



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISC APPLICATION NO. E037 OF 2021

MARY WANGUI NJORA.....1ST APPLICANT

LEAH WANJIRU MACHARIA.....2ND APPLICANT

HANNAH NJERI KINYANJUL.....3RD APPLICANT

MARY NJERI NJENGA.....4TH APPLICANT

SUSAN NJERI NJENGA.....5TH APPLICANT

MILKAH WAMBUI WANJIKU.....6TH APPLICANT

ONESMUS KURIA MACHARIA.....7TH APPLICANT

AMOS NJOROGE MURIITHI.....8TH APPLICANT

MOSES NJOROGE NJUNGWA.....9TH APPLICANT

MICHAEL GERALD MBUGUA NGINA.....10TH APPLICANT

DAVID CHEGE KARIUKI.....11TH APPLICANT

EPHANTUS GITHUNGU MURIITHI DAVID.....12TH APPLICANT

=VERSUS=

JOHN NDUNGU MWANGLI.....RESPONDENT

RULING

1. Through a notice of motion dated 6/9/2021, the applicants sought an order enlarging the time within which to lodge an appeal against the ruling rendered by the Hon. C.A. Otieno – Omondi SPM on 27/7/2021 in **Ruiru SPMC MCL & E E058 of 2021**. The application was supported by an affidavit sworn on 6/9/2021 by **Mary Wangui Njora**. She deposed that their advocate, *Prof. Kiama Wangai*, had informed them that he was unable to log into the online platform when the ruling was rendered on 23/7/2021 because he was not aware that the ruling was scheduled for delivery on the said date, and that he only learnt on 3/9/2021 that the ruling had been rendered on 23/7/2021. Consequently, they were not able to lodge an appeal against the said ruling. She added that the appeal stood a high chance of success because the Learned Magistrate, among other grounds, erred in striking out their suit on the ground that they ought to have applied to be joined in **ELC Appeal No. 16 of 2016** yet, in their view, new parties could not be joined at the appeal stage.

2. Canvassing the application in the virtual court on 16/11/2021, *Prof Kiama Wangai*, counsel for the applicants, reiterated the reasons for the delay and submitted that the 13 days delays was not inordinate. He urged the court to grant the extension.

3. The respondent opposed the application through a replying affidavit sworn on 11/11/2021. He deposed that the ruling date in **Ruiru SPMC MCL & E E58/2021** was set in court on 2/6/2021 in the presence of both advocates on record, hence the contention that counsel for the applicants was not aware of the ruling date was untrue. He added that the allegation by the applicants that they faced challenges in logging into the virtual court was not a proper excuse for the delay in filing the appeal. He deposed that the applicants had failed to tender a proper explanation for the delay. He further deposed that the intended appeal had no merit because the applicants had misunderstood the gist of the ruling.

4. In his oral submissions in the virtual court, *Mr. Wanjohi*, counsel for the respondent submitted that, in determining whether the application is merited, the court is enjoined to consider the extent of the delay; whether the delay has been explained; and whether the intended appeal has merit. Counsel argued that the applicants had not sufficiently explained the delay and had instead given contradicting reasons for their failure to attend court. Counsel added that the trial court properly considered the issue of *res judicata* and struck out the suit on that ground. Counsel urged the court to dismiss the application.

5. I have considered the application; the response to the application; and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The single issue falling for determination in the application is whether the applicants have satisfied the criteria upon which our courts exercise jurisdiction to enlarge the time within which to lodge an appeal.

6. The Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2013] eKLR** outlined the following principles which guide our courts when exercising jurisdiction to enlarge time:

“(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 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 respondent 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 consideration for extending time.

7. The Court of Appeal in **Leo Sila Mutiso v Rose Hellen Wangare Mwangi [Civil Application NAI 255 of 1997]** stated the following regarding factors which should guide the court when exercising this jurisdiction:

“It is also well settled that in general, the matters which the court takes into account in deciding whether to grant an extension of time are: first the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of success of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

8. In the present application, the time for lodging an appeal against the impugned ruling lapsed on or about 27/8/2021. The applicants contend that there was a delay of only 13 days as at the time they presented the present application. The explanation they have tendered is, firstly, that their advocates were unable to log into the virtual court. They have added that, they were not aware of the date scheduled for delivery of the judgment. The respondent contends that the above explanations are contradictory and are not *bona fide*.

9. I entirely agree with the respondent that the applicants have tendered sharply contradictory explanations for their failure to lodge an appeal within the prescribed time. A party seeking to invoke the court's discretion to enlarge time is expected to present a candid and *bonafide* explanation for the delay. That is not what the applicants have done. They have come to court contending that they were not aware of the date when the ruling was to be delivered. At the same time, they contend that they were aware but their advocate was unable to log into the virtual court on the day when the ruling was scheduled for delivery. This contradictory explanation cannot be said to be a proper explanation for the delay. It does emerge from paragraph 9 of the respondent's replying affidavit that the applicants were fully aware of the date when the ruling was to be delivered because the date was fixed in the presense of their advocate.

10. In the absence of a good and sufficient cause, explaining the delay in lodging the intended appeal in terms of **Section 79G** of the **Civil Procedure Act**, this court has no proper basis upon which to exercise discretion in favour of the applicants.

11. Further, from the materials presented in response to the application, it does emerge that the suit property has been the subject of litigation in a number of preceding suits which have been determined. It would, in the circumstances, not be proper for this court to casually grant an enlargement order without a good and sufficient cause from the parties seeking the enlargement order as required under Section 79G of the Civil Procedure Act.

12. For the above reasons, I find no merit in the notice of motion dated 6/9/2021. The same is declined. The respondent shall have costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF JANUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Muriithi for the Respondent

Court Assistant: Ms Phyllis Mwangi