



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**MISC. APP NO. 52 OF 2019**

**PETER NJOROGЕ NJUNGE.....APPLICANT**

**-VERSUS-**

**JOHN NGUGI NJOROGЕ.....1<sup>ST</sup> RESPONDENT**

**TRISANDS INVESTMENTS LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

The matter for determination is the Chamber Summons Application dated **7<sup>th</sup> October 2019**, by the Applicant brought under Section **3A,78, 79 (G) of the Civil Procedure Act and Article 159 (d) (e) of the Constitution 2010** for orders that;-

- 1. That this Honorable Court be pleased to issue a temporary order of injunction restraining the Respondents, their agents, servants, employees and/or any other person whatsoever working under them from transferring, disposing, charging or in any other way interfering with land parcel number NDEIYA/NDEIYA/2222, pending hearing and determination of this application and pending the hearing of the intended appeal.***
- 2. That this Court be pleased to grant leave to the Applicant to appeal out of time the ruling made by the Hon. E Olwande SPM on 25<sup>th</sup> April 2019.***
- 3. That the said leave do operate as a stay of proceedings in ELC case No 213 of 2018 at the Thika Elc court.***
- 4. That costs of this application be provided for.***

The Application is premised on the grounds that **Hon.E Olwande SPM**, delivered a ruling on **25<sup>th</sup> April 2019**. That the Applicant did not appeal against the ruling within the requisite time as Counsel for the Applicant lost contact with the Applicant and was unable to get instructions to appeal against the said Ruling until late **September 2019**. Further that the said Ruling is detrimental to the Applicant as it has the effect of leaving him and his siblings homeless. That the Ruling delivered on **25<sup>th</sup> April 2019**, is contradicting the orders of the Ruling issued on the **3<sup>rd</sup> December 2018**. Further that the trial Magistrate allowed new evidence to be introduced while the Court had already given its judgement through a consent Judgment issued on the **13<sup>th</sup> April 2017**, and without any application for review of the same.

Further that the Applicant has a suit before this court being **ELC NO 213/2018**, a fact that was highlighted to the trial magistrate in **CIVIL SUIT NO. 235/2014**. That the Applicant has an arguable appeal with high chances of success.

In his Supporting Affidavit, **Charles Njau Ngigi**, Advocate on record for the Applicant, reiterated the contents of the grounds in support of the Application and further averred that by the time the Ruling was being issued he had lost contact with the Applicant and he did not get instructions to file an appeal against the said Ruling. That the Ruling the Applicant wishes to appeal against was available to him on **30<sup>th</sup> September 2019**, and the said consent Judgment by the trial Magistrate has never been challenged. That the suit before this Court is still ongoing and the Ruling will render the same nugatory. That the Applicant is a man of straw and together with his siblings they have been living a life of destitution and despite him offering pro bono services, he could not have continued to file an appeal against the Ruling without instructions. That it is in the interest of justice that the appeal be heard and determined on its merits.

The Application is opposed and **Joseph Muongi Njunge**, the 2<sup>nd</sup> Respondent's Director swore a Replying Affidavit on **15<sup>th</sup> November 2019** and averred that the Application seeks leave to appeal against a Ruling which was delivered **6 months** ago on the **25<sup>th</sup> April 2019**. That the Applicant's counsel had been aware of the Ruling and only decided on filing an appeal against the Ruling after it became apparent that the 2<sup>nd</sup> Respondent intended to raise objection to the proceedings in **ELC No 213 of 2018**, on the basis that those proceedings had been overtaken by events in view of the Ruling in **SPMCC No. 235 of 2014**. Further that in **ELC No 213 of 2018**, the Applicant was seeking enforcement of orders issued in **Limuru SPMCC No 235 of 2014**, pursuant to an ex parte Judgment of the trial court of **23<sup>rd</sup> August 2017**.

That the Applicant proceeded with the prosecution in **ELC No 213 of 2018**, regardless of the fact that the subject matter in the suit had been extinguished by the Ruling of **25<sup>th</sup> April 2019**, in **SPMCC No. 235 of 2014**. That the Applicant further concealed to the Court the impact of the trial Court orders of **25<sup>th</sup> April 2019**, and had no intention of disclosing the same to the court in **ELC No 213 of 2018**. That the Applicant has not explained the reasons for the delay in filing the application for extension of time for the past 6 months.

He further averred that as at **25<sup>th</sup> of March 2019**, it is apparent that the Applicant was in touch with his Counsel as evidenced by an Affidavit sworn by the Applicant **Peter Njoroge Njunge** on **13<sup>th</sup> March 2019**, that was filed in **ELC No. 213 of 2019** on **25<sup>th</sup> March 2019**. Further that the Ruling the Applicant seeks to appeal against was delivered one month later and the Applicant's Counsel has not explained the circumstances under which he lost touch with his clients and the efforts put in trying to trace the client. Further that no evidence has been adduced by the Applicant on how he lost touch with his Counsel and therefore the averments are a mere afterthought. That the Applicant has been represented by the same Counsel since the commencement of the Court proceedings in **2014**, hence a loss of contacts should not be construed to mean that the Applicant has lost his way to the Advocates offices.

That the Ruling of **3<sup>rd</sup> December 2018**, was in relation to 2<sup>nd</sup> Respondent's Preliminary Objection that was dismissed by the Court on the basis that it was founded on material facts and the Court found that the jurisdiction issue should have been raised by other means. Further that the Ruling of **25<sup>th</sup> April 2019**, was on a Notice of Motion Application which sought to declare the proceedings of the Court a nullity due to lack of jurisdiction which issue he has been advised by his Advocate can be raised at any time even after the Judgment. Further that the Applicant is an indolent litigant who is undeserving of the Court's exercise of its discretion.

The Applicant **Peter Njoroge Njunge** swore a Supplementary Affidavit on **2<sup>nd</sup> December 2019**, and averred that he has been living a life of destitution and he has been trying to eek a living out of a charcoal burning at **Suswa within Narok County** and time to communicate with his Advocate had been challenging. That it has been hard to instruct his Advocates due to financial difficulties. That he learnt of the existence of the Ruling he intends to appeal against in late **September 2019** when time for filing appeal had lapsed. That he instructed his Advocates to sign the Supporting Affidavit of the present Application. Further that the Ruling he intends to appeal against is prejudicial to him and his other eight siblings. That the 2<sup>nd</sup> Respondent was enjoined in **Limuru SPMCC No. 235 of 2014** by the trial Court suo moto despite the matter having been concluded. That he has actively been pursuing his rights through **Limuru SPMCC No. 235 of 2014 and ELC No. 213 of 2018**, before Court. That upon securing his interests through a Consent Judgment issued on **23<sup>rd</sup> August 2017**, the 1<sup>st</sup> Respondent secretly and illegally removed the restriction he had lodged over the subject land through the District Officer's office and effected transfer thereof to the 2<sup>nd</sup> Respondent.

The Application was canvassed by way of written submissions which the Court has carefully read and considered, The Court has also read and

Considered the Application, the Affidavits as well as the authorities relied upon. The Court finds and holds that the issue for determination is **Whether the Application is merited.**

The Applicant has sought for time enlargement within which to file the appeal out of time. The Court is guided by the provisions of Section 79G of the **Civil Procedure Act** which provides that:-

***“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.”***

It is not in doubt that the orders sought by the Applicant are discretionary in nature and the Court is called upon to exercise its discretion and determine whether the Applicant has satisfied that he has a good and sufficient cause for not filing the appeal on time to enable the Court exercise its discretion and allow it to file the appeal out of time. In the case of **Liberato Kivanga Manga ...Vs... Prime Bank Limited [2021] eKLR** the Court of Appeal stated;

***“Further, in Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019 this Court expounded that:***

***“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”*** [Emphasis supplied

***Although there is no maximum or minimum period of delay set out under the law, the reason(s) for the delay must be plausible. To this effect, this Court in Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR 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.”***

