



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPL NO. 518 OF 2018

BETWEEN

EDWIN MOTARI ONGUTIAPPELLANT

-VERSUS-

SARAH MUCHENE.....1ST RESPONDENT

PETER M MURAYA T/A RECOVERY CONCEPT AUCTIONEERS....2ND RESPONDENT

(Being an appeal from Order of Senior Resident Magistrate Hon. I. Orange (Mr.) delivered on the 5th September, 2017 in Chief Magistrate 's Court Civil Case Misc. 587 of 2017 at Milimani Law Courts Nairobi.)

BETWEEN

PETER MURAYA T/A RECOVERY CONCEPT AUCTIONER.....APPLICANT

VERSUS

SARAH N. MUCHENE.....LANDLADY

EDWIN MOTARI ONGUTI.....TENANT

RULING

1. Edwin Motari Onguti, the Applicant herein, took out the motion dated 16th October 2018 whereof he sought for an order for leave to appeal against the orders issued by Hon. I. Orange, Senior Resident Magistrate on 5/9/2017 in Miscellaneous Application No 587 of 2017. The Applicant swore an affidavit he filed in support of the motion.
2. Sarah N. Muchere, the 2nd Respondent herein filed a replying affidavit to oppose the motion. In response, the applicant filed a further affidavit in an attempt to controvert the facts deponed in the replying affidavit.
3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the written submissions of the Applicant. The main order sought is for leave to file an appeal out of time.
4. An appeal against the decision of the subordinate to the High Court should be filed within a period of 30 days from the date of the decision. However, under the provision to section 79G of the Civil Procedure Act, an appeal can be admitted out of time if the applicant satisfies the court that he has good and sufficient cause for not filing the appeal in time.
5. It is therefore clear that the court has an unfettered discretion to determine the application save that the applicant must give good and sufficient reasons which made him/her from filing the appeal within time fixed. In this case, the Applicant stated that he was unaware of the orders issued by Hon. I. Orange learned Senior Resident Magistrate and that when he became aware of the existence of the order he without undue delay, filed the instant application. The applicant however does not disclose when he became aware of the existence of the orders he now seeks to challenge on appeal.
6. In his further affidavit, the applicant avers that the cause of the delay was due to the threat over his occupancy in a Kikuyu dominated area,

where threat to life is over contention over property is real.

7. The 2nd Respondent stated in her replying affidavit that the Applicant's application amounts to an abuse of the court process. It is said that this court lacks jurisdiction to entertain the same, and that in any case the Application is res judicata. It is also the 2nd Respondent's averment that no orders were issued on 5th September 2017 and that is why the Applicant has not annexed any copy to his affidavit.

8. I have already stated that the court has a wide discretion in determining an application for leave to file an appeal out of time so long as the Applicant gives a good and sufficient reason. In this case the Applicant gave a reason which in my view is not good nor plausible. He did not give an explanation as to what prevented him from accessing the court to file his appeal within the time fixed by law.

9. The order sought to be challenged on appeal was allegedly issued on 5th September 2017. The Applicant filed the current Application on 18th October 2018. There is no explanation as to when the Applicant came to know of the existence of the alleged order.

10. In the circumstances it cannot be said that the application was filed without unreasonable delay.

11. In the end, I find no merit in the motion dated 16th October 2018. The same is ordered dismissed with costs to the 2nd Respondent.

Dated, signed and delivered at Nairobi this 20th of December, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

.....for the Tenant

.....for the Landlady