



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E015 OF 2021

SHEM NALIANYA SIBITATI.....APPLICANT

VERSUS

FRANCIS TENDETI WABUGE.....RESPONDENT

RULING

1. The parties herein litigated over the land parcel **NO KIMILILI/ KIMILILI/1664** (the suit land) in **KIMILILI PRINCIPAL MAGISTRATE'S COURT ELC CASE No 54 of 2019** in which **FRANCIS TENDETTI WABUGE** (the Respondent herein) had sought the cancellation of the title to the suit land in the name of **SHEM NALIANYA SIBITALI** (the Applicant herein). The Land Registrar Bungoma and the Attorney General had been enjoined in the suit as the 2nd and 3rd defendants respectively.

2. The suit was heard by **HON G. ADHIAMBO (PRINCIPAL MAGISTRATE)** and in a Judgment delivered on 29th July 2021, the Honourable Magistrate found in favour of the Respondent. The parties were informed of their right of appeal.

3. The Applicant felt aggrieved but did not exercise his right to appeal within the time stipulated in the law.

4. By a Notice of Motion dated 7th November 2021 and filed herein on 18th November 2021, the Applicant seeks the following orders: -

1. That this application be heard ex – parte in the first instance.

2. That time to appeal be extended.

3. That upon granting prayer 2 above, the Applicant be granted leave to file the appeal out of time.

4. That costs be in the cause.

The application is predicated on the grounds set out therein and is also supported by the Applicant's affidavit to which are annexed a Memorandum of Appeal and the proceedings and Judgment in **KIMILILI PRINCIPAL MAGISTRATE'S COURT ELC CASE No 54 of 2019**.

5. The gravamen of the application is that on 29th July 2021 when the Judgment in the trial Court was delivered, the Applicant had intimated his intention to appeal. However, the Court file disappeared thus violating his right to appeal on time. That he is illiterate and did not apply for the proceedings in time but his appeal has high chances of success.

6. The application is opposed and by his replying affidavit dated 21st January 2022, the Respondent has averred, inter alia, that the application is frivolous, vexatious, scandalous and bad in law. That it has been filed four (4) months after the Judgment and is a mere afterthought meant to scuttle the Respondent's attempt to execute for his costs. That it is not correct for the Applicant to allege that the file was missing yet it was available and that is how the Bill of Costs were taxed. That no letter has been annexed to show that the Applicant's efforts to obtain the proceedings and Judgment were frustrated and this application should be dismissed with costs.

7. The Respondent has also made other averments which go beyond what the Applicant has sought. For instance, there is an averment in paragraph 19 of the replying affidavit making reference to orders of stay. The Applicant has not sought any orders for stay of execution.

8. The application has been canvassed by way of written submissions. These have been filed by the Applicant in person and by **MS CHUNGE** instructed by the firm of **ELIZABETH CHUNGE & COMPANY ADVOCATES** for the Respondent.

9. I have considered the application. The rival affidavits and the submissions by the parties.

Section 79G 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 mine.

Section 16A (1) and (2) of the Environment and Land Court Act 2011 is couched in similar terms. It reads: -

16(A) (1) “Appeals from Subordinate Courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the Subordinate Court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

(2) An appeal may be admitted out of time if the appellant satisfies the Court that he had a good and sufficient cause for not filing the appeal in time.” Emphasis mine.

10. The Judgment sought to be appealed having been delivered on 29th July 2021, the Applicant had upto the end of August to file his appeal. However, if he can demonstrate that he had **good and sufficient cause**, for not doing so, this Court can exercise its discretion and extend the time within which he can file his appeal. The terms **good cause** and **sufficient cause** mean one and the same thing. There is no difference between the two – QURESHI & ANOTHER .V. PATEL & OTHERS 1964 EALR 633. And in the cause of ATTORNEY GENERAL .V. THE LAW SOCIETY OF KENYA & ANOTHER C.A CIVIL APPEAL No 133 of 2011 [2013 eKLR], MUSINGA J.A said: -

“Sufficient cause or good cause in law means –

..... the burden placed on a litigant (usually by a Court rule or order) to show why a request should be granted or any action excused’ see BLACK’S LAW DICTIONARY 9TH EDITION page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.” Emphasis mine.

