

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC. CASE NO. 18 OF 2020

SHEM ISHAHILIDZA AMADI.....APPLICANT

VERSUS

SOPHIA WANJIRU NJOROGE.....RESPONDENT

RULING

The application is dated 31st August 2020 and is brought under Article 50 & 159 of the Constitution and Section 3A, 3B and 39 of the Civil Procedure Act Cap 21, rule 4 of the Court of Appeals Rules 2010 seeking the following orders:-

1. That the application be certified urgent and be heard ex-parte forthwith in the 1st instance.
2. That the honourable court be pleaded to grant the applicant leave to file appeal out of time from the ruling in Butali P.M.C. E.L.C. No. 122 of 2018.
3. That cost of this application be in the cause.

It is based on the supporting affidavit of Sylvia Ashitsa Muhanda and grounds that the time within which to file the appeal has expired hence the need to extend the same. That the delay in filing the appeal was not caused by the applicant. That the delay is not inordinate and is excusable. That the intended appeal has overwhelming chances of success and raises serious issues of law. That the subject matter is land and it is only justifiable that the applicant be given an opportunity to prosecute his claim. That it is in the interest of justice and fairness that the application be allowed. That this honourable court has legal authority to grant the orders sought. That the delay is not inordinate. That the respondents will not suffer any prejudice in the event the application is allowed. That it is in the best interest of justice that the orders sought be granted.

The respondent submitted that the applicant instituted this suit against the respondent's on 25th March, 2009 in the High Court, Kakamega High Court Civil Suit No. 38 of 2009. That the interim orders were granted on 16th March, 2020. That with the passage of time and the advent of the current constitutional regime we (Kenya) established and Land Court pursuant to Article 162 (2) (b) of the Kenya 2010 Constitution. That the suit was thereafter transferred to Kakamega Environment and Land court and allocated a new number Kakamega ELC Case No. 235 of 2016. That subsequently the suit was transferred to Kakamega Chief Magistrate Court. That the suit was finally transferred to Butali Senior Resident Magistrate Court and allocated number Butali SRMC ELC NO. 122 OF 2018 where it was finally determined. That all that while the applicant was never interested in prosecuting his case since he had obtained interim orders. That the respondents attended court severally when the matter could not proceed due to the absence of the applicant. That the respondents moved the court to have the suit dismissed but the court were reluctant because the subject matter of the suit is land. That finally the Principal Magistrate's Court at Butali dismissed the suit on 22nd November 2018 for want of prosecution and non attendance.

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 ruling herein was delivered on 9th September, 2019 and the applicant applied for proceedings on 11th September, 2019. The proceedings were supplied to the applicant on 10th August, 2020 which was outside the allowed time within which to lodge an appeal. The delay to file an appeal was not caused by the applicant. I find that from the submissions the proceedings were paid for on 13th September, 2019. The applicant started following up on the same over one year later on the 14th December 2020. This is a very old

matter which started way back in 2009. 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 costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23RD MARCH 2021.

N.A. MATHEKA

JUDGE