



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC MISC. NO. 34 OF 2015**

MOSES NDEGWA GATIMU.....APPLICANT/PLAINTIFF

VERSUS

WANJIRU KITHUMU.....1<sup>ST</sup> RESPONDENT/DEFENDANT

COUNTY GOVERNMENT OF KIRINYAGA.....2<sup>ND</sup> RESPONDENT/DEFENDANT

**RULING**

This is in respect to the application dated 18th September 2015 and filed herein on 22nd September 2015 in which the applicant seeks the following orders:-

- 1. That this Honourable Court be pleased to grant the applicant leave to file the memorandum of appeal out of time.***
- 2. That costs of this application be provided for.***

The application is based on the grounds set out therein and supported by the applicant's affidavit.

The gravamen of the application is that the applicant (as plaintiff) filed **KERUGOYA CHIEF MAGISTRATE'S CIVIL CASE No. 70 of 2005** against the respondents (as defendants) seeking various orders with respect to plot No. 382 KUTUS MJINI. In a judgment delivered on 21st April 2015, the applicant's suit was dismissed with costs. Being dissatisfied with the said judgment, the applicant wrote to the trial Court on 27th May 2015 requesting for copies of the proceedings and judgment which were only availed on 19th August 2015 hence this application.

The 1st respondent has filed grounds of opposition to the effect that the application is incompetent, bad in law and an abuse of the Court process and therefore lacks merit.

The 2nd respondent filed a Notice of Preliminary Objection in which it sought the striking out of the application as being totally defective.

On 24th October 2016, it was agreed that this application be canvassed by way of written submissions which have now been filed by the firm of **MAGEE WA MAGEE Advocate** for the 1st respondent and **GORI OMBONGI Advocate** for the applicant. The firm of **MUNENE WAMBUGU & KIPLAGAT Advocates** for the 2nd respondent did not file any submissions.

I have considered the application, the supporting affidavit, the grounds of opposition and Preliminary Objection as well as the submissions by counsel.

**Section 79 G of the Civil Procedure Act** provides as follows:-

***“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”.*** Emphasis added.

It is clear therefore that the Court may, for “***good and sufficient cause***” admit an appeal out of time. In the case of **NICHOLAS KIPTOO arap KORIR SALAT VS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (I.E.B.C) and OTHERS 2014 e K.L.R**, the Supreme Court laid down the following principles that should guide the Court in considering such an application:-

- 1. Extension of time is not a right but an equitable remedy and is only available to a deserving party and at the discretion of the Court.***
- 2. A party who seeks for extension of time has the burden of laying the basis to the satisfaction of the Court.***
- 3. Discretion to extend time is a consideration to be made on a case to case basis.***
- 4. Where there is a reasonable reason for the delay, it should be explained to the satisfaction of the Court.***
- 5. Whether there will be any prejudice suffered by the respondent if the extension is granted.***
- 6. Whether the application has been brought without undue delay.***
- 7. Whether in certain cases, like elections, public interest should be a consideration for extending time.***

Bearing the above principles in mind, it is clear that the judgment of the subordinate Court having been delivered on 21st April 2015, the applicant had thirty (30) days within which to file his appeal. That period may be extended where the applicant obtains from the trial Court a certificate of delay within the meaning of **Section 79 G of the Civil Procedure Act** indicating any period that was required to prepare “***a copy of the decree or order***”. **Section 79 G of the Civil Procedure Act** was considered by the Court of Appeal in the case of **KYUMA VS KYEMA 1988 K.L.R 185** where it held that:

***“But in order to set a foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order..... This period may be extended provided he obtained from the magistrate’s Court a certificate of delay within the meaning of Section 79 G of Act 21. The section allows the thirty days to be extended by such period as was required to make a copy of the “decree or order of the Court”. As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the memorandum of appeal not only the order of the Court, but also a certificate of delay”.*** Emphasis added

It is clear therefore that whoever intends to file an appeal must obtain an order or decree which must be filed together with the memorandum of appeal and a certificate of delay certifying the time taken to prepare and deliver the order or decree if the appeal is to be admitted outside the thirty days allowed by law. The applicant herein has annexed a Memorandum of Appeal dated 18th September 2015 as well as the judgment and proceedings in **KERUGOYA CHIEF MAGISTRATE’S COURT CIVIL CASE No. 70 of 2005**. There is no decree or certificate of delay as envisaged by **Section 79 G of the Civil Procedure Act**. Besides, in paragraph 5 of his supporting affidavit, the applicant depones as follows:

***“That the Court supplied me with the proceedings and judgment on 19.8.2015”***

However, a copy of the proceedings shows that they were certified on 19th August 2015 while the judgment was certified on 28th April 2015. There is no explanation as to why it took the applicant upto 18th September 2015 to file this application and in any event, guided by the decision in the case of ***KYUMA VS KYEMA*** (supra) which is binding on me, there is really no appeal before me which can be ***“admitted out of time”*** as envisaged by the provisions of ***Section 79 G of the Civil Procedure Act*** which, in my view connotes both the act of allowing an appeal to be filed out of time as well as allowing an appeal already filed to be admitted out of time. The applicant herein seeks leave to file the Memorandum of Appeal out of time but as is now obvious, without the certificate of delay from the subordinate Court, this application must fail.

I must also consider whether the applicant has demonstrated ***“good and sufficient cause for not filing the appeal in time”*** as provided under ***Section 79 G of the Civil Procedure Act***. As indicated earlier, judgment herein was delivered on 21st April 2015 and so the appeal ought to have been filed within 30 days from the date of delivery of that judgment. The applicant depones that he only obtained copies of the proceedings and judgment on 19th August 2015. This application was filed on 22nd September 2015 (one month later). While the period between 21st April 2015 and 19th August 2015 has been explained, no explanation has been given for the further delay between 19th August 2015 and 22nd September 2015 which is un-reasonable in the circumstances bearing in mind that the applicant was aware about the delivery of the judgment on 21st April 2015. As was stated by the Supreme Court of India in ***PARIMAL VS VEENA 2011 3 SCC 545:***

***“Sufficient cause means that a party had not acted in a negligent manner or there was want of bona fide on its part in view of the fact and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently’ or ‘remaining inactive’. However, the facts and circumstances of each case must afford sufficient grounds to enable the Court concerned to exercise discretion for the reason that wherever the Court exercises discretion, it has to be exercised judicially”.***

The Court is of course alive to the principle laid down in the ***NICHOLAS SALAT*** Case (supra) that the power to extend time is not a right but an equitable remedy available only to deserving parties at the Court’s discretion. Considering all the above, I am not persuaded that this is a proper case in which to exercise my discretion in favour of the applicant.

The up-shot of the above is that the applicant’s Notice of Motion dated 18th September 2015 is dismissed with costs to the respondents.

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> MARCH, 2017**

Ruling delivered, dated and signed in open Court this 31<sup>st</sup> day of March 2017

Mr. Abubakar for the 1<sup>st</sup> Respondent present

Mr. Ombongi for the Applicant absent.

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> MARCH, 2017**

