



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT SIAYA

MISCELLANEOUS APPLICATION E005 OF 2021

DR JAMES OUKO OKUMBE.....APPLICANT

VERSUS

DR JOSHUA ABONGO OKUMBE.....1ST RESPONDENT

DISTRICT LAND REGISTRAR-BONDO.....2ND RESPONDENT

RULING

Applicant's case

1. Within the provisions of **Sections 1A, 3A, 79G and 95** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules** the applicant filed a motion dated 5/11/2021 seeking the following main verbatim reliefs:

“1. THAT this Honourable Court be pleased to grant an extension of time to file an appeal.

2. THAT this Honourable Court be pleased to grant leave to file an appeal out of time.

3. THAT the Honourable Court be pleased to grant the Applicant leave to lodge and serve the memorandum of appeal and record of appeal.

2. The applicant's motion is mainly anchored on several grounds on the face of the motion. The motion is supported by the affidavit of the applicant's counsel **Robin Odhiambo** dated 5/11/2021 together with several annexures namely; a letter to the 1st respondent's counsel making reference to **Succession Cause No. 43 of 2018** and **Bondo ELC Case No. 28 of 2019**, notice of change of advocates, defence and counterclaim of **Bondo PM ELC no. 28 of 2019**, a letter to the executive officer, Bondo Law Courts referencing **Land Cause no.2 of 2019**, Ruling of **Land Cause no.2 of 2019**, Judgement of **Siaya HCCA no.26 of 2018** and an application for leave to appeal out of time in the lower court and a memorandum of appeal. Except for **Siaya HCCC Civil Appeal no.26 of 2018**, one can decipher that the several suits mentioned by the applicant in one way or the other relate to the applicant and the respondent.

Respondent's case

3. The respondent filed grounds of opposition and a replying affidavit both dated 11/11/2021. The grounds were mainly ;(i) the motion was fatally defective, incompetent and a nullity (ii) the court cannot grant the orders sought, (iii) no convincing reasons had been advanced for the inordinate delay and, (iv) apart from this application, the applicant has filed two other similar applications.

4. As directed by the court, the parties disposed of the motion by way of written submissions.

Applicant's submissions

5. The applicant filed written submissions dated 1/12/2021 in which he contended that the delay in filing the appeal within the stipulated timelines was occasioned by several grounds; (i) the actions of his previous advocates compounded with trickle down effects of the COVID pandemic and, (ii) the court file which is the subject of the appeal was missing in the court registry. He contended he had an arguable appeal and urged the court to allow the motion. He placed reliance on several cases including; **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet (2018) Eklr** , **Itute Ngui & Anor vs Isumail Mwakavi Mwendwa, Civil Application No.Nai.166 of 1997**, **Belinda Muras & 6 others v Amos Wainaina (1978)KLR**, **Philip Chemwolo & Another v Augustine Kubede (1982-88) KLR 103** among several others.

1st Respondent's submissions

6. The 1st respondent filed written submissions dated 15/12/2021. He contended that the motion was fatally defective, incompetent and a nullity because the orders sought did not disclose the case number and/or ruling or judgment the applicant was aggrieved against. He submitted that the period of delay is inordinate and inexcusable and that no convincing reason had been proffered for the delay. He urged the court to dismiss the motion with costs.

Analysis and determination

7. Before this court proceeds with its legal analysis and determination, it shall outline some preliminary issues.

8. I note that the respondent filed both a replying affidavit and grounds of opposition to the motion. In my view, he should have relied on only one response and not both. He cannot rely on the replying affidavit as well as the grounds of opposition at the same time.

9. The parties in this matter appeared before this court on a similar application in **ELC MISCELLANEOUS APPLICATION** no. 5 of 2021 **DR. JAMES OUKO OKUMBE vs DR. JOSHUA ABONGO OKUMBE & ANOTHER** and by its ruling dated 21/10/2021, this court in striking out the applicant's motion gave the following verbatim reasons;

“Had the appellant disclosed the substance of the suit against which he is dissatisfied and aggrieved against and filed a draft memorandum of appeal which he has not, this court would have exercised its discretion in deciding whether or not to grant the motion based on the well-established principles of the Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat”
[Emphasis added].

10. The instant motion and the motion that was the subject of the ruling in **MISCELLANEOUS APPLICATION** no. 5 of 2021 (*ibid*) are more or less similar and the only apparent departure is that in the instant motion, the applicant has annexed his draft memorandum of appeal.

11. Having considered the motion, supporting affidavit, replying affidavit, grounds of opposition, annexures and written submissions, this court is of the considered view that the only issue falling for determination is whether the applicant's motion is merited.

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

12. Though this court has discretionary jurisdiction under **Sections 79G and 95** of the **Civil Procedure Act** to grant a party leave to file an appeal out of time and enlarge time on condition the intended appellant shall demonstrate good and sufficient cause, this court is called upon to exercise such discretionary power with abundant caution. From the face of the motion, the substance of the decision the appellant intends to appeal against is not disclosed.

13. It is trite law that parties are bound by their pleadings and this court is called upon to decide a case based on the pleadings presented before it and not on other extraneous factors. Even if this court were to grant the applicant the orders sought on the face of the application, it would be an exercise in futility because the court and decision the applicant is aggrieved against are not disclosed. Courts are independent arbiters and cannot guide parties on how to refine their cases, pleadings or prayers lest it be accused of entering into the arena of litigation. This court agrees with 1st respondent that the application is fatally defective, incompetent and a nullity. This court need not say more and it is the finding of this court that the motion is an abuse of the court process.

14. Ultimately, the court makes the following disposal orders: -

a) The notice of motion dated 5/03/2021 is hereby dismissed.

b) Costs shall be borne by the applicant. ruling delivered virtually.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JANUARY 2022

IN THE PRESENCE OF:

M/S NYABUTI H/B FOR MR. ONYATTA FOR THE APPLICANT.

N/A FOR THE RESPONDENT

COURT ASSISTANT: SARAH OORO

HON. A. Y. KOROSS

JUDGE

20/1/2022