



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC MISC APPLICATION NO. E012 OF 2020

MERCY NKIROTE.....APPLICANT

=VERSUS=

LAWRENCE NGAKU BUNDI1ST RESPONDENT

MWENDA TIMOTHY MANYARA..... 2ND RESPONDENT

JOHN MANYARA.....3RD RESPONDENT

JUDGMENT

1. Before me is a Notice Motion dated 22/12/2020 brought pursuant to the provisions of Article 159(2) (d) of the Constitution of Kenya, Section 1A, 1B, 3A and 79G of the Civil Procedure Act, Order 32 Order and 51 of the Civil Procedure Rules seeking orders that the Applicant be granted leave to file an appeal out of time against the judgment of Hon S. Ndegwa Principal Magistrate, delivered on 9th December 2019 in Githongo ELC Case No. 28 of 2018, and that the annexed Memorandum of Appeal be deemed as duly filed.

2. The Application is based on the grounds on the face of it and on the supporting affidavits of the applicant and her advocate. The applicant contends that she sued the defendants in Githongo Principal Magistrate Court in Suit No. 28 of 2018, in which judgment was delivered against her on 9/12/2019. The applicant was aggrieved by the said judgment and she desired to lodge an appeal. Her counsel proceeded to seek certified copies of the proceedings and judgment vide a letter dated 10th December 2019, but the same were not supplied until 21st December 2020. She states that the Covid -19 protocols hampered the acquisition of the said proceedings and judgment.

3. The applicant contends that she stands to suffer substantial prejudice if her application is not allowed and that her appeal has high chances of success.

4. The application was not opposed.

5. I have carefully perused the application and the issue for determination is **whether to allow an appeal to be filed out of time.**

6. In **Joseph Kakomo Mbenga v Maingi Charles & another [2018] eKLR**, the court made reference to the case of **First American Bank of Kenya Ltd v Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65**, where the Court set out the principles/factors to be considered in exercising its discretion when deciding whether or not to enlarge time as follows:-

“(i) The explanation if any for the delay;

(ii) The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

(iii) Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant”.

7. The Court has unfettered discretion in granting leave to file an Appeal out of time. However, there must be some material before it to enable the court exercise such discretion. The applicant seeking enlargement of time to file an appeal must show good cause for doing so.

8. In **LSG Lufthansa Service Europa/Afrika GMBH & another v Eliab Muturi Mwangi (Practicing in the name and style of Muturi Mwangi & Associates Advocates) [2019] eKLR**, a Court of Appeal decision which is eerily similar to the facts in this suit, the application for extension of time was allowed on the basis that the delay was well explained and was not unreasonable or inordinate.

9. On examination of the record, the Applicant has given a plausible explanation for the inordinate delay and has provided a certified letter of delay signed by the trial court on 21st December 2020.

10. I find that the application is merited in so far as the issue of extension of time is concerned. I however decline to consider the memorandum of appeal as duly filed as this is a miscellaneous file. In the final analysis, I direct that the memorandum of Appeal be filed in an appeal file within 14 days from the date of delivery of this ruling failure to which, the orders granted herein shall lapse. Costs in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF FEBRUARY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 19.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE