

REPUBLIC OF KENYA

High Court at Bungoma

Miscellaneous Application 53 of 2013

BENJAMIN OSORE MABUNDE.....APPLICANT

VERSUS

JOSEPH WEKESA WATULO.....

.....RESPONDENT

RULING

The applicant has come to court seeking extension of time within which to file an “appeal against the judgment and or decree in Bungoma CMCCC NO. 585 of 2009. He also prayed for costs of the application. The application is supported by an affidavit of the applicant sworn on 11th February 2013 and a supplementary affidavit sworn on 2nd April 2013. In the supporting affidavit, the applicant avers the application is not inordinate. In the supplementary affidavit he avers that the law provides for that an aggrieved party is at liberty to exhaust other avenues irrespective of delay. That the pendency of Bungoma HCC 65 of 2010 cannot effect determination of this matter on merit.

The respondent has opposed the application and swore a replying affidavit. He swears that the applicant has not moved out of his land nor paid him costs as per the judgment in Bungoma SPMCC No. 585 of 2009. He further avers the applicant commenced another suit in Bungoma HCC NO. 65 of 2010 which is pending before in court. He states that the applicant has been aware of the existence of the judgment through the several applications he has made and which copies were attached to his affidavit. Therefore the present application is an afterthought .

I have perused the application and the documents in reply. Annexure “**JWW1**” is a decree to be appealed from. The judgment was delivered on 25th February 2010. The plaintiff/respondent costs were then assessed. The proceedings of the trial court annexed to the replying affidavit shows the applicant's effort to set aside the judgment which on 6th January 2011 the said application was dismissed. The applicant has not explained the reason for delay in filing the appeal as put by the respondent. All through he was represented by counsel who then must be aware of time lines for taking up necessary steps. The extension of time is a discretion of the court which must be exercised reasonably. In the court of appeal case of Leo Sila Mutiso vs. Rose Hellen Wanyari – Civ. Appl. No. Nai. 255 of 1997 (unreported) the court stated thus,

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general matters which this court takes into account in deciding whether to grant an extension of time are; length of delay, reason for delay, the chances of appeal succeeding if the application is granted and lastly the degree of prejudice to the respondent if the application is granted”.

Under Section 79 G of the Civil Procedure Act, the appellant must satisfy the court that he had good and sufficient cause for not filling an appeal in time. As summarized in earlier paragraphs the applicant did not explain the reason for the delay. He has also not explained or justified that his appeal has high chances of success.

The application was made in February 2013, some three years after the decree to be appealed against was delivered. The respondent has explained the prejudice he is exposed to i.e. neither has the respondent moved out of his land nor paid him the assessed costs. Instead the applicant commenced fresh proceedings vide Bungoma HCC case No. 65 of 2010. Essentially the applicant has not demonstrated why

this court should exercise the discretion in his favour in extending time within which to appeal. The upshot is I dismiss the application dated 11th February 2013 with costs to the respondent.

RULING DATED, SIGNED, READ AND DELIVERED in open court this 30th day of May 2013.

A. OMOLLO
JUDGE.