly filed and served and, (iii) costs to be provided for. The motion was primarily grounded on; (i) the appellant is aggrieved and dissatisfied by the judgement of the lower court, (ii) time had already run out by the time he intended to appeal, and, (iii) he is not guilty of inordinate delay. The affidavit in support of the motion reiterates the averments in the appellant's motion. The appellant has annexed a draft memorandum of appeal to his motion dated 6/08/2019.

Respondent's case

3. Despite service of the instant motion, the respondent has not tendered a response.

Submissions

4. The appellant filed his written submissions dated 8/10/2021. In his submissions, the appellant has placed reliance on **Sections 79G and 95** of the **Civil Procedure Act** as the statutory provisions that clothes this court with jurisdiction to grant the orders sought. He equally placed reliance on the cases of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** and **First American Bank of Kenya Ltd vs Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No.2255 of 2000 (2002) 1 EA 65** which set out the parameters that guide judicial officers in exercising their discretionary powers in motions seeking enlargement or extension of time to file an appeal. He urged the court to allow the motion. The appellant framed one issue for determination; whether the appellant has demonstrated sufficient cause to warrant the court to grant him leave to file an appeal out of time.

5. Despite service of the pleadings, the respondent did not file written submissions.

Analysis and determination

6. Having considered the motion, supporting affidavit, annexure and submissions, the court considers that these are the issues falling for determination; (i) whether the appellant shall be granted leave to file an appeal out of time and, (ii) whether the draft memorandum of appeal dated 6/08/2019 and annexed to the appellant's motion shall be deemed as duly filed. The issues shall be dealt with in a sequential manner.

I will proceed to analyze the legal and jurisprudential framework on these issues.

7. The appellant has moved this court within the provisions of **Order 50 Rule 5** of the **Civil Procedure Rules** instead of **Order 50 Rule 6** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The overriding objective of this court is to do substantive justice in cases presented before it. Being guided by **Article 159(2)** of the **Constitution**, **Order 2 Rule 12** and **Order 51 Rule 10(1)** of the **Civil Procedure Rules**, this court shall administer justice without undue regard to procedural technicalities.

8. The provisions of law that clothes this court with discretionary jurisdiction to grant leave to file an appeal out of time lies with **Sections 79G and 95** of the **Civil Procedure Act** and **Section 16A** of the **Environment and Land Court Act** and in order for a party to succeed in such a motion, an appellant must satisfy the court that he has a good and sufficient cause for not filing the appeal in time.

9. The principles that guide courts in allowing or declining a motion seeking leave to file an appeal out of time was settled by the Supreme Court of Kenya in the case **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** where the court set out the principles as follows: -

“we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- 1. 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;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.**

10. Has the appellant met the principles outlined in the **Nicholas Kiptoo Arap Korir Salat case**? Though the provisions of law do not set out the maximum or minimum period of delay, an applicant has to demonstrate that he has good and sufficient cause for the delay.

11. The main ground the appellant has proffered for the delay is that after delivery of the judgement, he severed ties with his erstwhile advocates and by the time he instructed another advocate to act him, time had already run out. Looking at the circumstances of the delay, it is the considered view that the appellant has proffered a reasonable and plausible explanation for the delay.

12. The period of delay from the time the judgement was delivered to the time this motion was filed is approximately 3 months. This motion was filed on 6/08/2019 while the judgement was delivered on 25/04/2019. It is the finding of this court that the period of time is not inordinate to warrant denial of the appellant the right to argue his case on appeal.

13. The court has had a chance to look at the memorandum of appeal annexed to the appellant’s motion and the grounds set out therein establish an arguable case with possibility of success and the appellant should not be denied access to the seat of justice.

14. The respondent did not participate in the proceedings in the lower court and he has equally not participated in the proceedings before this court and consequently, he will not be prejudiced if the motion is granted.

15. It is the finding of this court that the appellant has met the criteria for the grant of leave to file an appeal out of time and the motion is merited.

16. Consequently, this court makes the following disposal orders;

- a. The appellant is granted leave to appeal out of time.**
- b. The draft memorandum of appeal dated 6/08/2019 be deemed as duly filed.**
- c. Lower court file to be availed to this court within 30 days from today.**
- d. The Memorandum of appeal to be served upon the respondent within 30 days from today.**
- e. Case to be mentioned for directions on 19/01/2022.**
- f. Costs in the cause.**

In the presence of:

Mr. F. Owuor for the appellant - present

Mr. Fredrick Omondi Okech- Respondent - Present.

Court assistant: Sarah Ooro

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF NOVEMBER, 2021

HON. A. Y KOROSS

JUDGE