



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC MISC. NO. E044 OF 2021

SALOME WANGUI MBUGUA.....APPLICANT

VS

JAMES GACHUNGA KARANJA.....RESPONDENT

RULING

1. The application dated the 21/10/2021 was filed by the Applicant under Article 48, 50 and 159 of the Constitution of Kenya and all other enabling laws. It seeks orders that there be stay of proceedings in **Limuru ELC No 24 of 2019** pending the hearing and determination of the application/appeal; the Applicant be granted leave to file appeal against the ruling and orders of **SRMCC No 24 of 2019** delivered on the 14/9/2021 out of time; costs of the application.
2. The application is premised on the grounds annexed and the affidavit of the Applicant deponed on the 21/10/21 in which the Applicant avowed that vide a ruling dated the 17/4/2021 she was allowed to file a defence out of time within 10 days of the ruling. That the ruling was delivered without any prior notice to her or her advocates and at such a time when Court attendance was hampered due the prevalence of COVID pandemic. Further the Applicant seems to fault the Court for its orders issued on the 17/4/21 in allowing the Applicant to file her defence within 10 days on the ground that there was already a defense on record and that the Court in so holding made an error on the face of the record. That the Court ordered the defence to be filed by the 9/4/2021, a date that was long past therefore making it impractical to comply with the orders. It is on that basis that she states that the ruling had errors on the face of it. However, she deponed that she proceeded to file an amended defence on the 20/8/2020 and waited for the plaintiff to commence pretrial procedures until his advocates on record received a notice from the filing portal of the Court for mention scheduled for the 6/7/2021 when the advocate sought time to seek instructions on how to proceed from his client. That she filed an application on the 3/8/2021 seeking to set aside the proceedings that had taken place from the 17/4/21 to enable her defend the suit. That the said application was dismissed on the 14/9/21 and the delivery of judgement was set for the 26/10/21. That thereafter she fell ill and was hospitalized and was unable to file an appeal on time. That she has an arguable appeal that raises serious issues of law including her right to access justice.
3. In opposing the application, David K Ngari the learned advocate for the Respondent filed a replying affidavit sworn on the 5/11/2021 where he deponed that the orders being sought are premised on the wrong footing that there was a defence on record by the time the ruling of 17/4/20 was delivered. That the Applicant has not filed any evidence in support of her allegation that she was prevented from filing an appeal on time due to hospitalization. He accused the Applicant of delaying the hearing of the matter. That leave to appeal was not sought in the lower Court and as such the present application is unprocedural.
4. Through a Preliminary Objection dated the 5/11/2021 the Respondent faults the application as unknown in law and that it offends the provisions of Section 42 rule 6(5) of the Civil Procedure Rules.
5. On the 11/11/2021 the parties elected to canvass the application by way of written submissions. As at the time of writing this ruling, none had complied with the orders of the Court. The Court will therefore rely on the pleadings on record to determine the application.
6. With respect to the prayer for orders staying the proceedings in **ELC No 24 of 2019**, I consider this prayer is now moot on account that the judgement of the Court with respect to the lower Court suit was delivered on the 26/10/2021 as averred in the RA sworn on behalf of the Respondent. There are therefore no live proceedings for the Court to stay in the circumstances.
7. 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 , excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellants of a copy of the decree or order:

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.”

8. Order 50 Rule 5 provides as follows

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

that the costs of any application to extend such time and of any order made thereon be borne by the parties making such application, unless the Court orders otherwise.”

9. Enlargement of time is at the discretion of the Court. Section 95 of the Civil Procedure Act provides as follows;

“Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

10. Courts have held that discretion of a judge ought to be exercised judiciously and not in a whimsical or capricious manner. See the case of **Shah -vs- Mbogo [1967] EA 166**

11. I am guided by the decision by the Supreme Court of Kenya decision in the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others (M.K. Ibrahim & S.C. Wanjala SCJJ) [2013] eKLR** in which the principles that guide the applicable threshold and which I fully adopt were restated as follows: - 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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; whether there will be any prejudice suffered by the Respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time”.

12. As to whether the application for leave to file an appeal out of time is merited, I wish to cite the decision in the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where this Court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this Court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the Respondent if the application is granted.”

13. It has been explained that the Ruling, the subject of the application was delivered on the 14/9/2021 and the current application was filed on the 22/10/2021, a period of about 38 days which is long past the 30 days allowed to file an appeal. The reasons for the delay in filing the appeal have been stated by the Applicant as hospitalization. While the Court may want to sympathize with the Applicant, she failed to adduce any evidence in support of this averment.

14. Whether the Applicant has an arguable appeal, the Applicant failed to annex the Memorandum of Appeal so that the Court is informed of the Grounds of Appeal so as to gauge the chances of appeal if the application is granted. Even in the absence of a Memorandum of Appeal, it is clear to this Court that the application is for dismissal because the judgement in the case has already been delivered hence proceedings have ceased and this application have been overtaken by events.

15. In sum, having taken all the requisite factors into account, I come to the conclusion that the application is not merited, and I decline to exercise my discretion to allow it. Accordingly, the Notice of Motion dated 21/10/21 be and is hereby dismissed with costs to the Respondent.

16. Orders accordingly.

DELIVERED, SIGNED & DATED AT THIKA ON THE 24TH DAY OF FEBRUARY, 2022 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Githinji for Applicant

Respondent - absent

Ms. Phyllis – Court Assistant