



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL SUIT NO. 363 OF 2012

DANIEL MUYA WAMBUA.....APPLICANT

VERSUS

NGUGI GORO.....RESPONDENT

RULING

The application before the court for determination is the Notice of Motion dated 30th May 2012 seeking leave to appeal out of time against the judgment delivered on the 3rd May 2010 in Thika CMCC No. 248 of 2010.

The application is supported by the affidavit of Daniel Muya Wambua, the Applicant, dated 30th May 2012. He avers that he could not file the appeal in time because he had no financial means to do so. He also stated that he was sickly and on medication after he was involved in a road accident in 2009. He sought assistance from various government offices and he was referred to Kituo cha Sheria by the office of the Attorney General.

The Applicant claims that he is aggrieved by the decision of the lower court. The suit premises were transferred from his name by the Respondent when he was in prison. The Applicant further claims that he did not sign the agreement that sold his land to the Respondent which was produced in court as evidence. The Applicant further stated that in the trial court a document examiner was not called to authenticate the signature and/or thumb print in the sale agreement.

The application is not opposed. On 26th February 2014 the court ordered the Respondent to file and serve a replying affidavit within 21 days. There is no such affidavit on record. The parties also agreed to prosecute the application by way of written submissions. The record contains the Respondents submissions dated 7th July 2014. The Applicant did not file their submissions also as agreed.

The Respondent submitted that the grounds advanced by the Applicant as to why the appeal should be allowed out of time are not convincing for the court to exercise its discretion. The Respondent stated that the supporting affidavit does not show how being poor contributed to his failure to file an appeal. The Respondent argued that if proceedings were supplied as early as 2010, to take two years to move the court is inordinate delay. The Respondent also stated that there was nothing on record to show that the Applicant was ill and that the illness caused delay.

The Respondent further submitted that even if the appeal is filed it will not have any chances of success. That there is evidence that the Applicant sold the land to the Defendant. The Respondent claims that the Applicant based his suit on fraud and it was incumbent upon him to prove fraud. The Respondent submitted that the Applicant cannot shift the burden of proving his signature as genuine on another party.

I have carefully considered the facts above. The issue for determination given the circumstance of this case is *whether or not the Applicant has demonstrated sufficient reason for granting him leave to appeal out of time.*

Order 50 Rule 6 gives the court powers to enlarge time and 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 powers to enlarge such time upon 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 at provided that cost of any application to extend such time and any order made therein shall be borne by the parties making such application unless the court order otherwise.”

The decision whether to extend time for appealing is essentially discretionary and the court ought to be guided by consideration of the factors including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the Respondent and interested parties if the application is granted, and finally whether the matter raises issues of public importance. **Section 79 G** states:

79G. 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.

The Applicant has stated that he could not file the appeal in time because he is a poor man without financial means. He further stated that he was involved in a road accident which also contributed to the delay of the matter. The court acknowledges the mentioned facts and accepts them. In order to file the current application the Applicant sought assistance from Kituo cha Sheria which is currently representing him. In my view the reasons are persuasive enough for the favourable exercise of court’s discretion. I am persuaded therefore, that the Applicant should be allowed to have his day in court and that this court should accordingly exercise its discretion in his favour considering as well the fact that the subject matter of the suit is land.

Order

- 1. The time to appeal is hereby extended for 30 days.**
- 2. The Draft Memorandum of Appeal shall be the Memorandum of Appeal subject to its being signed by the Appellant or his counsel.**
- 3. Costs in the cause.**

Dated and delivered at Nairobi this 16th day of June, 2015.

.....

D A ONYANCHA

JUDGE