



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**MISCELLANEOUS APPLICATION NO.64 OF 2020**

**ZABLON AENCHA NTABO .....1<sup>ST</sup> APPLICANT**

**JOYCE KEMUNTO ZABLON ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**ROBERT ATANDI ASIMBA .....RESPONDENT**

**RULING**

*(Application to file appeal out of time; principles to be considered; applicants filing application about 3 months after judgment; reasons given being the Covid-19 pandemic challenges; application allowed)*

1. The substantive prayer in the application before me, which is that dated 25 August 2020, is for orders that leave be granted to enable the applicants file an appeal, out of time, arising from the decision in the suit Mombasa Chief Magistrate's Court, ELC No. 74 of 2019. That judgment was delivered on 15 May 2020 and following the provisions of Section 79G of the Civil Procedure Act, Cap 21, Laws of Kenya, the appeal needed to be filed within 30 days thereof. No appeal was filed thus this application.
2. The application is based on the reasons that owing to Covid-19, it was impossible for the applicants to even access the court file to peruse it and seek further advice. The supporting affidavit is sworn by Zablun Aencha Ntabo. He was the 1<sup>st</sup> defendant in the suit before the Magistrate's Court and his co-applicant was the 2<sup>nd</sup> defendant. The respondent was the plaintiff. He has deposed that his advocate did not appear in court when judgment was delivered and he did not learn about it in good time to enable him seek advice due to the Covid-19 pandemic. He has deposed that he only came to know of the judgment when he was served with a proclamation on 6 August 2020. He believes that he has a strong appeal and deserves to be heard.
3. The respondent filed a replying affidavit to oppose the motion. He averred that judgment was delivered on 15 May 2020 and on 22 May 2020, counsel for the applicants was notified of the judgment. He deposes that in the judgment the applicants were ordered to refund to the respondent purchase price to land. He avers that no payment was forthcoming and he instructed an auctioneer to attach the goods of the applicants. He does not think that the applicants have any arguable appeal. He further states that he is gainfully employed and able to refund the purchase price.
4. I directed counsel to file submissions and I have taken note of the submissions filed.
5. The suit before the Magistrates Court was filed by the respondent. In issue was a sale agreement entered into on 2 September 2016 where the respondent was purchaser and the applicants vendors. The purchase price was Kshs. 1,200,000/=. The respondent averred to have paid the applicants Kshs. 920,000/= before the applicants repudiated the contract and withheld the sum of Kshs. 320,000/= claiming breach by the respondent. In the suit, the respondent sought orders of vacant possession of the property, and in the alternative, refund of Kshs. 320,000/= plus cost and interest. In the judgment, the trial magistrate ordered the applicants to refund to the respondent the sum of Kshs. 320,000/=. It is this decision that the applicants wish to appeal.
6. In opposing the application, the respondent's counsel referred me to the case of *Gerald Kithu Muchanje vs Catherine Muthoni Ngare & Another (2020) eKLR* where various authorities regarding the grant of leave to appeal out of time were considered including the Court of Appeal decision in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi (1999) 2EA 231* where it was stated as follows :-

*"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."*

7. I am guided by the above dictum. I will only add that courts ought to endeavour to see to it that parties are not denied their right to appeal, unless in the circumstances, great prejudice will be occasioned to the respondent, such that the grant of leave to appeal out of time, will cause an injustice to the respondent which militates against the order to extend time. On this point, each case must be considered on its own peculiar facts.

8. It will be seen that grant of extension of time to file appeal is discretionary and some elements that the court is to consider are set out in the above decision of the Court of Appeal. The first issue is the length of the delay. The judgment in issue was read on 15 May 2020. I have seen that there is communication dated 22 May 2020 from the respondent's counsel to counsel for the applicant informing them of the judgment. It is not clear to me whether the applicants' counsel informed the applicants and I will therefore give the applicants benefit of doubt.

9. The applicants aver that they faced challenges owing to the Covid-19 pandemic and they could not even access the court file. I take judicial notice that as at May 2020, Covid-19 was still very new with us, and it is true that court operations were not being conducted as before. There were even lockdowns around this period and it was generally a difficult phase for many. It is possible that these challenges may have affected the applicants and handicapped them from filing their appeal within time.

10. I do not see any great prejudice that the respondent will suffer if I allow this application. At stake is a money decree and I have not seen anything, which in the circumstances of this case, will cause great hardship to the respondent so as to militate against the grant of the order sought.

11. I will therefore give leave to the applicants to file their appeal out of time. They may file their appeal within the next 14 days. If no appeal is filed within this time frame then it should be taken that the applicants do not intend to file any appeal.

12. On costs, since it is the applicants who delayed in filing the appeal, they will shoulder the costs of this application.

13. Orders accordingly.

**DATED AND DELIVERED THIS 13TH DAY OF APRIL 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**