



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO. 42 OF 2021**

**ROBERT K. MUTHAMIA.....APPLICANT**

**VERSUS**

**CATHERINE KAJEU KIREMA.....RESPONDENT**

**RULING**

**A. The Application**

1. By an application dated 22.10.2021 the applicant seeks leave to appeal out of time against the judgment delivered on 21.5.2020 in Nkubu Principal Magistrates civil case no. 943 of 2015. The application is supported by the applicant's affidavit sworn on 22.10.2021. The reasons given are that the matter was heard ex parte despite a defence on record due to non-appearance at the hearing; the trial court declined to re-open the suit; there was no appeal lodged against the ruling for made on 21.5.2020 but had appealed against the judgment which the court held there should have been an appeal against the orders of 21.5.2020 and that the applicant was condemned unheard.

**B. Grounds of Opposition**

2. The application is opposed through a replying affidavit sworn by Catherine Kajuju Kirema and filed on 24.11.2021 on the basis that the applicant was guilty of laches; Meru ELCA no.39 of 2020 was delivered on 7.7.2021 while this application was filed on 25.10.2021, the orders sought would be absurd, the applicant is estopped by conduct from filing any appeal against the ruling of 21.5.2020 since he had waived that right and that the factual findings of this court's judgment delivered on 7.7.2021 had not been appealed against to the Court Of Appeal.

3. In a supplementary affidavit sworn on 30.11.2021 the applicant averred mistakes of former lawyers should not be visited on him as he could not tell why the said advocates failed to appeal against the ruling.

4. Further the applicant averred the respondent was his sister and should not be afraid to have the matter heard on merits and that the Meru ELCA no. 39 of 2020 had only dealt with the procedure, but not the merits of the appeal.

5. Lastly it was averred by the applicant that he did not have the financial muscle to hire another lawyer on time hence the delay in lodging this application.

**C. Written submissions**

6. With leave parties filed written submissions dated 4.1.2022 and 19.1.2022 respectively. The applicant submitted mistakes, error or omission of his previous advocates should not be visited upon him and that that he should be given an opportunity to be heard on merits since he was still in occupation, and that there would be no prejudice to the respondent.

7. The respondent submitted that there had been inordinate delay and hence the application failed to meet the threshold on extension of time as held in **Fahim Yasin Twaha vs Timamy Issa Abdalla and 2 others (2015) eKLR and Charles Wnayama Okuyumba and 30 others vs Pan Africa paper mills E.A Ltd (2013) eKLR.**

**D. Guiding Principal on The Extension of Time**

8. The guiding principles for extension of time have now been set by the Supreme Court of Kenya in **Nickolas Salat vs IEBC & 6 others (2013) eKLR** case the court held that whereas the discretion to extend time was unfettered, an applicant must explain the delay; there must be extenuating circumstances to enable the court to exercise the discretion; it was not a matter of right but an equitable remedy only available to deserving parties; the burden to lay basis was on the party to the satisfaction of court; the consideration to grant or not to grant is on case to case basis; there must be reasonable cause for the delay; there should be consideration on prejudice to the respondent the application

should be brought within reasonable time; and public interest may be a necessary consideration.

9. In this case, the applicant has blamed his previous advocates and also the prosecution of the appeal against the primary judgment which was before this court.

10. In Meru ELCA 39 of 2020 this court found that though the appeal was against the judgment delivered on 2.7.2020 the issues raised were with regard to the ruling delivered on 21.5.2020 in which there had no pending appeal. The applicant herein is seeking to go behind the judgment by this court through this application by seeking leave to come to this court for a second bite of the cherry.

11. In my considered view, the applicant is the same person who must have instructed his erstwhile lawyers on what they had to do. He has not stated if he had given the said lawyers such instructions then and they refused to comply with his instructions between 21.5.2020 and the time the judgment was delivered, on 2<sup>nd</sup> July 2020. There was also no explanation given why the applicant had to wait for the judgment to be delivered in order to lodge this application.

12. Further the applicant has not told the court when he discovered the appeal was not against the ruling but the judgment. Again the applicant has not told the court why he had to await the delivery of judgment before this court to be told the obvious that he should have exercised his rights as to appeal on time or at all.

13. The trial court record herein indicates the applicant was the author of his own misfortune by filing an appeal as if against the judgment but which actually was against the ruling.

14. In this application the applicant has not attached a draft proposed grounds of appeal for this court to have a glance if the same are different from the grounds of appeal already determined to finality by this court in the previous appeal.

15. The respondent stated that she would be prejudiced and it would be against fair hearing to re-open a matter already determined by this court which would lead to absurdity. In the circumstances I find no merits in this application.

16. The same is dismissed with costs. Orders accordingly.

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

**In presence of:**

**Kiyuki for Githinji for applicant**

**Mwirigi Kaburu for respondent**

**HON. C.K. NZILI**

**ELC JUDGE**