



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 70 OF 2019

NAPHTALI O. MOGUSUAPPELLANT

VERSUS

JANE NUNGARI BORO.....RESPONDENT

RULING

There are two applications for determination before this court. In the first application dated 4/10/2019, the Respondent seeks to strike out the Appellant's memorandum of appeal filed on 24/09/2019 on the ground that it was filed out of time. The second application dated 17/10/2019 was brought by the Appellant.

The court will first consider the application dated 17/10/2019. The Appellant seeks leave to lodge an appeal out of time against the decision delivered in **Milimani CMCC Civil Case No. 7228 of 2014** by the Honourable Miss E. Wanjala, Senior Resident Magistrate, on 22/8/2019. He also sought orders that upon grant of leave to appeal out of time, the memorandum of appeal he had filed be deemed to be duly filed and for the costs of the application to be provided for.

The application was based on the ground that the Appellant lodged the appeal on 24/09/2019, two days after the stipulated timeline without obtaining the requisite leave because counsel for the Appellant was under the mistaken belief that Saturdays and Sundays are not included in the computation of the time for filing an appeal. He contended that that was a mistake of counsel which should not be visited on the Appellant. The Appellant urged that the mistake was an error which he had moved with haste to resolve. Further, that the court should be guided by Article 159(1) (d) of the Constitution and disregard the technicality; and that the intended appeal is arguable and has high chances of success.

The application was supported by the Appellant's affidavit sworn on 17/10/2019. He deponed that that he was represented by a different advocate in the Magistrate's Court and that he instructed his present counsel who filed a notice of change of Advocates on 16/09/2019 and applied for typed proceedings, judgement and decree on the same date. He annexed the letter requesting for these document. He further deponed that he was aware that a Memorandum of Appeal was lodged on 24/09/2019 without leave and outside the 30 days' timeline for filing an appeal to this court. He pleaded with the court to allow the application so that his appeal can be heard on merit and urged that his advocate's mistake should not be visited upon him.

The Respondent opposed the application vide the grounds of opposition dated 14/07/2020. She contended that the Memorandum of Appeal is an abuse of the court process since it was filed out of time without leave of the court and should be struck out. She also urged that the application was a deliberate attempt by the Appellant to delay the process of execution since the Respondent had already been granted orders to proceed with eviction after the Appellant failed to comply with orders of the court. She added that she will continue to face prejudice since she cannot develop her property. She maintained that the reasons advanced by the Appellant for his failure to file the appeal within time were unsatisfactory and no evidence has been adduced to prove the reasons given.

Parties filed written submissions which the court has considered. The Appellant submitted that he had explained the reason for delay and that the delay was not unreasonable. He further submitted that his explanation was enough to unlock the court's flow of discretionary favour.

The Respondent submitted that the Appellant had not met the threshold for the grant of orders for extension of time since no reason for the delay by the Appellant can suffice as he was represented and thus was aware of the timelines stipulated under Section 79G of the Civil Procedure Act. She further submitted that the intended appeal does not raise any triable issues as what is in the appeal is a replica of what was canvassed in the lower court and the Honourable Magistrate made a proper judgement. She also submitted that the court subsequently dismissed an application for stay pending appeal and proceeded to issue orders for eviction. She contended that by filing the Memorandum of Appeal without leave of the court, the Appellant was asking the court to endorse an illegality.

The decision whether or not to extend the time within which to file an appeal is essentially discretionary. However, the court ought to be guided by consideration of factors stated in previous decisions of the court. The Supreme court in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** laid down principles that a court should consider in exercising the discretion to extend time. This court has considered those principles. This court finds that the reasons given for the delay in

filing the appeal being that counsel for the Respondent was under the mistaken belief that Saturdays and Sundays are excluded in the computation of time for filing a memorandum was explained is satisfactory. The Appellant was only out of time by two days and he filed the memorandum of appeal without seeking leave owing to the mistaken belief that he was within time. The delay was not inordinate and the Appellant moved with haste to rectify it even though that was after the Respondent had noticed the error. The Respondent will not be prejudiced by allowing the Appellant to exercise his right of appeal.

Guided by the Constitution of Kenya which requires this court to administer justice without undue regard to technicalities, this court grants leave to the Appellant to file his appeal out of time. The Memorandum of Appeal filed on 24/9/2019 will be deemed as properly filed.

The Appellant filed this application after the Respondent had filed her application dated 04/10/2019 and for failing to be vigilant, the Appellant will pay costs to the Respondent for that application.

Having allowed the Appellant's application, the Respondent's application dated 04/10/2019 is overtaken by events. The Appellant will however pay the Respondent costs for that application.

Delivered virtually at Nairobi this 8th day of February 2021.

K.BOR

JUDGE

In the presence of:-

Mr. C. Kagimu holding brief for Ms. F. Lukoye for the Appellant

Mr. Gachie Mwanza for the Respondent

Mr. V. Owuor- Court Assistant