



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC APPEAL NO. 8 OF 2019

MARY NAMULIZA WATIMAH.....APPELLANT

VERSUS

ISAAC WASWA WABWILE.....1ST RESPONDENT

PHILIP WEKESA WAMBILIANGA.....2ND RESPONDENT

RULING

(Being an application for leave to appeal out of time from the Judgment delivered by HON. N. N. BARASA – SENIOR RESIDENT MAGISTRATE on 22nd February 2019 in WEBUYE SPMCC No 27 of 2012)

1. The application before me is the one dated 24th April 2019 in which **MARY NAMULIZA WATIMAH** (the Applicant) seeks the following orders: -

1. That this Honourable Court be pleased to grant leave upon the Applicant to challenge the Judgment delivered on 22nd February 2019 by HON N. N. BARASA – SENIOR RESIDENT MAGISTRATE in WEBUYE SPMCC No 27 of 2012 out of time.

2. That the Memorandum of Appeal together with the compiled record of appeal already filed herein be deemed as having been properly filed and the appeal herein be admitted for hearing.

3. That costs of this application be provided for.

The application is premised on the grounds set out therein and supported by the Applicant's affidavit also dated 24th April 2019.

2. The gist of the application is that the Applicant, being dissatisfied with the Judgment delivered on 22nd February 2019 in **WEBUYE SPMCC No 27 of 2012** instructed her then advocate (**M/S OMUKUNDA & COMPANY ADVOCATES**) to apply for copies of the proceedings and Judgment on the same day. However, it was not until 26th March 2019 that she was furnished with the same and having decided to act in person after withdrawing the services of her previous Counsel, it took her time to read, understand and fully digest the said Judgment before making up her mind to lodge an appeal.

3. Within a short time, she has been able to prepare, compile and serve the record of appeal which raises weighty issues on both points of law and fact with over – whelming chances of appeal. That she will suffer irreparable loss, damage and prejudice which cannot be adequately compensated by an award of damages if the orders sought in the appeal are eventually granted. That she is ready to abide by any conditions to be set by this Court and it is in the interest of justice that the orders sought be granted as the Respondents will not suffer any prejudice.

4. The following documents are annexed to the application: -

1. Letter dated 22nd February 2019 from OMUKUNDA & COMPANY ADVOCATES addressed to the SENIOR PRINCIPAL MAGISTRATE WEBUYE COURT requesting for certified copies of proceedings and Judgment in WEBUYE SPMCC No 27 of 2012 MARY NAMULIZA WATIMAH .V. ISSAC WASWA WABWILE & ANOTHER.

2. Receipts for Kshs. 1,800/= paid for proceedings.

3. Certificate of Delay dated 5th April 2019.

4. Draft Memorandum of Appeal.

5. Notice of Appointment filed by OSANGO & COMPANY ADVOCATES.

Only the 2nd Respondent **PHILIP WEKESA WAMBILIANGA** responded to the application vide his replying affidavit dated 26th June 2019. The 1st Respondent **ISAAC WASWA WABWILE** did not respond to the application.

5. In his replying affidavit, the 2nd Respondent has averred, inter alia, that the application is an abuse of the process of this Court since the Applicant has infact already filed **CIVIL APPEAL No 8 of 2019**. That this application is made in bad faith and meant at vexing him since the Applicant is well aware that she ought to have filed the appeal within 30 days. That he is entitled to enjoy the fruits of his Judgment and litigation must come to an end.

6. When the application was brought before me on 8th March 2022, I directed that it be canvassed by way of written submissions. However, **MR MAKOKHA** for the 2nd Respondent informed the Court that he would only rely on the replying affidavit. Only the Applicant filed her submissions through **MR OSANGO** instructed by the firm of **OSANGO & COMPANY ADVOCATES**.

7. I have considered the application, the rival affidavits by the Applicant and the 2nd Respondent as well as the submissions by **MR OSANGO**.

8. I must at this stage point out that this Court had infact already admitted the appeal to hearing on 21st September 2020. However, the order admitting the appeal was vacated on 8th March 2022 to give way to the determination of this application.

9. It is not in dispute that the Judgment sought to be appealed was delivered on 22nd February 2019. The Applicant therefore had upto 22nd March 2019 to lodge her appeal. However, for good and sufficient cause, the time within which the Applicant can file the appeal may be extended. **Section 79G** of the **Civil Procedure Act** provides that: -

“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 appellants 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.” Emphasis mine.