In **Muchugi Kiragu v James Muchugi Kiragu & another** Civil Application No. NAI. 356 of 1996, this Court had the following to say as regards this Court's discretion under Rule 4:

**“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”** (Emphasis supplied).

**[17] On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant is aggrieved by the judgment of the ELRC and is desirous of appealing against the said judgment out of time.”**

The Court is guided by the above provision of law and the decided case by the Court of Appeal together with the other cited cases. It is not in doubt that a decision on whether or not to allow a party an opportunity to appeal out of time is discretionary. That while there are set down standards that the Court may choose to follow, It has also been held that the principles to be considered are not exhaustive and the Court is further called upon to determine each case on its own circumstances.

In this instant, there is no doubt that the time within which the Applicant ought to have appealed against the decision of the learned magistrate has been surpassed by around 5 months. As already noted in the cited case above, the Court of Appeal observed that there is no set time of delay that while in other circumstances 5 months may be inordinate in certain circumstances a year may not be inordinate delay.

The Applicant has contended that he only learnt of the Ruling in September 2019. That he had gone to look for work in Narok County and had lost contact with his Advocates. The Applicant also in his Affidavit averred that he had lost Contact with his Client and though he was acting pro bono, he could not file an appeal without express instruction.

The Court is called upon to determine this case on its own circumstances. The Court notes that the property subject of the suit is an alleged ancestral land that was allegedly to be shared amongst siblings but that one brother who held the suit property in trust sought to use it for his own benefits to the exclusion of his siblings.

The Court further notes that the Applicant has indicated that he had financial issues and was unable to instruct his Advocate on time. Further that there is a chance that he and his siblings would be left homeless if the appeal is not heard on merit.

Having carefully considered the circumstances of this case and further in balancing the prejudice that the Applicant may suffer as against that, that may be suffered by the Respondents, the Court is satisfied that the situation at hand and the explanation by the Applicants warrants it exercise its discretion in its favour and allow it to file the appeal out of time. That a party that is facing financial challenges ought not be ignored unless the delay is so inordinate that it is inexcusable. The Court does not find 5 months in this circumstances inordinate. See the case of Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR where the Court stated that;

**The parameters for the exercise of such discretion are clear See MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486 and FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported) where this court rendered itself thus:**

**“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”**

The Respondents have not indicated what prejudice that they may suffer if the Applicants is allowed time to ventilate his appeal. Further the Court notes that the Applicant has been following up on his case and though the Interested Party had indicated that he is an indolent litigant, there has been no evidence to warrant the same.

Having gone through the Memorandum of Appeal, the Court notes that the same is arguable and being that what is at stake would mean that the Applicant would be rendered homeless, it is in the best interest of justice and equity that he be allowed an opportunity to be heard as no evidence has been presented that his actions are inexcusable. That in the circumstances, shutting out the Applicant would not be in the interest of justice. The Court therefore finds and holds that the prayer for extension of time is merited.

On whether the Court should grant interlocutory injunction, it is not in doubt that the Interested Party who is now the registered owner of the suit property is a land buying Company and as per the requirements of Order 40 of the Civil Procedure Rules, an injunction is necessary in order to prevent the disposal of the suit property that would then render the Appeal nugatory.

The Upshot of the above therefore is that the Court finds and holds that the Application dated 7<sup>th</sup> October 2019 by the Applicant is merited and the same is allowed entirely with cost being in the cause.

Further the Applicant is directed to file the intended Appeal within the next 60 days from the date hereof and failure to comply, the stay orders will lapse automatically.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 15<sup>TH</sup> DAY OF APRIL 2021.

L. GACHERU

JUDGE

15/4/2021

Court Assistant - Phyllis

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They 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.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr Mburu for the Applicant**

**Mr. Masinde for the 2<sup>nd</sup> Respondent**

**No appearance for the Respondent**

L. GACHERU

JUDGE

15/4/2021