



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 75 OF 2008**

**MUTUKU NGEI.....PLAINTIFF**

**VERSUS**

**JULIUS MAKENZI MWATU** (*Suing as the legal representative and on behalf of the Estate of*

**MWATU MUTUE** *alias* **MWATU WAITA NGUYO** (*deceased*).....**1<sup>ST</sup> DEFENDANT**

**ROBERT MUTYANGO MUSAU**.....**2<sup>ND</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 3<sup>rd</sup> September, 2020 brought pursuant to Sections 3, 3A, 7 & 41 of the Appellate Jurisdiction Act and Article 159 (2) B of the Constitution. The Plaintiff seeks the following orders:

***a. Spent.***

***b. That this Honourable Court be pleased to extend time within which to file and lodge a Notice of Appeal against the decision of this Honourable Court dated and delivered on the 30<sup>th</sup> July, 2020.***

***c. That the annexed draft Notice of Appeal be deemed as duly filed upon payment of requisite court fees.***

***d. That costs of this application be in the cause.***

The application is premised on the grounds on the face of it and the supporting affidavit of ESTHER NDULU MUTUKU, an appointed Attorney of the Plaintiff where she explains that on 9<sup>th</sup> June, 2020, they were informed that judgement would be delivered on notice. Further, on 15<sup>th</sup> June, 2020, they were asked to send their submissions in soft copies. She contends that on 3<sup>rd</sup> September, 2020, when they approached the registry to enquire about the date of judgement, they were informed that the same was delivered on 30<sup>th</sup> July, 2020 by which time the 14 days period for filing a Notice of Appeal had lapsed, hence they have to seek leave. She insists the delay in filing the Notice of Appeal within the required 14 days after delivery of the judgement was not in any way intentional, as they never received any notice of the delivery of the judgement. She reiterates that this court is vested with jurisdiction by virtue of Section 7 & 41 of the Appellate Jurisdiction Act to entertain the instant application and grant the orders sought. Further, that he will be greatly prejudiced if the orders sought are not granted.

The 2<sup>nd</sup> Defendant ROBERT MUTYANGO MUSAU opposed the application by filing a replying affidavit where he deposes that this court does not have jurisdiction to grant the orders as sought. He explains that the Applicant has invoked the provisions of the Appellate Jurisdiction Act which are clearly only applicable on matters before the Court of Appeal. He contends that this court issued a Notice of Delivery of Judgement via emails on 22<sup>nd</sup> July, 2020 and the Applicant's firm was on the mailing list. Further, that the said cause list suffices as a judgement notice and it is therefore evident that the Applicant is not being truthful by alleging not to have received the aforementioned notice. He avers that the application is an afterthought as he has instructed his advocates on record to file the Bill of Costs dated the 17<sup>th</sup> September, 2020. He reiterates that the Applicant's intended Appeal is therefore defeated by the doctrine of laches.

The Plaintiff filed a further affidavit sworn by ESTHER NDULU MUTUKU where she reiterates their averments and explains that even though the email was dispatched by one Griffiths on the 22<sup>nd</sup> July, 2020 at 10:48 pm, their advocates did not receive it. She contends that neither their advocates or themselves have ever failed to attend court to prosecute the instant suit. She claims the probable failure on the technology ought not to be visited upon them with adverse orders. She insists this Court has jurisdiction to grant the orders sought and denying them leave to file a Notice of Appeal would be a great injustice. Further, that the intended Appeal is not an afterthought. She

reaffirms that the Defendants have not demonstrated any prejudice nor will they suffer prejudice if the application is allowed.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 3<sup>rd</sup> September, 2020 including the respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the Plaintiff should be granted leave to file the Notice of Appeal out of time, against the Judgement delivered on 30th July, 2020.

The Plaintiff in his submissions reiterated his claim and explains that failure to attend court for delivery of judgement was not deliberate or intentional. He insisted that this Court has requisite jurisdiction to extend time for filing and lodging the Notice of Appeal. To support his arguments, he has relied on the following decisions: *Abdulkadir Athman Salim Elkindy V Director of Public Prosecutions & Another (2018) eKLR*; *Machakos High Court Civil Appeal No. 172 of 2014 – Peter Kago Kariuki & Another V George Kimuli Mwikya (Suing as the legal representatives of the Estate of MUTUKU KIMULI – DCD) and Civil Appeal No. 724 of 1998 – Trimbora Agricultural Engineering Limited v David Njoroge Kabaiko & Another*.

The 2<sup>nd</sup> Respondent in his submissions insists this court is devoid of jurisdiction to entertain the instant application. Further, that the Applicant has not offered any plausible reasons why he took over 90 days to follow up on the judgement. To support his arguments, he has relied on the following decisions: *Halai & Another V Thornton Turpin (1963) Ltd (1990) KLR 365*; *Simon Towett Martim V Jotham Muiruri Kibaru, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004) eKLR*; *Habo Agencies Limited V Wilfred Odhiambo Musingo (2015) eKLR*; *Fahim Yasin Twaho V Timamy Issa Abdalla & 2 Others (2015) eKLR*; *Andrew Kiplagat Chemaringo V Paul Kipkorir Kibet (2018) eKLR and Bi-Mach Engineers Limited V James Kahoro Mwangi (2011) eKLR*.

Rule 75(1) & (2) of the Appellate Jurisdiction Act provides as follows:

***“(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court. (2) Every such notice shall, subject to Rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”***

Order 50 Rule 6 of the Civil Procedure Rules stipulates that:

***“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”***

The Court of Appeal in the case of *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi, (1999) 2 EA 231*, laid down the parameters in extending time in lodging an Appeal and stated 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 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.”***

Further, in the case of *Hannah Muthii Kibindu V Stephen Njine Kibindu & Another (2020) eKLR*, it is the Court of Appeal that extended time to lodge a Notice of Appeal out of time.

In the instant case, the Plaintiff's suit was dismissed. The Plaintiff seeks to Appeal against the said Judgement and insists he was not aware of the delivery of the judgement as his advocate never saw the Judgment notice, which fact is opposed by the 2<sup>nd</sup> Respondent. I note the Plaintiff was represented by Counsel and has provided an affidavit from the said Counsel to confirm he was not aware that the said Judgement was delivered. Further, on perusal of the impugned notice of delivery of judgement which is annexed herein, I note the Plaintiff's Counsel's law firm was indeed sent an email concerning the date of delivery of the judgement. The Plaintiff insists challenges of technology cannot be visited upon it, and it will suffer prejudice if the application is not allowed. Insofar as the Plaintiff has raised pertinent issues in his application, however from a reading of Rule 75 cited above while associating myself with the quoted decisions, I note it is the Court of Appeal that has the jurisdiction to grant leave to the Plaintiff to file his Notice of Appeal out of time as this Court is devoid of the same. In the circumstance, I will decline to grant the prayer sought for extension of time to lodge the Notice of Appeal.

It is against the foregoing that I find the Plaintiff's Notice of Motion application dated the 3<sup>rd</sup> September, 2020 unmerited and will proceed to dismiss it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15<sup>TH</sup> DAY OF MARCH, 2022**

**CHRISTINE OCHIENG**

JUDGE