And in the case of NICHOLAS KIPTOO arap KORIR SALAT .V. I.E.B.C & OTHERS 2014 eKLR, the Supreme Court laid down the following principles that should guide a Court in considering an application to extend time. These are: -

- (a) **Extension of time is not a right. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.**
- (b) **A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.**
- (c) **Whether the Court should exercise its discretion to extend time is a consideration to be made on a case to case basis.**
- (d) **Where there is a reason for delay, it should be explained to the satisfaction of the Court.**
- (e) **Whether there will be any prejudice suffered by the Respondent if extension is granted.**
- (f) **Whether the application has been brought without delay.**
- (g) **Whether in certain cases like election petitions, public interest should be a consideration for extending time.**

This application was filed on 18th November 2021 some four (4) months after the Judgment had been delivered by the trial Court and three (3) months after the expiry of the time within which the appeal ought to have been filed. To enable this Court exercise its discretion in favour of the Applicant, there must be evidence of **good and sufficient cause**. Evidence is the basis upon which discretion is anchored. Therefore, without evidence that is rational, Plausible, logical, convincing reasonable and truthful – ATTORNEY GENERAL .V. LAW SOCIETY OF KENYA (supra) – there can be no basis upon which this Court can exercise its discretion.

11. What then is the Applicant’s explanation for not complying with the timelines set out in the law? His first explanation as per paragraph 4 of his supporting affidavit is that soon after the Judgment the **“Court file immediately disappeared”** and his efforts to trace it bore **“no fruits.”** This has been rebutted by the Respondent in paragraphs 8 and 9 of his affidavit as **“not true”** because soon after the Judgment, the Respondent was able to assess his bill of costs because the file was available. If indeed the Court file had disappeared, the Applicant ought to have made a complaint to the Court. There is no evidence showing that he made such a complaint. The averment in paragraph 5 of his supporting affidavit that the Court file **“resurfaced only after the execution of the decree”** against him is such a serious matter that should have been the subject of a complaint to the head of the station who was infact the trial Magistrate in that case. It appears to me that the Applicant only approached this Court when the execution process commenced. That cannot be a plausible explanation.

12. Secondly, the Applicant has not explained when he eventually obtained the proceedings. In paragraph 6 of his supporting affidavit, he only depones that **“it took long for typing and proof reading”** the Court proceedings. He is however cagey on when eventually he obtained the proceedings herein. The proceedings and Judgment annexed to the Applicant’s supporting affidavit show that they were certified and therefore ready for collection on 23rd August 2021. No explanation has been given as to why it took the Applicant upto 17th November 2021 to file this application bearing in mind that he was infact present in Court when the Judgment was delivered on 29th July 2021.

13. The long and short of all the above is that there is not good and sufficient cause to warrant the grant of extension of time within which to appeal. In his submissions, the Applicant has cited the case of **VISHVA STONE SUPPLIES COMPANY LTD .V. RSR STONE 2006 LTD [2020 eKLR]** where **R. NAMBUYE J A** quoted from the case of **LEO SILA MUTISO .V. ROSE HELLEN WANGARI MWANGI 1999 2 E.A 231** as well as other cases, the following principle: -

“The law does not set out any minimum or maximum period of delay. All that it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favorably exercised.”

That is of course a correct proposition of the law. But it is this hurdle of **plausible and satisfactory explanation** that the Applicant has failed to surmount.

14. In the case of **KENYA POWER & LIGHTING COMPANY LTD .V. ROSE ANYANGO & HIGHRISE ENTERPRISES 2020 eKLR** also cited by the Applicant, **ABURILI J** granted leave because the delay was not inordinate and was explained to have been due to the **“downscaling of the Court services owing to the COVID – 19 pandemic and which threw all persons in a spin of uncertainty as to how services were to be rendered.”** That was clearly a plausible and satisfactory explanation. In the circumstances of this case, the proffered given has been far from satisfactory for the reasons given above. Those two cases do not aid the Applicant’s case.

15. The up – shot of all the above is that the Notice of Motion dated 7th November 2021 and filed herein on 18th November 2021 is devoid of any merit. It is accordingly dismissed with costs.

Boaz N. Olao.

J U D G E

28th February 2022.

RULING DATED, DELIVERED AND SIGNED AT BUNGOMA THIS 28TH DAY OF FEBRUARY 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC PROTOCOLS AND WITH NOTICE TO THE PARTIES.

Boaz N. Olao.

J U D G E

28th February 2022.