On the other hand, **Section 16A (1) and (2)** of the **Environment and Land Court Act 2011** provides that: -

16A (1) “All appeals from Subordinate Courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in Section 13(2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the Subordinate Court or tribunal may certify as having been requisite for the preparation and delivery to the appellants of a copy of the decree or order.

(2) An appeal may be admitted out of time if the appellant satisfies the Court that he had a good and sufficient cause for not filing the appeal in time.” Emphasis mine.

10. The terms good cause and sufficient cause mean one and the same thing. There is no difference between the two – **QURESHI & ANOTHER .V. PATEL & OTHERS 1964 EALR 633**. In the case of **ATTORNEY GENERAL .V. THE LAW SOCIETY OF KENYA & ANOTHER C.A. CIVIL APPEAL No 133 of 2011 [2013 eKLR] MUSINGA J A** described those terms as follows: -

“Sufficient cause or good cause in law means

..... the burden placed on a litigant (usually by a Court rule or order) to show why a request should be granted or any action excused see BLACK’S LAW DICTIONARY 9TH EDITION page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.” Emphasis mine.

And in **NICHOLAS KIPTOO arap KORIR SALAT .V. I. E. B. C & OTHERS 2014 eKLR**, the Supreme Court identified the following principles which should guide the Court while considering an application to extend time. These are: -

a. Extension of time is not a right. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.

b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.

- c. Whether the Court should exercise its discretion to extend time is a consideration to be made on a case to case basis.
- d. Where there is a reason for delay, it should be explained to the satisfaction of the Court.
- e. Whether there will be any prejudice suffered by the Respondent if extension is granted.
- f. Whether the application has been brought without delay.
- g. Whether in certain cases like election petitions, public interest should be a consideration for extending time.

The Judgment sought to be appealed was delivered on 22nd February 2019 and this application was filed on 25th April 2019. The Applicant's Counsel applied for copies of the proceedings and Judgment on the same day it was delivered but it was not until 26th March 2019 that the proceedings and Judgment were delivered as per the Certificate of Delay. Thereafter, the Applicant who had parted ways with her previous Counsel **MR OMUKUNDA** took time to read, understand and digest the Judgment before instructing her new Counsel **MR OSANGO** to file an appeal thus culminating in this application. The delay between 26th March 2019 and 25th April 2019 when this application was filed is not inordinate and has been explained to my satisfaction. The explanation proffered is rational, plausible, logical convincing reasonable and truthful. There is no evidence of malafides on the part of the applicant nor is it an abuse of the process of the Court as averred by the 2nd Respondent in his replying affidavit. And neither do I consider this application to be "calculated to delay the (2nd Respondent) from enjoying the fruits of successful litigation" as deponed in paragraph 5 of the replying affidavit since the Applicant's suit was dismissed meaning her prayers to evict the Respondents from the suit premises being **Plot No 272 WEBUYE** and injunct them from interfering with it was dismissed with costs. That means that the Respondents remain in possession thereof pending any appeal and no prejudice will be caused to them if time is extended as prayed. The Applicant is clearly deserving of the orders sought in her Notice of Motion dated 24th April 2019 and filed on 25th April 2019.

11. The up – shot of the above is that the Notice of Motion is allowed in the following terms: -

1. The appeal and Record of Appeal filed herein on 25th April 2019 be deemed as duly filed.
2. The appeal is hereby admitted to hearing and be canvassed by way of written submissions.
3. The Respondents be served with the submissions and the Record of Appeal within 14 days from today. Affidavit of service be filed.
4. The Respondents shall have 30 days from the date of service upon them of the Record of Appeal and Appellant's submissions to file their submissions. Affidavit of service be filed.
5. The appeal shall be mentioned virtually before the Deputy Registrar on 9th May 2022 for purposes of confirming compliance and fixing a date for Judgment which shall be delivered by way of electronic mail in keeping with the COVID – 19 pandemic guidelines.
6. Costs shall abide by the appeal.

BOAZ N. OLAO.

J U D G E

21ST MARCH 2022

Ruling dated, signed and delivered at **BUNGOMA** on this 21st day of March 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

BOAZ N. OLAO.

J U D G E

21ST MARCH 2022