



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC MISC APPL NO. E009 OF 2020

JULIUS THURANIRA LAICHENA.....APPLICANT

VERSUS

MWONTUNE M'LAICHENA.....1ST RESPONDENT

JOHN NTHIRINGA LAICHENA.....2ND RESPONDENT

M'MARIMBA M'ITHEWA.....3RD RESPONDENT

JOSEPH MUTHAA M'MUTHURI.....4TH RESPONDENT

JOSHUA MWETI M'MUTHURI.....5TH RESPONDENT

JOEL KILELA RUKANGA.....6TH RESPONDENT

JUDGMENT

1. Before me is a Notice Motion dated 26/10/2020 brought pursuant to Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Section 1A and 1B of the Civil Procedure Act, seeking leave to file an Appeal out of time against the judgment/decision of the Principal Magistrates Court- Tigania (Hon Wechuli SRM), delivered on 28th January 2020.

2. The Application is based on the grounds on the face of it and on the Supporting Affidavit of Julius Thurania Laichena, the Applicant, who stated that he was aggrieved by the said judgment and he intended to appeal. He proceeded to apply and pay for a copy of the proceedings and judgment on 30/01/2020 which were only provided on 31/8/2020. Due to financial constraints, he proceeded to file an appeal by himself, Appeal No. 49 of 2020 only to later learn that he ought to have first sought the court's leave. That he subsequently withdrew the said appeal and filed this miscellaneous suit.

3. He contends that his appeal has high chances of success and that the respondents will not suffer prejudice if his application is allowed.

4. The 3rd - 6th respondents have opposed the application vide the replying affidavit dated 11/01/2021 sworn by Joseph Muthaa M'Muthuri the 4th Respondent. He avers that the applicant has not tabled evidence to show that he applied for copies of the proceedings and judgment and that his application is tailored to hoodwink the judicial system as he has no triable issues. It is further averred that copies of the proceedings are not mandatory in filing the appeal.

5. I have carefully perused the application and the issue for determination is **whether to allow an appeal 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 its discretion to be so exercised. The applicant seeking enlargement of time to file an appeal must show good cause for doing so. In the case of **Fahim Yasin Twaha vs Timamy Issa Abdalla & 2 Others [2015] eKLR**, the court had this to say on issue of extension of time to appeal.

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court; Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis”.

8. On examination of the record, the Applicant has given an explanation for the inordinate delay and has provided a certificate of delay signed by the presiding Magistrate dated 23.10.2020 stating that the proceeding and judgment were supplied to the applicant on 31/08/2020.

9. The applicant has also provided a receipt of payment dated 30/01/2020 for the judgment, this is 2 days after judgment was delivered. He also stated that he had filed an appeal though the same was withdrawn for being improperly filed. It follows that the applicant has laid a basis as to why he seeks extension of time to lodge the appeal.

10. In the circumstances, I allow the application on the following conditions;

(1) That the memorandum of appeal is to be filed and served within 14 days.

(2) Applicant is to meet the costs of the present application/ suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF MARCH, 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 20.1.2021. 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