



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC MISCELLANEOUS APPLICATION NO. 5 OF 2020**

**COSMAS WAMBUA MUTUTU.....1<sup>ST</sup> APPLICANT**

**JOSEPHINE MUENI NDETO.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**HENRIETTA MUKII MWILU.....1<sup>ST</sup> RESPONDENT**

**MORRIS MATHEKA KIMEU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide a Notice of Motion dated 28<sup>th</sup> January 2020, the Applicants sought the following orders;

**a. Spent**

**b. Spent**

**c. That this Honourable court be pleased to grant the applicants leave to file their appeal out of time.**

**d. That if prayer (3) above is granted, the Applicants' Memorandum of appeal hereto attached be deemed as properly filed.**

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

2. The application is supported by the affidavit of Josephine Mueni Ndeto, the Second applicant, who averred that the parties herein were parties in Mavoko CMC ELC 33 of 2019; that judgment therein was delivered on 20<sup>th</sup> November 2019; that the Applicants are aggrieved by the said judgment and intend to file an appeal thereto but they are out of time; that the delay to file appeal was due to the fact that the Applicants' counsel was taken ill and was therefore unable to file the appeal on time; that the appeal has high chances of success and that the applicants will suffer injustice if they are not given a chance to file their appeal.

3. The application is opposed. Henrietta Mukii Mwilu, the 1<sup>st</sup> Respondent herein, filed a replying affidavit sworn on 1<sup>st</sup> February 2021, where she deposed that the application is frivolous, vexatious, an abuse of the court process and lacking in merit; that the reasons given by the applicants for delay do not warrant grant of the orders sought; that counsel for the applicants filed wrong documents in court and seeks to remedy his wrong; that it took counsel for the applicants 21 days to file the application herein after resuming work; that the application is aimed at denying the Respondents fruits of their successful litigation and that the applicants have come to court with unclean hands.

4. The application was canvassed by written submissions and on record are the applicants' submissions filed on 18<sup>th</sup> October 2021 and the Respondents' submissions filed on 19<sup>th</sup> October 2021.

**Submissions**

5. The Applicants submitted that under section 79G of the Civil Procedure Act, this court has power to grant orders sought as long as good and sufficient cause is shown. Counsel relied on the case of *Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR*, for the proposition that where there is no negligence, inaction or bad faith on the part of the applicant, that would amount to a good and sufficient cause. Counsel submitted that the reason for delay was sickness on the part of the Applicants' counsel and therefore the same was justified.

6. The Respondents on the other hand submitted that the application is an afterthought and a delaying tactic. Counsel argued that it took the Applicants five months to seek to file their appeal out of time and therefore the delay is not satisfactorily explained. Counsel relied on Section 79G of the Civil Procedure Act and Order 42 Rule 1 of the Civil Procedure Rules to argue that breach of the timelines provided for filing appeals is not a procedural technicality excusable under Article 159 of the Constitution and therefore the same ought to be dismissed.

### **Analysis and Determination**

7. I have considered the application, the affidavit in support, the response and the parties' submissions. The only issue that emerge for determination is whether the orders sought should be granted.

8. Section 79G of the Civil procedure Act provide as follows;

**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 Appellant 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.**

9. It is therefore clear that under Section 79G of the Civil Procedure Act, where there is a good and sufficient reason, the court has discretion to grant leave for a party to file appeal out of time.

10. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR*, the Supreme court had the following to say on extension of time for filing an appeal;

**1. 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.**

**2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.**

**3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.**

**4. Whether there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.**

**5. Whether there will be any prejudice suffered by the Respondents if the extension is granted.**

**6. Whether the application has been brought without undue delay; and**

**7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

11. The right of appeal is a constitutionally protected right which should not be fettered without proper justification. In the cases of *Mbaki & Others v Macharia & Another [2005] 2 EA 206* and *Richard Nchapi Leiyagu v IEBC & 2 Others [2013] eKLR*, the common thread running through those decisions were that;

a. The right to a hearing is a constitutionally anchored right and cornerstone of the rule of law

b. The right to be heard is a fundamental and important right; and

c. The right of a party to be heard before adverse decision is taken against such party is so basic so that a decision arrived in violation of it will be nullified even though the same decision would have been reached had the party been heard; as the violation is contrary to natural justice.

12. In the present case, there is no dispute that the lower court judgment was delivered on 20<sup>th</sup> November 2019. Therefore, the 30-day period within which the appeal ought to have been filed ended on 20<sup>th</sup> December 2019. Time did not run between 21<sup>st</sup> December 2019 and 13<sup>th</sup> January 2020, by dint of Order 50 Rule 4 of the Civil Procedure Rules. The application herein was filed on 29<sup>th</sup> January 2020, that is sixteen days after the lapse of the 30 day period for appeal. Counsel for the applicant explained that he was taken ill as a consequence of which he was unable to file the appeal in time. I have had opportunity to look at counsel's medical examination report dated 17<sup>th</sup> December 2019 and I am satisfied that counsel was indeed unwell and therefore unable to file the appeal in time. It is my considered view that the applicants' counsel has satisfactorily explained the cause of the delay. It is also my considered view that the delay herein of sixteen days cannot be termed as inordinate.

13. The upshot is that the application dated 28<sup>th</sup> January 2020 is merited and the same is allowed in the following terms;

**a. The Applicants are granted leave of 14 days to file and serve their appeal.**

**b. Each party shall bear their own costs.**

14. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 27<sup>TH</sup> DAY OF APRIL 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Ms. Nzili holding brief for Mr. Munyao for the Respondents

Mr. Kioko for the Applicants

Ms Josephine Misigo – Court Assistant