



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 21 OF 2019

HAMISA SWALEH.....APPELLANT

VERSUS

RAMA SWALEH.....1ST RESPONDENT

MAUWA SWALEH.....2ND RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated 11th June, 2019 expressed to be brought under Section 79G and Section 3A of the Civil Procedure Act and Order 51 Rules 1 and 2 of the Civil Procedure Rules. The Applicant is seeking leave to file an appeal out of time against the ruling of Honourable T. Lewa delivered on 21st July 2017. The application is supported by the applicant's affidavit sworn on 11th June, 2019 which she has annexed a copy of the Memorandum of Appeal in Civil Appeal No. 22 of 2017. The application is premised on following grounds:

- i. On the 21st July, 2017 the trial court Honourable T. Lewa delivered a ruling dismissing the applicant's suit in the absence of the parties and she only knew about the judgment when she went to peruse the court file.**
- ii. The applicant was aggrieved by the ruling and consequently instructed her advocate to lodge an appeal against the ruling.**
- iii. On 4th October, 2017 the applicant's advocate lodged an appeal dated 9th September, 2018 and on 7th March 2019, the High Court Struck out the Memorandum of Appeal for having been filed out of time without leave.**
- iv. That there is a delay of about two months in lodging the appeal which in the circumstance is not inordinate delay and the same was occasioned by the delivery of judgment in the absence of both parties.**
- v. That the delay was occasioned by the advocate and as such, advocate's mistake should not be visited onto the innocent litigants.**
- vi. The applicant's intended appeal has arguable grounds which should be allowed to go for trial.**
- vii. That the respondent's shall suffer no prejudice if the application is allowed.**

2. The respondents filed a replying affidavit sworn by Rama Swaleh on 14th August 2019 and grounds of opposition dated 27th October, 2020 and contended inter alia that:

- a. There existed Mombasa ELC Appeal No. 22 of 2017 Hamisa Swaleh –v- Rama Swaleh & Another which was struck out by this court on 7.3.2019 on account of having been filed out of time without having first sought leave for extension of time.**
- b. The applicant has neither appealed nor applied for review of the court's ruling dated 7.3.2019 dismissing Appeal No. 22 of 2017.**
- c. The issues raised in the application are well suited to be raised only on appeal and that this court is functus officio and cannot revisit the merits of its decision.**

d. That any intended appeal filed between the same parties over the same subject matter is res judicata.

e. Over 3 years have lapsed since delivery of ruling by Hon. T. Lewa on 21/7/2017 which constitutes an inordinate delay which has not been explained.

3. Mr. Khatib, learned counsel for the applicant submitted that Civil Appeal No. 22 of 2017 was not dismissed but struck off on grounds that it was filed out of time and without leave and therefore there was no decision on the merits. It was submitted that the applicant has explained the reasons for not filing appeal in time and that the court has discretion to grant the orders sought adding that this is a land matter in which the parties issues should be ventilated. The applicant's counsel relied on the case of **Patriotic Guards Limited –v- James Kipchirchir Sambu (2018)eKLR, and Samuel Mwaura Muthumbi –v- Josephine Wanjiru Ngugi & Another (2018) eKLR** and urged the court to allow the application.

4. Mr. Kihara, counsel for the respondents relied entirely on the response filed.

5. I have considered the application. It is apparent from the record that the applicant was aggrieved by the ruling and order of Hon. L. T. Lewa (SRM) delivered on 12th July, 2017 in RMCC No.1613 of 2016 in which the trial magistrate upheld a preliminary objection that the court had no jurisdiction. The applicant on 4th October 2017 filed **ELC Appeal No.22 of 2017**. This court struck out the said appeal because it was filed out of time and without leave of court. The applicant's appeal No.22 of 2017 having been struck out by this court, the applicant now through the instant application seeks extension of time to be able to file an appeal out of time against the learned trial magistrate's ruling of 12th July 2017. The application is brought under Section 79G which provides as follows:

79G. Every appeal from a subordinate court to the High Court shall be within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

6. Section 95 of the same Act provides thus:

95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by the Act, the court may in its discretion from time to time, enlarge such period originally fixed or granted may have expired.

7. Order 50 Rule 6 of the Civil Procedure Rules also provides power to enlarge time and provides thus:

6. Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.**

8. Under Section 79G of the Civil Procedure Act, every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date the decree or order appealed against. In the present case, the decision of the subordinate court was made on 12th July 2017. Being aggrieved by the ruling and order of the subordinate court delivered on 12th July 2017, the applicant filed **Appeal NO. 22** of 2017 on 4th October, 2017 which was clearly outside the thirty days permitted by the law, and without leave of court for extension of time to do so. This court struck out that appeal on 7th March, 2019 for having been filed out of time and without leave of the court. In my view, the applicant exercised her right of appeal, albeit irregularly and without complying with clear provisions of the law and therefore exhausted the process of appeal and now wishes to go back to the same order she appealed against and failed and to try her luck with the instant application. In my view, the applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application is an afterthought and constitutes an abuse of the process of the court and the same must fail. The applicant had her day in court when she chose to file appeal no.22 of 2017. Litigation somehow must come to an end and for the applicant, the end came when she appealed the ruling delivered by the subordinate court by the said appeal. No doubt litigation cannot be conducted on the basis of trial and error. That is the reason why there are provisions of the law and the procedure to be adhered to. The applicant certainly invoked the provisions of the law and the procedure and filed appeal No.22 of 2017 though without adhering to the timeline provided, and the court rendered itself on the basis of the law. I take cognizance of the fact that the applicant was for all the time represented by counsel and must have exercised her options consciously.

9. The upshot is that I find no merit in the application dated 11th June, 2019 and the same is ordered dismissed with costs to the respondents.

10. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 27TH day of January 2021.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE