



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 93 OF 2019**

**ABDALLA CHOGO MZINGO.....PLAINTIFF**

**VERSUS**

**JOHN NZAKA {DECEASED}**

**JUMA NZAKA {SON}..... DEFENDANT**

**RULING**

This ruling is in respect of an application dated 12<sup>th</sup> August 2021 by the Defendant/Applicant seeking the following orders:

**a) Spent**

**b) That this Honourable Court be pleased to order a stay of execution on the Ruling and/or order in ELC Cause No. 93 of 2019- Malindi delivered against the Applicant on the 30<sup>th</sup> April, 2021, pending the hearing and determination of this Application.**

**c) That this Honourable Court be pleased to grant the Applicant leave to file an Appeal against part of the Ruling written by Justice J.O Olola on the ELC Cause 93 of 2019- Malindi.**

**d) That this Honourable Court be pleased to grant the Applicant leave to file an Appeal out of time against part of the Ruling written by Justice J.O Olola on the ELC Cause 93 of 2019- Malindi and as a result of enlarge the time for filing a Notice of Appeal of the decision.**

**e) That costs of this application be in the cause.**

Parties agreed to canvas the application vide written submissions which were duly filed

**DEFENDANT'S SUBMISSIONS**

Counsel relied on the Supporting Affidavit filed and submitted that a ruling was delivered in this matter on 30<sup>th</sup> April 2021 against the Defendant and that the Defendant was not aware of the ruling until 28<sup>th</sup> July 2021 when he was served with the orders.

Counsel submitted the Plaintiff was in the process of executing the impugned ruling and orders and that the Defendant and his extended family were at the risk of being evicted from the suit property. That by the time the Applicant became aware of the ruling, time within which to appeal had already lapsed hence the application for leave to appeal out of time.

Counsel submitted that the delay for not filing the appeal was due to the fact that the Applicant was not aware of the orders and that the application has been filed expeditiously. Counsel also submitted that the intended appeal has a high chance of success for the reason that this court erred in granting a prayer for quashing the decision of the Minister under the Land Adjudication Act, whereas that prayer was not a final prayer in the Plaintiff.

Mr. Mwangunya relied on Order 43 of the Civil Procedure Rules, 2010 and the cases of **J.P. Machira t/a Machira & Company Advocates v Wangethi Mwangi & another [2002] eKLR**, **Peter Adams Ludavaa v Housing Finance Co. of Kenya Ltd [2021] eKLR**, **George Ileri Mukindia t/a Gim Fresh v K-Rep Bank Limited [2015] eKLR** to buttress the principles for grant of leave to appeal out of time and that the same is discretionary and urged the court to allow the application as prayed.

The Plaintiff relied on the Replying Affidavit and stated that there was inordinate delay in filing this application and that he will suffer prejudice if the application is allowed. Further that the intended appeal has no chances of success as the property had been given to him in by the Provincial Appeals Committee in **Appeal Case No. 14 of 1997** and also in High Court **Appeal Case No. HCCC No. 143 of 2003**. The Plaintiff urged the court to dismiss the application with costs.

### **ANALYSIS AND DETERMINATION**

This is an application for leave to file as Appeal out of time and for stay of execution of the ruling dated 30<sup>th</sup> April 2021. The court had granted interim orders which in its nature were not final. The Applicant did not argue that limb of the application assuming that the same had been confirmed by the interim orders.

I have looked at the application for stay of the ruling dated 30<sup>th</sup> April 2021 and find that it does not meet the threshold for grant of stay of the orders.

The issue for determination is whether the Defendant has shown sufficient cause to warrant the court to grant leave to file an Appeal out of time from the ruling of this court dated 30<sup>th</sup> April 2021.

Section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, which provides that:

***The High Court may extend the time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:***

***Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.***

Order 43 Rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right. Under Order 43(2) it is provided that an Appeal shall lie with the leave of the court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1) leave to appeal must be obtained before such an Appeal can be preferred. Order 43 Rule 1 Sub-rule 3 provides as follows:

***An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.***

The Intended Appeal being an appeal against the ruling and orders of this court, orders which did not fall within those under Order 43 Rule 1, it was incumbent upon the Defendant to file an application for leave to appeal at the time when the ruling was delivered or within 14 days from 30<sup>th</sup> April 2021.

In an application for leave to appeal out of time, an Applicant must satisfy the court that it had good and sufficient cause for not filing the appeal in time. The Supreme Court of Kenya in the case of **County Executive of Kisumu vs County Government of Kisumu & others [2017] eKLR** while relying on its decision in the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others Application No. 16 of 2014 [2014] eKLR** the Honourable Judges Ibrahim SCJ and Wanjala SCJ reiterated the considerations to be made in such a case to be as follows:

***“the under-lying principles that a Court should consider in exercise of such discretion:***

- 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 for 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 Respondents 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 a consideration for extending time.”***

Further, the Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR** outlined the guiding principles in such cases *inter alia*:

***“(viii) The law does not set out any minimum or maximum period of delay. All 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 favourably exercised.*

*(ix) Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.*

*(x) An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court;*

*(xi) The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.”*

As to whether the application was filed without delay, the same was filed 3 months after the ruling was delivered. The question is whether this amounts to inordinate delay. In the case of **Almas Hauliers Ltd v Abdulnasir Abukar Hassan [2017] eKLR** a delay of four months was found not to be inordinate. In computation of time to measure delay, each case has to be determined according to the circumstances surrounding it as even 1 of 3 days may be deemed as inordinate delay whereas one year may be deemed not inordinate.

I find that there was not inordinate delay in filing this application taking into account of the nature of delivery of the ruling vide notice. The application for stay of execution of the ruling is without merit but the applicant is hereby granted leave to file an Appeal out of time within 14 days' failure to which the leave lapses.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***