



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC MISC. NO. 2B OF 2020**

**JULIA KARWIRWA BENSON .....APPLICANT**

**VERSUS**

**CONSOLIDATED BANK (K) LTD .....1<sup>ST</sup> RESPONDENT**

**SAMWEL MWENDA MBOGORI.....2<sup>ND</sup> RESPONDENT**

**MUGA AUCTIONEERS & GENERAL**

**MERCHANTS .....3<sup>RD</sup> RESPONDENT**

**RULING**

**A. The application**

1. The court is asked through an application dated 12.2.2020 to extend time and allow the applicant to file an appeal against a ruling delivered on 18.12.2019 in Meru Chief Magistrates E & L case No. 71 of 2018. The application is supported by an affidavit of Julia Karwirwa Benson sworn on the even date.
2. The grounds of the application are the delay was one day, copies of the ruling were supplied on February 9<sup>th</sup> 2020, the intended appeal has high chances of success, the delay was not intentional and that February 11<sup>th</sup> 2020 was a public holiday.

**B. Grounds of opposition**

3. The application was opposed through a replying affidavit by Albert Anjidhi for the 1<sup>st</sup> respondent sworn on 3.11.2020. The reasons are that there was no indication if upon seeking for the certified copies, a follow up was made on the same; there was no certificate of delay attached; the applicant has been guilty of delay throughout the life of the suit especially after obtaining interim orders and failing to attend the hearing after a date was taken by consent; the applicant was delaying the loan recovery for no reason and throughout litigation there has been no explanation for the delay; there will be prejudice since the loan was accruing interest and other charges which was likely to exceed the security offered and lastly if the court was to allow the application, the applicant should deposit the outstanding amount of Kshs.2,827,373.17 as at 13.2.2018 in a joint interest earning account.

**C. Written submissions**

4. The applicant submissions dated 7.2.2022 are that she initially filed E33 of 2021 on 17.2.2021 which pending, days afterwards an application dated 9.2.2021 was filed for the same application to be heard interpartes without giving directions as the fate of the already filed appeal.
5. The applicant therefore submitted that which had been properly done in accordance with a court order could not be reversed given the appeal was already before this court and had not been struck out.
6. It was submitted that this application was not only prejudicial, taxing, unfair, contradictory but also mockery of the course of justice.

**D. Determination**

7. The court has gone through the court record. The court on 3.2.2021 allowed the application herein. By an application dated 9.2.2021, the 1<sup>st</sup> defendant sought for the review of the orders made on 3.2.2021 and an opportunity to participate in the hearing the application on merits,

on the basis that there was an error on the face of the record at the time the application was allowed since their response was in the court file, filed electronically.

8. The court proceeded to set aside the order. The effect of the review of the orders was that no leave existed to file any appeal. The law governing principles on extension of time have been settled by the **Supreme Court of Kenya in Nicholas Arap Salat vs IEBC & 7 others (2014) eKLR** that; the consideration to extend time is unfettered, the reason for the delay has to be explained, extenuating circumstances must be there to enable court to extend its discretion; extension of time is not a matter of right but an equitable remedy; the burden of laying basis to the satisfaction of the court is on the party seeking for the extension; whether to extend is on a case to case basis; there must be reasonable cause for the delay; prejudice to the respondents must be considered and undue delay and lastly in some cases public interest has to be considered.

9. Applying the above principles in the instant case the delay is allegedly to have been one day and for reasons being of the failure to obtain the lower court ruling on time.

10. In my view such a delay cannot be termed as inordinate.

11. The applicant avers his case was dismissed for nonattendance and hence was not heard on merits.

12. The subject matter to this suit is still encumbered by the 1<sup>st</sup> respondent. Other than the accruing interest, charges and the outstanding loan there is nothing brought before the court to indicate the applicant is interfering with the suit property to the detriment of the 1<sup>st</sup> respondent?

13. Therefore I find there are extenuating circumstances to warrant this court to exercise its discretion in favour of the applicant given that the interests of the 1<sup>st</sup> respondent are fully catered by the existing charge and that the title documents are already held by the bank.

14. I proceed to allow the application and grant leave to file the appeal out of time. The same to be filed within 7 days from the date hereof. Costs to the respondents in any event.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 6<sup>TH</sup> OF APRIL, 2022**

**IN PRESENCE OF:**

**OCHIENG FOR RESPONDENT**

**NDUBI FOR APPLICANT**

**HON. C.K. NZILI**

**ELC JUDGE**