



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC MISC APPLICATION NO. 6 OF 2020

SAMSON LOPAGAVE LONGU.....APPLICANT

-VERSUS-

EUNICE R.W. GITAHL.....RESPONDENT

RULING

1. By a Notice of Motion dated 4th June 2020 made under the provisions of Section 1A, 1B and 3A and 79 (G) of the Civil Procedure Act, Order 50 Rule 6, Order 51 Rule 1, of the Civil Procedure Rules and all other enabling provisions of the Law, the Applicant herein seeks an extension of time to file their Memorandum of Appeal out of time against the judgment of Hon J Wanjala CM delivered on 29th January, 2020 in Nyahururu CM ELC No. 141 of 2018.
2. The application is premised on the grounds on its face as well as on the supporting affidavit of the Applicant's Counsel M/S Eunice Wamucii Ndegwa, sworn on the 4th June, 2020.
3. Directions were taken for the Application to be served upon the Respondent and thereafter the same be disposed of by way of written submissions. The application having been served upon the Respondent and there having been no response, the Applicant proceeded to file their written submissions.
4. The Applicant's submission is that their application was premised on the provisions of section 79G of the Civil Procedure Act as read with Section 95 of the same Act.
5. The Applicant also relied on the decided case of **Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR** which case laid down the principles to be considered in deciding whether or not to grant an extension of time.
6. Their submission was that they had sufficient cause to be granted the orders sought. Reason being that Counsel had no access to the court file to enable them come up with a properly drafted Memorandum of Appeal as the Court file had gone missing from the registry almost immediately upon the reading of the judgment.
7. That the inability to access the court file despite an in-person visit to the registry and correspondences thereafter through letters of complaint to the court contributed to the delay in filing of the Appeal. That the Applicant's Counsel was finally able to access the court file and the judgment on 27th May 2020 wherein the instant application was filed within one week thereof, which was not unreasonable delay in the circumstance.
8. That the intended Appeal as evidenced by their draft Memorandum of Appeal annexed to the application, raised weighty questions of law and it was only proper and just that the Applicant be granted a chance to be heard on merit.
9. That the Respondent would not be prejudiced if the application was granted as it had been the Applicant and his family who had been in occupation of the property and therefore they stood to suffer more if the application was not allowed. That further the Respondent had not filed any response to the application despite service.

Determination.

10. Section 79 (G) of the Civil Procedure Act provides as follows:-

Every appeal from a subordinate court to the High Court shall be filed 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.

11. It will be seen from the above provision that an application to file an Appeal out of time can be allowed so long as the Applicant demonstrates that (s)he has a good and sufficient cause for not filing the Appeal in time. The merits or otherwise of the Appeal is therefore not a consideration.

12. In exercising my discretion therefore, I need to consider two key issues thereto thus:-

- i. The nature of the delay
- ii. The reasons for the same

13. On the first issue as to whether the delay was in-ordinate, I find that the Judgment sought to be appealed was delivered on 29th January, 2020 wherein Counsel for the Applicant was not present in Court but had sent her colleague to hold her brief. Counsel thus recorded only the outcome of the judgment to the effect that that the Applicant had lost the case wherein an eviction order had been issued against him and his extended family.

14. It was the Applicant's submission that pursuant to the delivery of judgment, efforts to trace the file so as to initiate the process of an Appeal had been fruitless as the file was not in the registry as it had been returned to the Hon trial Magistrate reportedly to make minor corrections and to have the judgment typed. That further, in the process, the courts had closed down due to the measures put in place to mitigate the Covid-19 pandemic.

15. The Applicant through his Counsel subsequently communicated to the Executive Officer vide their letter dated 17th March 2020 and an e-mail sent on 22nd May 2020 (herein annexed as EWN (a) and (c)) of their inability to trace the Court file.

16. They finally got access to the same on the 27th May 2020 but noted that the Judgment they had been supplied with not only had crucial pages missing but also had defects which defects had been reported to the Executive Officer who, as at the time the Application was filed, was still working on them in liaison with the trial Magistrate. That due to the above captioned challenges, the Applicant was only able to file their Memorandum of Appeal out of the stipulated period of time.

17. I find that the Applicant has satisfactorily explained the delay which was in fact caused by the Court and for which he cannot bear responsibility. In my view, the Applicant has shown a *good and sufficient cause for not filing the appeal in time* as required by *Section 79(G) of the Civil Procedure Act*. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour.

18. The Respondent has not demonstrated what prejudice, if any she would suffer if the application is allowed. I am, therefore, inclined to exercise the discretion vested in this court in favour of the Applicant as no substantial prejudice will be occasioned on the Respondent.

19. In the circumstances, I find merit in the Applicant's Notice of Motion dated 4th June 2020. The Appeal be filed within 15 days of delivery of this ruling.

20. Costs in the cause.

Dated and delivered at Nakuru this 13th day of January 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE