



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

MISC. APPLICATION NO. 6 OF 2020

JOSEPH MURIITHI MUNENE.....PLAINTIFF

VERSUS

FRANCIS GITARI NJOKA.....1ST DEFENDANT

HELLEN KARAMBU GITARI.....2ND DEFENDANT

RULING

By a Notice of Motion dated 3rd February 2020, the Applicant moved this Honourable Court for the following orders:-

(1) Spent.

(2) That the Applicant be granted an extension of time within which to file and serve the Memorandum of Appeal against the ruling delivered and order issued by Honourable A.K. Ithuku (C.M) on the 5th day of December 2019 in ELC Number 62 of 2018 in Kerugoya.

(3) That the costs of this application be in the cause.

(4) That any further orders that meet the ends of justice.

Grounds upon which the application is premised

(a) That on the 5th day of December 2020, Honourable A.K. Ithuku dismissed the applicant's suit.

(b) That that the applicant being dissatisfied with the decision of the Honourable Court delivered on the 5th day of December 2019 intends to appeal against the same.

(c) That the applicant applied for a certified copy of the Ruling and typed proceedings on the 5th day of December 2019 to enable him lodge an Appeal but he received the same on the 13th day of January 2020 hence he was unable to instruct his Advocate on record to lodge an Appeal within the prescribed time.

(d) That meanwhile, the time of filing the Memorandum of Appeal has elapsed as the applicant received a copy of the Ruling and typed proceedings on the 13th day of January 2020.

(e) That this Honourable Court has the discretion to enlarge the period for filing a Memorandum of Appeal from an order of the lower Court to the High Court.

(f) That it is trite law that the applicant has an undoubted right of Appeal and ought to be given that opportunity.

(g) That the applicant has an arguable Appeal with high chances of success.

(h) That there has been no inordinate delay in bringing this application.

(i) That it is in the interest of justice that this application be heard expeditiously and the orders sought granted.

Applicant's Statements of Facts

The applicant filed an affidavit in support of the said application and stated as follows:-

- (i) That on 5th day of December 2019, Hon. A.K. Ithuku (C.M) dismissed his suit with costs payable to the respondent.
- (ii) That he was duly informed by his advocate on record the outcome of the Ruling delivered on the 5th day of December 2019 and he immediately applied for a copy of the Ruling and typed proceedings to enable him instruct his advocate on record to lodge an Appeal on his behalf. He annexed a copy of the letter and marked "JM N 1".
- (iii) That being dissatisfied with the decision of the Honourable Court delivered on the said 5th December 2019, he intends to appeal the same and he has since instructed his Advocate to lodge an Appeal on his behalf upon receipt of the Ruling and typed proceedings on 13th January 2020.
- (iv) That he is aware that his Advocate on record has since prepared a Memorandum of Appeal and that the same raises arguable issues with high chances of success. He annexed a copy of the draft Memorandum of Appeal and marked "JM N 2".
- (v) That he risk to lose ownership of the suit property known as Plot Number BCR – 6 Kerugoya Township as the Respondents acquired title documents duly transferred to themselves fraudulently and that the said plot is his only source of livelihood.
- (vi) That meanwhile the time for filing Memorandum of Appeal has elapsed as he was unable to receive a copy of the Ruling and typed proceedings to enable him to issue his Advocates on record with instructions to lodge an Appeal within the prescribed time.
- (vii) That it is trite law that he has undoubted right of appeal and ought to be given that opportunity.
- (viii) That he has an arguable Appeal with high likelihood of success.
- (ix) That there has been no inordinate delay in bringing this application.
- (x) That it is in the interest of justice that this application be heard expeditiously and the orders sought herein granted.
- (xi) That he is ready and willing to abide by any directions of this Honourable Court.
- (xii) That this application has been filed timeously and that he is not guilty of laches.
- (xiii) That it is in the interest of justice that this application be heard expeditiously and the orders sought granted.

