



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO. 27 OF 2015

BENARD NYANGAU OMBORI..... APPLICANT

VERSUS

CHARLES OKELLO OMOGA.....RESPONDENT

RULING

1. The application dated 24th March 2015 made by **Charles Okello Omboga (applicant)** against **Bernard Nyangau Omore (respondent)** is for leave to file appeal out of time. It is made pursuant to **Order 50 rule 6 and Order 51 Rule 1 of the Civil Procedure Act** have also been invoked. The grounds in support of the application are contained on the face of the appropriate notice of motion and are fortified by the averments contained in the two supporting affidavits dated 24th March 2015.

2. The genesis of this application is **Civil Case No. 136 of 2013**, at the Chief Magistrate's Court, Nyamira in which the respondent (plaintiff) had sued the applicant (defendant) for the sum of Kshs.240,000/= together with interest being a refund of the amount allegedly paid to the applicant by the respondent for the purchase of a portion of land described as **L.R. No. West Mugirango/Siamani/4879**.

A defence to the claim was filed by the applicant who in turn counter claimed against the respondent for general damages for breach of contract and malicious prosecution. After the completion of the hearing the trial court entered judgment in favour of the respondent on the 29th January 2015.

3. The applicant's counter claim was at the same time dismissed but after a period of time, the applicant filed the present application on the 26th March 2015.

This court has given due consideration to the application, its supporting grounds and those in opposition as well as the written submissions filed herein by both sides through **Messrs Ochoki & Co. Advocates** for the applicant and **Messrs Oguttu Mboya & Co. Advocates** for the respondent. Basically, in considering on application of this nature, the court exercises its unfettered and discretionary of jurisdiction which however must be exercised judicially and not arbitrarily or capriciously or on the basis of sentiment or sympathy.

The guidelines for exercise of such discretion were set out by the Court of Appeal in the case of **Leo Sila Mutiso .vs. Hellen Wangari Mwangi Nairobi Civil Appeal 251 of 1997**.

4. In that case, the court stated that:-

“It's now well settled that the decision, whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the

matters which this court takes into account in deciding whether to grant an extension of the time are:- first the length of the delay, secondly, the reason 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.”

Applying these principles to this case, it is evident that there was a delay of about two (2) months considering that the judgment was delivered on 29th January 2015, and the memorandum of appeal was filed on 26th March 2015.

5. The reason given for the delay is that the applicant’s previous advocate despite being instructed by the applicant to file the appeal with the prescribed time failed to do so.

This reason was however, not established by the applicant by way of an affidavit to that effect by his previous advocate or by any other means. Suffice to say and hold that the applicant has really not provided sufficient reason for the delay in filing the intended appeal within the prescribed time even though a delay of about two months cannot be said to be grossly excessive. The probability of the appeal succeeding cannot be gauged at this juncture but the grounds of appeal indicate that the trial court did not have the necessary jurisdiction to deal with the matter and that the issues pertaining to the counter claim were not properly considered or were disregarded all together.

6. The jurisdiction of a court in dealing with a matter is a pertinent issue and so is the allegation of breach of contract on the part of the respondent. These are highly triable issues for which discretion may be exercised in favour of the applicant and considering that the respondent shall not be prejudiced by an extension of time.

Consequently, this application is granted. Leave be and is hereby granted to the applicant to file the intended appeal out of time and in any event within the next fourteen (14) days from this date hereof. In default, the extension order be vacated forthwith. Each party shall bear own costs of the application.

Ordered accordingly.

J.R. Karanja

JUDGE

[Read and signed this 17th day of **November 2015**) before Mr. Sagwe holding brief for Mr. Oguttu for respondent and Mr. Nyamwencha holding brief for Mr. Ochoki for applicant.]