



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO.564 OF 2017

JAMES MWANGI MUGURO.....1ST PLAINTIFF

JOSEPHINE WANGUI MWANGI.....2ND PLAINTIFF

=VERSUS=

JORETH LIMITED.....DEFENDANT

RULING

1. Judgment was entered in this matter on 29th April 2021. The Plaintiffs/Applicants filed the Notice of Motion application dated 10th June 2021.
2. It is brought under Article 159 of the Constitution, Sections 3A and 3B of the Appellate jurisdiction Act, Section 95 of the Civil Procedure Act, Rule 4 of the Court of Appeal Rules and all other enabling provisions of the law.
3. The Applicants seek orders:-
 - a) *Spent.*
 - b) *That this Honourable court be pleased to grant the Applicants leave to lodge an appeal out of time against the judgement entered on 29th April 2021 in Nairobi ELC Case No.564 of 2017.*
 - c) *That the Notice of Appeal herein be deemed as properly filed.*
 - d) *That costs of this application be provided for.*
4. The grounds in support are set out in paragraphs 1 to 9 on the face of the application. The application is also supported by the annexed supporting affidavit sworn on 10th June 2021 by of Salome M. Beacco, Advocate in conduct of this suit on behalf of the Plaintiffs/Applicants.
5. She deponed that judgement was delivered on 29th September 2021 in favour of the Plaintiffs /Applicants as against the Defendant/Respondent for Kshs.1,500,000/= plus costs and interest but the Plaintiffs were aggrieved with the whole of the judgement of the court and applied for a copy of the judgement on 30th April 2021. She added that when the Applicants received a copy of the judgement, the statutory 14 days period for filing a notice of appeal had already lapsed.
6. She further deponed that failure to file a notice of appeal on time was occasioned by delay in obtaining a copy of the judgement and also in seeking and obtaining instructions to appeal, which are circumstances beyond the control of the Applicants and that of their Advocates. She added that no explanation was given by the Deputy registrar as to the delay in obtaining a copy of judgement.
7. She also deponed that the Applicants have an arguable appeal and that the Defendant will not be prejudiced if the orders are granted.
8. In response to the application, the Defendant filed a replying affidavit sworn on 5th July 2021 by its director; Peter Mungai. He contended that Rule 75 of the Court of Appeal rules provides that a Notice of Appeal should be filed within 14 days from the date of delivery of judgement yet the Applicants seek to file their notice 47 days after the judgement. He further deponed that the delay is long and inordinate and it should not be excused.
9. Simultaneously with the replying affidavit, the Defendant/Respondent also filed the preliminary objection dated 5th July 2021 raising

ground that this Court has no jurisdiction to hear and determine the Plaintiff's Notice of Motion application dated 10th June 2021 as the same falls within the jurisdiction of the Court of Appeal.

10. Salome M. Beacco; counsel for the Plaintiffs/Applicants swore a supplementary affidavit on 4th November 2021 in response to the Defendants preliminary objection. She opposed the preliminary objection and deponed that the Applicants' obtained a copy of judgment on 10th June 2021 and immediately advised the Applicants who then issued instructions to lodge the appeal. She contended that this court has jurisdiction to hear the notice of motion.

11. On the 12th October 2021, the court with the consent of the parties directed that the notice of motion and the preliminary objection be heard together. The Court also directed that parties do file and exchange written submissions.

The Plaintiffs' submissions

12. They are dated 4th November 2021. The Plaintiff submitted that this court is vested with jurisdiction to hear and determine this application by dint of Section 7 of the Appellate Jurisdiction Act, Section 95 of the Civil Procedure Act and Rule 4 of the court of appeal rules.

13. They further submitted that the principles that guide a court in considering an application for leave to file an appeal out of time are discretionary and unfettered. They added that the principles were enunciated in the case of **Paul Musili Wambua v Attorney General & 2 Others [2017] e KLR** and restated by the Supreme court of Kenya in **Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**.

14. They also submitted that no prejudice will be occasioned to the Defendant/Respondent if the application is allowed since the judgement they intend to appeal against was in their favour, therefore there is no imminent threat of execution.

