



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC APPEAL NO.44 OF 2021

**LYDIA AOKO OJUEKE (suing as the personal representative
of the estate of Damian Okumu Oloo).....APPELLANT**

VERSUS

MICHAEL NYAMEA OGUTU.....1ST RESPONDENT

JOYCE DEBORAH OKOTH.....2ND RESPONDENT

HELIDA AMONDI OKOTH.....3RD RESPONDENT

SAMUEL OKOTH.....4TH RESPONDENT

RULING

Appellant's case

1. By way of a Notice of Motion dated 21/09/2020 the appellant moved this court within the provisions of **Sections 1A, 1B, 3A and 79G** of the **Civil Procedure Act** and **Order 42 Rule 6 (1) and (2)** and **Order 51 Rule 1** of the **Civil Procedure Rules** seeking orders that the period limited for filing the instant appeal against the decision of the subordinate court be extended to the time when the instant appeal was filed on 11/06/2019.

2. The motion is premised on the grounds enumerated on the face of the motion and the annexed affidavit of the appellant's counsel Jude Ragot sworn on 21/09/2020. Briefly stated, the appellant's advocate mistakenly filed an application in the lower court seeking leave to appeal out of time, which application was allowed by the lower court. On the strength of this ruling, the appellant lodged a memorandum of appeal dated 7/06/2022 and a record of appeal dated 26/06/2019. When the matter came up for directions on 31/8/2020, the court directed the appellant's advocates to file an application for leave to appeal out of time before directions on the appeal could be issued. She filed the instant motion as directed by the court and this motion is the subject of this ruling.

The respondents' case

3. Despite service, the respondents have neither filed a response to the motion nor filed written submissions. Even if the motion is unopposed, this court has to determine this motion on its own merits.

The Applicant's submissions

4. The appellant filed her written submissions dated 3/12/2021. She submitted that this court is clothed with jurisdiction to extend the time limited for lodging an appeal for as long as she demonstrates that she has sufficient grounds for not lodging the appeal within the prescribed time. She submitted that the delay in lodging the appeal was occasioned by two circumstances; firstly, the lower court which had earlier reserved its judgement for 8/01/2019 rendered its decision on 6/01/2019 without notifying the parties and lastly, when she became aware of the judgement, she timeously filed a motion for leave to file an appeal out of time albeit in the wrong court.

5. The appellant urged the court to allow the motion and placed reliance on **Section 79G** of the **Civil Procedure Act** and the authorities of **Kennedy Ochieng Otieno & another v Elisaphan Omolo Nyasita [2019] e KLR** and **Ngoso General Contractors v Jacob Gachunge [2005] e KLR** and **Kenya Power and Lighting Company Limited v IO suing through GIO [2020] eKLR**.

Analysis and determination

6. I have considered the appellant's motion, supporting affidavit, written submissions and authorities cited and it is the considered view of this court that the only issue falling for determination is whether the appellant shall be granted leave to file an appeal out of time.

7. The provisions of law that clothes this court with discretionary jurisdiction to grant leave to file an appeal out of time lies with **Sections 79G and 95 of the Civil Procedure Act** and **Section 16A of the Environment and Land Court Act** and in order for a party to succeed in such a motion, an appellant must satisfy the court that he has a good and sufficient cause for not filing the appeal in time.

8. The principles that guide courts in allowing or declining a motion seeking leave to file an appeal out of time was settled by the Supreme Court of Kenya in the case **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** where the court outlined the principles as follows: -

“we derive the following as the under-lying principles that a Court should consider in exercise of such discretion: 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. 5. The delay should be explained to the satisfaction of the Court; 6. Whether there will be any prejudice suffered by the respondents if the extension is granted; 7. Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.

9. Has the appellant met the principles outlined in the **Nicholas Kiptoo Arap Korir Salat case (ibid)**? Though the provisions of law do not set out the maximum or minimum period of delay, an applicant has to demonstrate that he has good and sufficient cause for the delay.

10. The appellant averred that a notice of judgement was never issued by the court when it deferred its judgement date from 8/01/2019 to 9/02/2019 and when she became aware of the judgement through her advocates, time for lodging an appeal had lapsed. Further delay was occasioned by failure to obtain typed proceedings in a timely manner.

11. In addition, the appellant's advocate albeit lodging an application for leave to appeal out of time in a timely manner, mistakenly filed it in the wrong court. The appellant's advocate, admitted his error and argued that his mistakes should not be visited upon the appellant. The appellant ably referenced the cases of **Kenya Power and Lighting Company Limited v IO suing through GIO [2020] eKLR** and **Patriotic Guards Limited v James Kipchirchir Sambu [2018] eKLR** which held that the mistakes of advocates should not be visited upon their clients. I find the reasons given for the delay are reasonable, plausible and sufficient.

12. This court needs to balance the interests of the respondents who have a decision in their favour against the interest of the appellant who has a constitutionally underpinned right of appeal. It would be in the interest of justice if the appellant was given an opportunity to vent her issues on appeal.

13. The court has had a chance to look at the memorandum of appeal annexed to the appellant's motion and the grounds set out an arguable case with possibility of success and it is the considered view of this court that the appellant should not be denied access to the seat of justice.

14. The respondents never participated in the proceeding in the lower court and have not proffered a response to the appellant's motion and for this reason, it is the considered view of this court that the respondents will not be prejudiced if an order for extension of time is given.

15. It is the finding of this court that the appellant has met the criteria for the grant of leave to file an appeal out of time and the motion is merited.

16. Consequently, this court makes the following disposal orders;

a) The appellant is granted leave to appeal out of time in terms of prayer 1 of the motion dated 28/08/2019.

b) The record of appeal dated 26/06/2019 be deemed as duly filed.

c) Case to be mentioned for directions on 23/02/2022.

d) Costs to the respondents.

RULING DELIVERED VIRTUALLY DATED, SIGNED AND DELIVERED THIS 10TH DAY OF FEBRUARY 2022

In the presence of:

Mr. Oduol holding brief M/S Anuro for the Appellant

No appearance for respondent.

Court assistant: Ishmael

HON. A. Y. KOROSS

JUDGE

10/2/2022