



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT LAND COURT OF KENYA**

**AT HOMABAY**

**MISC. APPLICATION NO. 9 OF 2021**

*(Formerly Migori ELC Misc. application No. E 021 of 2021)*

**GEORGE KABAKA OWUOR .....APPLICANT**

**VERSUS**

**ELISHA OPIYO ACHIENG .....RESPONDENT**

**JEREMIAH OBAR NDONG .....INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated 4<sup>th</sup> August 2021 and filed herein on 28<sup>th</sup> September 2021 under Sections 1A,1B, 3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, among other provisions of the law (the Motion herein), the applicant, George Kabaka Owuor through the firm for Ongaya Ombo Advocates, is seeking the following orders;

- a) THAT leave be granted to the Applicant to file appeal out of time against the whole judgement and decree in case No. 100 of 2018 on 16<sup>th</sup> June, 2021.
- b) THAT a certificate of delay be provided to the Applicant.
- c) THAT the costs of this application be in the cause.

2. The Motion is anchored upon a ten (10) paragraphed supporting affidavit sworn on even date by the applicant and copies of a draft memorandum of appeal, a letter by the applicant's counsel and a receipt marked as "GKO 1", "GKO 2" and "GKO 3" respectively and annexed to the affidavit. The motion is further based on grounds (a) to (e) set out on it's face.

3. Briefly, the applicant's lamentation is that the court file was not available immediately the judgment was rendered in Homa Bay CMCC No. 100 of 2010. That he was sick and isolated as he had contracted Covid-19 Virus thus, delayed in issuing instructions on time, among other things.

4. The respondent and the interested party were duly served via email as shown in document marked as "GKO 1" herein. There was no response to the motion.

5. I have duly considered the entire motion. So, is the same competent and merited?

6. The motion is mounted under various legal provisions including sections 1A 1B 3 and 3A (supra). In dealing with the motion, I also bear in mind **Articles 159 (2) (d) and 10 (2) (c) of the Constitution of Kenya, 2010.**

7. Notably, time for filing of appeals from subordinate courts is provided for under **section 79 G of the Civil Procedure Act Chapter 21 Laws of Kenya. Rules, 2010.** This court is aware of **Order 50 Rules 1 and 2, 6, 7 and 8 of the Civil Procedure Rules, 2010** relating to time inclusive of power to enlarge time, enlargement of time and computation of days.

8. Be that as it may, going by the preamble to the document marked as "GKO 1", was the applicant the substituted defendant before the trial court as shown therein? This court is conscious of **Order 1 Rule 10 Civil Procedure Rules, 2010** on substitution of parties in a suit. Is the intended Appeal by pauper under section 79G of the Civil Procedure Act Chapter 21 Laws of Kenya? By paragraph 2 of the supporting affidavit to the motion and on the face of the document marked as "GKO 1", the decision sought to be appealed from was made in Homa Bay

CMCC No. 100 of 2018. However, the documents marked as “GKO 2” and “GKO 3” reveal the suit therein as Homa Bay CMCC No. 100 of 2010. This is a puzzling!

9. Another puzzle is that there is no copy of decision or decree from the court that rendered the same and annexed to the motion. This court is indeed, aware of the definition of “*court which passed a decree*” as provided for under **section 29 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

10. Access to justice and fair hearing are anchored under **Articles 48 and 50 (1) of the Constitution of Kenya, 2010**. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system as held in the case of **James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another (2016) eKLR**.

11. In the present motion, the Deputy Registrar of this court duly notified the applicant’s counsel regarding the hearing and ruling of the motion via email at [hello@ongayaombo.com](mailto:hello@ongayaombo.com) as shown in the letter (GKO 2), on Monday, December 6, 2021 at 04:36 PM GMT+3 and Monday, January 31, 2022 at 03:30 PM GMT+3 respectively. Today, Mr. G.S Okoth learned counsel for the interested party has appeared for the interested party.

12. In the foregone, I find the motion dated 4<sup>th</sup> August 2021 and duly filed in this court on 28<sup>th</sup> September 2021, incompetent, bad in law and devoid of merits. The same is hereby struck out with half costs of the motion to the interested party.

**DELIVERED, DATED and SIGNED at Homa Bay this 16<sup>th</sup> day of February 2022.**

**G.M.A ONG’ONDO**

**JUDGE**

Present:

Mr G.S Okoth, learned counsel for the interested party

Okello, court assistant