



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

MISC. APPLICATION NO. 13 OF 2020

MOSES AGEYA KEMBE.....APPLICANT

VERSUS

WASHINGTON OKELLO SULE.....RESPONDENT

RULING

The applicant has filed an application (under certificate of urgency) dated 05/05/2020 on 06/05/2020. The application is premised on Section 3A, 79G and 95 of the Civil Procedure Act and Article 159 of the Constitution and all other enabling provisions of the law.

The applicant seeks the following orders this Court be pleased to extend time limited for lodging an Appeal. That the Memorandum of Appeal in Kisumu Environment and Land Case Appeal No. of 2020 be deemed to have been duly filed. That costs of the application be in the cause

The application is supported by the applicant's supporting affidavit sworn on 05/05/20. The following grounds of the application can be deduced from the face of the application and the supporting affidavit;

- a) The applicant is desirous of appealing against the judgement delivered in Kisumu CMCC ELC Case No. 36 of 2018 wherein the applicant was the defendant. The judgement allowed the plaintiff's suit and dismissed the defendant's counter claim.
- b) The time within which to lodge the said appeal has lapsed. There was delay in obtaining Court proceedings and other documents required to file the appeal and the delay in obtaining the documents is not attributable to the applicant; and that the delay in filing the appeal was occasioned by facts beyond the applicant's control. The delay is therefore not intentional or contumelious and therefore excusable.
- c) That as a result of the declaration made by the Chief justice on the 15/03/20 restricting Court operations because of the worldwide Covid 19 pandemic, the appellant did not manage to file the appeal as directions were that people stay at home to prevent the transmission of the disease.
- d) That the appeal has merit and high chances of success and unless the orders sought are granted, the appeal will be rendered nugatory.
- e) The application has been brought without delay and in good faith and the respondents will not be prejudiced if the application is allowed.
- f) That the Court has power under the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of disputes; further Article 159 of the Constitution requires the Court to proceed without undue regard to procedural technicalities.

The Respondent filed a grounds of opposition dated 29/05/20 and filed on the same day. The Respondent opposes the application on the following grounds;

- a) The application is misconceived and constitutes an abuse of the due process of the law.
- b) The application discloses no proper factual or legal basis for granting of the said orders. Further, litigation ought to come to an end, and the Respondent having acquired rights from the judgement delivered on 11th March 2020, the application ought to be dismissed unless cogent reasons are given for such a request of extension of time.

c) The intended appeal appears to be misconceived and does not disclose any reasonable prospects of success, thus rendering the exercise of discretion in the Applicant's favour to be in vain.

On 26/01/21, the Court directed that the Applicant file submissions within seven days and the respondent to file and serve his submissions within seven days of service. As at todate, none of the parties has filed his submissions. It is noteworthy that the applicant's counsel was not in Court when the orders were made. However, the applicant or his counsel ought to have taken the initiative to find out and to comply with the orders that were given.

The main issue for determination is **whether the Applicant has met the requirements to warrant being granted leave to file the appeal out of time**

Section 79G of the Civil Procedure Act provides;

“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...*

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 case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] 2 EA 231* (referred to by the Court of Appeal in *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR*) set out the guiding principles to be applied in considering an application for extension of time as;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are:

- i. first the length of the delay;
- ii. secondly, the reason for the delay;
- iii. thirdly (possibly) the chances of the appeal succeeding if the application is granted; and,
- iv. fourthly, the degree of prejudice to the respondent if the application is granted.”

Similarly, in *Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR*, the Court relied on the case of *First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65* where the Court set out the factors to be considered in deciding whether or not to enlarge time to file an appeal as;

- 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 favorable exercise of discretion in favour of the applicant.

The judgement sought to be appealed against was delivered on the 11/03/2020. The applicant had 30 days from the said date to lodge an appeal. The applicant had until on or about 12/04/2020 to lodge the appeal. It is therefore not in dispute that there was delay. The instant application was filed on 6/05/2020, around three weeks after the time for filing of the appeal had lapsed. I do not think this amounted to inordinate delay in the circumstances herein.

In *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR*, the Court noted that there is no maximum or minimum period of delay set out in law. The Court referred to the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR* where it was stated;

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

The Court in *Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR* stated at paragraph 29;

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy [1964] 3 All ER 933; Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259.* ‘

The applicant has stated that there was delay in obtaining Court proceedings and other documents required to file the appeal. The applicant has further averred that he was unable to file the appeal given the declaration made on the 15th March 2020 by the Chief Justice restricting Court operations due to the worldwide Covid-19 pandemic.

I have noted that the declaration on the restriction of Court operations was made about four days after the judgement sought to be appealed against was delivered. It is my belief that this probably contributed to the applicant's delay in obtaining Court proceedings and other documents as well as the inability to file the appeal within time. The Court in *Kenya Power & Lighting Company Ltd v Rose Anyango & another [2020] eKLR* allowed an application to file an appeal out of time on the basis that the 30 days' period within which the appeal ought to have been filed fell in the Covid 19 pandemic situation. The Court noted that the downscaling of court services owing to Covid 19 pandemic threw all persons in a spin of uncertainty as to how services were to be rendered.

Based on the above, I find that the applicant's explanation for the delay is plausible and for the delay was plausible and has satisfactorily been explained.

As regards to whether the appeal has high chances of success, the Court in *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR* held that it was the role of the Court to determine definitively the merits of the intended appeal. The same was also the view of the Court in the case of *Kenya Power & Lighting Company Ltd v Rose Anyango & another* where the Court stated;

'On whether the intended appeal has chances of success is not for this court to decide at this stage save that from the draft intended memorandum of appeal annexed, I am satisfied that the intended appeal is not frivolous on the face of it. The applicant will have an opportunity to satisfy the court on the merits of its appeal and the Respondents will have a chance to respond to the merits or demerits of the appeal once filed.'

It is also my view that it is not for the Court to determine the merits or otherwise of the appeal at this point in time. In the event this application is allowed, the applicant will have the chance to argue the appeal on its merits after which the Court will make its informed decision.

I have however looked at the memorandum of appeal annexed to the applicant's application. From the 2nd ground of appeal, I am able to deduce that the matter in issue is the ownership of land. The appellant has also alleged bias and that the Trial Magistrate made a decision against the weight of the evidence. I think the appellant has raised very weighty issues and it is only fair that the applicant be granted his day in Court to give him the opportunity to argue out his case.

I have looked at the pleadings and the judgement filed and delivered at the trial court respectively. It is my finding that the respondent will not be prejudiced if the applicant is granted time to file an appeal out of time because as much as the trial court found that the plaintiff (respondent herein) was the lawful owner of the property, it is clear and undisputed from the pleadings that it is the defendant (applicant herein) who had been in possession of the property since 2002 when he allegedly bought the parcel of land from the plaintiff's uncle.

The upshot of the above is that the application is allowed and that the applicant is ordered to file the appeal within 30 days from today.

DATED AT KISUMU THIS 29th DAY OF APRIL, 2021

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE