



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISCELLANEOUS APPLICATION NO. E123 OF 2021

ROSE WANGARI MUKIRA.....APPLICANT

VERSUS

MARY WANJIKU MBOGA.....RESPONDENT

(Intended Appeal from the Judgment of the Hon. E.K Usui (CM) made on 30th April 2021

in MCELC No. 242 of 2011)

RULING

1. The applicant has filed a notice of motion dated 15th June 2021 brought under Order 50 Rule 7 of the Civil Procedure Rules, Sections 79 G, 1A, 1B & 3A of the Civil Procedure Act seeking the following substantive orders:

a) Time be enlarged within which to file an intended appeal out of time.

b) Costs be provided for.

2. The applicant based his application on the grounds on the face of the motion and his affidavit sworn on 15th June 2021. The gist of the applicant's averments revolves around the following reasons; the failure to file the Appeal in time was not intentional nor negligent but was due to the fact that they were not aware that the Judgment had been delivered on 30th April 2020 and it was only until sometimes in end of May 2021 when they learnt that judgment had been delivered.

3. It was deposed that no notice for delivery of judgment was served upon them and further the same was delivered without any notification from the court. It was further deposed that the Applicant had written several letters following up on the status of the matters and the said letters were attached as annexure "GNK" of the supporting affidavit.

4. When the matter came up for directions on 27th October 2021, it was directed that the application be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. However, the material on record shows that the Applicant filed their written submissions dated 15th December 2021 through **M/S Muchangi Nduati & Co. Advocates** whereas the Respondent's submissions were not filed neither was the court furnished with any response from them.

5. In the Applicant's submissions, Counsel relied on the contents of the supporting affidavit and further stated that the delay in filing of the Appeal was not deliberate and the Applicant was not to be blamed. In support of the application, counsel also relied on the cases of ***Edith Gichungu Koine v Stephen Njugi Thoithi (2014) KLR and Stecol Corporation Limited v Susan Awour Mudemb [2021] eKLR.***

6. Having considered the motion, supporting affidavit and annexures and submissions filed by the applicant, it is in my view that the main issue for determination is whether the applicant should be granted leave to file the intended 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 No. 19 of 2021** 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. Being an equitable relief, they are underpinned on well settled principles which guide the Court to decline or grant the application. In the case of ***Salat v Independent Electoral & Boundaries Commission & 7 others [2014] eKLR-SCK***, the Court held as follows on extension of time to file an appeal out of time:

- i) 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;*
- ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- iii) Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- iv) Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;*
- v) Whether there would be any prejudices suffered by the respondents if the extension was granted;*
- vi) Whether the application had been brought without undue delay; and;*
- vii) Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.*

9. Has the appellant met the principles outlined in the Nicholas Kiptoo Arap Korir Salat case (supra)? 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 time stipulation is a requirement of the law as clearly stated in **Section 79 G of the Civil Procedure Act**. In short, parties cannot, either unilaterally or by agreement between them, metaphorically, waive away the rules of the court. The rules of the Court are meant to achieve timely and orderly commencement, progress and proper determination of litigation of proceedings. Given the statutory limit, principally, the delay is inexcusable unless the applicant shows sufficient cause to justify the delay and that any such extension shall not prejudice the respondent. In this regard, the Court in Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR the Court of Appeal while referring to other authorities observed:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy and caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors states in previous decisions of this Court 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 whether the matter raises issues of public importance. In Henry Mukora Mwangi v Charles Gichina Mwangi-Civil Application No. Nai 26 of 2004, this Court held:- “It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize his principle by referring to the decision in Mwangi v Kenya Airways Ltd. [2003] KLR 486 in which this Court stated: “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing an application for extension of time under rule 4 of the Rules.

For instance, in Leo Sila Mutiso vs Rose Hellen Wangari Mwangi- Civil Application No Nai. 255 of 1997 (unreported), the Court expressed itself thus: -

“It is 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 delay; secondly the reason for 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.”

11. The legal authorities demonstrate that it is indeed a balancing exercise between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted. That’s why in the Salat case (Supra) observed **“Extension of time being a creature of equity, one can only enjoy if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it”**.

12. In the present application, I have given due attention to the issue of delay and prejudice which may be occasioned to the respondent. Judgement was delivered on 30th April 2020 and the Notice of Motion to extend time filed electronically on 21st June 2021. From the evidence, the cumulative delay period is over 1 year from the original time of 30 days stipulated in **Section 79 G of the Civil Procedure Act**. The delay though inordinate has been explained by the applicant and may be excusable given that she was not aware that judgment had been delivered and neither was she served with any notice in respect to the same.

13. In the circumstances, the Notice of Motion dated 15th June 2021, for extension of time is allowed on the following terms: -

- i) The applicant to file and serve a notice of appeal within 14 days from the date of this ruling.*
- ii) The applicant to compile, file and serve the record of appeal within 30 days from the date hereof.*
- iii) In default of compliance to (i) and (ii) above, the orders issued herein shall automatically lapse.*
- iv) Each party to bear its own costs of the application.*

14. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MARCH 2022

E. K. WABWOTO

JUDGE

In the presence of: -

N/A for the Applicant.

N/A for the Respondent.

Court Assistant; Caroline Nafuna.