15. They also relied on the case of Housing **Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR** to submit that they have an arguable appeal that raises serious triable issues thus the need to allow the determination of the appeal on merit. They added that they wish to demonstrate that the Honourable court erred in failing to find that they, having a certificate of title and having purchased the suit property for valuable consideration with no knowledge of fraud were bonafide purchasers for value and therefore entitled to the protection of the law as such.

16. They relied on the case of **Joseph Kingori Kioni v Kenya Women Microfinance Bank Ltd & Another [2021] e KLR** to submit that it is in the interest of justice to grant leave to appeal out of time.

17. On the Defendant's/Respondent's preliminary objection, they relied on the case of **Maree Ahmed & Another v Leli Chaka Nduro [2017] e KLR** and the case of **Loise Chemutai Ngurule & Another v Winfred Leswari Kimung'en & 2 Others [2015] e KLR** to submit that this court has jurisdiction to extend time for filing an appeal.

The Defendant's submissions

18. They are dated 18th November 2021. The Defendant framed the issues for determination as follows: -

a) Whether this Honourable court has jurisdiction to deal with an application for leave to appeal out of time.

b) Who bears the costs of the preliminary objection?

19. The Defendant submitted that the Plaintiffs herein have sought for leave to appeal out of time and not extension of the time within which to file a notice of intention to appeal therefore this court has no jurisdiction to determine that prayer. It relied on **ELC case No.99 of 2015; Richard Kipmalem Chesimet v Nandi County Government** cited in the case of **Trimborn Agricultural Engineering Limited v David Kabaiko & Another [2000] e KLR** and urged the court to dismiss the Plaintiffs' application and award it costs.

20. I have considered the notice of motion and the affidavit in support. I have also considered the preliminary objection and the replying affidavit, the written submissions and the authorities cited. The issues for determination are:-

a) Whether this court has jurisdiction to entertain an application for leave to file an appeal out of time.

b) Whether the Applicants have made out a case for grant of an extension of time within which to file a notice of appeal.

21. The Plaintiffs/Applicants first prayer is for leave to file an appeal out of time. The Defendant/Respondent has correctly objected and submitted that this court has no jurisdiction to grant leave as it is a preserve of the Court of Appeal. **Rule 4** of the Court of Appeal Rules provides that:-

"The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended".

22. This is the gist of the Defendants/Respondents preliminary objection dated 5th July 2021. I have considered the same and I find that it is a preliminary objection raising a pure point of law as enumerated in the case of **Mukisa biscuits Manufacturing Co. Ltd vs West End**

Distributors Ltd [1969] EA 696 where it was held thus; as per Sir Charles Newbold P.

“.....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought, is an exercise of judicial discretion”.

Law JA proceeded to state thus:-

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary objection my dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

23. It is clear that this court has no jurisdiction to grant this prayer. In the case of **“The Owners of Motor Vessel “Lilian S” Vs Caltex Oil (Kenya) Ltd [1989] KLR 1 page 14,** it was held that:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

24. The Plaintiffs/Applicants rely on Section 7 of the Appellate Jurisdiction Act. I agree with the Defendant’s/Respondent’s submissions that this section does not confer jurisdiction on this court to grant leave to file appeal out of time. I find that this application ought to be filed in the Court of Appeal.

25. **Rule 39** of the Court of Appeal Rules provides that:-

“In civil matters-

Where an appeal lies on certification by the superior court that the case is fit for such leave; may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision”

Counsel for the Plaintiffs was present in court when the judgment in this matter was delivered. The Judgment was delivered on 29th April 2021. The Plaintiffs’ counsel claims to have obtained a copy of the judgment on 10th June 2021. There is no explanation for the delay between 29th April 2021 to 10th June 2021.

26. In conclusion, I find that the Preliminary Objection is merited and the same is upheld. The notice of motion dated 10th June 2021 is hereby struck out with costs to the Defendant/Respondent

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 17TH DAY OF MARCH 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mrs. Beacco for the Plaintiffs

Mrs. Olembo for Mrs. Koech for the Defendant

Steve - Court Assistant