Respondents Statements of Facts

The Respondents filed a replying affidavit sworn by the 1st respondent on 7th February 2020 and stated as follows:-

- (i) That the applicant is not candid enough to demonstrate what decision of the Court delivered on 5/12/2019 the applicant is referring to.
- (ii) That although the applicant received a copy of the Ruling and typed proceedings on 13th January 2020, he did not annex a copy of the same to the supporting affidavit.
- (iii) That the draft Memorandum of Appeal does not raise any arguable issue as the trial Court struck out the applicant's suit for being time barred.
- (iv) That it is the applicant's own evidence that he received a copy of the Ruling and typed proceedings on 13th January 2020 and that the applicant had ample time to file his Memorandum of Appeal as the ruling was made on 5th December 2019 and he had 30 days to file the Appeal which time ended on 14th January 2020.
- (v) That even if we go by computation of time whereby the law stipulates that the period between the twenty first day of December in any year and the thirteen day of January in the year next following both days inclusive shall be omitted from any computation of time, the applicant's period of filing the Appeal lapsed on the 14th day of January 2020.
- (vi) That the applicant received a copy of the ruling and typed proceedings on the 13th day of January 2020 but filed this matter on the 4th February 2020 a lapse of twenty-one days and that the applicant has not explained the reasons for the delay.
- (vii) That the applicant did not need to wait until he was supplied with the copy of the Ruling and typed proceedings to instruct his Advocate to lodge an Appeal as the Ruling and proceedings are not requirements in filing the Memorandum of Appeal. He could have filed his appeal awaiting the Ruling and typed copies of proceedings.
- (viii) That there is no urgency in this matter.

(ix) That the application is bad in law for he failed to demonstrate to this Court the copy of the Ruling made on 5th December 2019 nor the order he intends to appeal against and that the same ought to be dismissed with costs.

Legal Analysis

I have considered the Notice of Motion, the affidavit evidence and the annexures thereto. An application for extension of time within which to file and serve an Appeal from the subordinate Court to the High Court and Courts of equal status is founded on **Section 79 G CPA Cap. 21 Laws of Kenya** which provides thus:-

“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”.

The applicant has deponed in the supporting affidavit that the same date the suit was dismissed on 5/12/2019, he applied for certified copy of the Ruling/order and typed copies of proceedings. He annexed a letter to his affidavit and marked “**JMN 1(a)**”. He also annexed a copy of payment receipt as “**JMN 1(b)**”. In his supplementary affidavit in further support of the application, the applicant also annexed a copy of typed Ruling and proceedings certified as true copies of the trial Court on 13th January 2020.

It is now trite law that an application for extension of time to appeal out of time is a discretionary power which must be exercised judicially on a case by case basis. The applicant must however place before the Court sufficient material to persuade the Court that the discretion should be exercised in their favour. Our case law is replete with factors which aid our Courts in deciding whether or not to exercise the discretion in favour of an applicant. In the case of **Mwangi Vs Kenya Airways Ltd (2003) K.L.R.**, the Court of Appeal set out these factors to include the following:-

- (a) *The period of delay;*
- (b) *The reason for the delay;*
- (c) *The arguability of the appeal;*
- (d) *The degree of prejudice which could be suffered by the respondent if the extension is granted;*
- (e) *The importance of compliance with time limits to the particular litigation or issue; and*
- (f) *The effect if any on the administration of justice or public interest if any is involved.*

In the instant application, the applicant has stated that the impugned Ruling/order was issued on 5/12/2019 and on the same date, he applied for a certified copy of the Ruling and proceedings which was supplied on 13/1/2020 after the thirty days’ period required to file appeal. This application was filed on 4th February 2020. I find the explanation for the delay in filing the Appeal within the statutory period satisfactory and excusable. The applicant took almost 17 days after receipt of the Ruling and proceedings to file this application. I consider a period of 17 days not inordinate bearing in mind that the respondent has not stated what prejudice he could suffer if the application is granted.

Considering all the factors in totality, I find the Notice of Motion dated 3rd February 2020 merited and the same is allowed as follows:-

(1) The Applicant is granted leave to file and serve a Memorandum of Appeal against the Ruling delivered and order issued by Hon. A.K. Ithuku (C.M) on 5th December 2019 in ELC No. 62 of 2018 (Kerugoya) within 7 days from today.

(2) The costs of this application to be borne by the Applicant.

READ, DELIVERED physically and SIGNED at Kerugoya this 12th day of February, 2021.

E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Igati Mwai
2. Plaintiff – present
3. Kabuta, Court clerk – present