



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC MISC. CASE NO. E9 OF 2020**

**ELI N. KILAMBI.....APPLICANT**

**VERSUS**

**GUNYAMA ANDREW GUNYAMA.....RESPONDENT**

**RULING**

The application is dated 23<sup>rd</sup> October 2020 and is brought under Section 3 and 3A of the Civil Procedure Act and Order 22 Rule 22 of the Civil Procedure Rules seeking the following orders:-

1. That this application be certified urgent and service of the same be dispensed within the first instance.
2. That this honourable court be pleased to grant leave to the applicant to file an appeal out of time.
3. That this honourable court be pleased to order temporary stay of execution of the judgment and all consequential order made by the Hon. Wandera (SPM) on 9/10/2019 in Kakamega MCLE No. 194 of 2018 pending the hearing and determination of this application inter parties together with the intended appeal.
4. That the costs of this application be in the cause.

It is based on the annexed affidavit of Eli Nyabali Kilambi and on the following grounds that the applicant and Counsel were not made aware of the delivering of judgment on the 10<sup>th</sup> September, 2020 as the quorum for that day indicates that parties were absent but Mr. Shifwoka held brief for Mr. Ombaye for the plaintiff. That a copy of the typed judgment in the court file erroneously indicates that Counsel for the defendant was in court during its delivery. That numerous enquiries were made at the chambers but they were informed that file was still in chambers. That the court file was finally traced on 9<sup>th</sup> October, 2020 at the registry and a copy of judgment was obtained. That the applicants intended appeal has high probability of success. That if the stay of execution is not granted the applicant's intended appeal will be rendered nugatory and the applicant will suffer irreparable damages. That unless this application is granted the respondent threatens to levy execution against the applicant which relates to eviction from land parcel.

This court has considered the application and the submissions therein. Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:

“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.”

In the case of Paul Musili Wambua v Attorney General & 2 others (2015) eKLR, the court held that;

“....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

The applicant submitted that the judgment was delivered on the 10<sup>th</sup> September, 2020. That a copy of the typed judgment in the court file erroneously indicates that Counsel for the defendant was in court during its delivery and he was not. That numerous enquiries were made at the chambers but they were informed that file was still in chambers. That court file was finally traced on 9<sup>th</sup> October, 2020 at the registry and a copy of judgment was obtained. I find no evidence that the said file was unavailable after delivery of judgement. Secondly the record shows that the defendant was represented by Counsel during the delivery of the said judgment. I find that the reason for the delay is not acceptable and a good and sufficient cause for not filing the appeal in time has not been demonstrated. I find this application is not merited and I dismiss it with no orders as to costs as the same was undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23<sup>RD</sup> MARCH 2021.**

**N.A. MATHEKA**

**JUDGE**