

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPLICATION NO. 25 OF 2011

FLORENCE BURUKU) 1ST APPLICANT

WYCLIFFE ONYONDI BURUKU) 2ND APPLICANT

VERSUS

**LUGARI YEARLY MEETING OF RELIGIOUS SOCIETY OF FRIENDS THROUGH EPHRAM
MALENYA AGESA,)..... RESPONDENTS**

RODGERS K. WAMBIA, JONATHAN) RESPONDENTS

OMBEMBA OMBIMA) RESPONDENTS

RULING

The application dated 7th March, 2011 is for leave to file appeal out of time. Apparently, the applicant is aggrieved by the decision of the learned Resident Magistrate in Eldoret Chief Magistrate Civil Suit No. 231 of 2010 delivered on 6th December, 2010 and wishes to appeal against the same out of time. The main reason for the delay in having the appeal filed within the prescribed time is stated in paragraphs 5 and 6 of the applicant's supporting affidavit dated 7th March 2011. Paragraph 7 of the said affidavit indicates that the intended appeal has high chances of success. The learned counsel, **Mr. Kibor**, argued the application on behalf of the applicant by reiterating the content of the supporting affidavit.

The respondents, through **Mr. Cheluget**, learned counsel, opposed the application on the basis of the facts contained in the replying affidavit dated 11th March 2011. The said facts were briefly highlighted by **Mr. Cheluget** at the hearing of the application. Concentration was given more to the defectiveness of the application on account of technicalities. It may however, be noted that the determination of the application by this court will be based on the substance and merit and not technicalities. In any event, a technical lapse would not render an application incurably defective.

Be that as it may, courts have unfettered discretion when considering applications of the present nature. Among the matters to be considered are firstly, the period of delay, secondly, the reasons for the delay, thirdly, whether the appeal or intended appeal is arguable, that it is not frivolous and fourthly, whether the respondent would be unduly prejudiced if the application were to be granted. (See, **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Nairobi Civil Application No. 251 of 1997**).

Herein the period of delay was more than two (2) months from the date of the judgment up to the date of the filing of this application (i.e 6th December, 2010 to 8th March 2011). The reason for the delay is that the applicants were delayed by the court in securing certified copies of the lower court proceedings in that whereas the application for the proceedings was made on the 7th December 2010, the same were supplied on 24th January 2011. This reason is in the opinion of this court untenable. Certified copies of proceedings are not necessary for purposes of mounting a competent appeal. (see, **James Obanda vs. Isaiah Juma & Another (Kisumu Civil Appeal No. 222 of 2008 (C.A.)**).

In essence, the applicants are guilty of inordinate delay in filing the intended appeal and have no

good reasons for such delay. With regard to the arguability of the intended appeal, the applicants have merely made a bare statement that the appeal has chances of success. There has been no demonstration of the fact. In any event, the annexure “JMW3” in the supporting affidavit and the annexure EMA1” indicate that the dispute related to a parcel of land in which the respondents are the registered proprietor. In the circumstances, the success of the intended appeal is doubtful thereby rendering the appeal frivolous. By the same taken, if the application is granted, the respondents being the registered owner of the suit land will be unduly prejudiced.

In sum, the application is unmerited. It is hereby dismissed with costs.

J.R. KARANJA
JUDGE

(Read and signed this 6th day of April, 2011 in the presence of Mr. Kiboi for applicant and Mr. Cheluget for respondent).