



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 14 OF 2019

SHUKRI ISAMIL JAMAAPPELLANT

VERSUS

MARIAM MOHAMED.....1ST RESPONDENT

ISILO COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

1. The background to this matter is that a judgment was delivered in Isiolo CM ELC NO. 7 OF 2011 on 13.12.2018 where the plaintiff, now the appellant lost the case. The appellant filed a memorandum of appeal on 18.1.2019. The respondent lodged an application dated 30.7.2019 and filed on 14.10.2019 seeking to have the appeal struck out for being filed out of time. The appellant came up with her own application dated 26.11.2019 and filed on 27.11.2019 seeking for enlargement of time in filing the memorandum of appeal and the record of appeal.

2. This ruling is in respect of the two applications. The parties agreed to canvass the two applications by way of written submissions. On 28.11.2019, the 2nd respondent indicated that they would not be opposing the application of the 1st respondent to have the appeal struck out.

3. The case for the appellant is contained in her application, the supporting affidavit and a replying affidavit all dated 26.11.2019. She urges the court to enlarge time for filing of the memorandum and record of appeal against the judgment and/or decree of the subordinate court in Isiolo CM ELC case no 7 of 2011. She also prays that the memorandum and record of appeal filed out of time on 18th January and 23rd July 2019 respectively and served be deemed to be properly filed and on record.

4. She avers that upon being aggrieved by the judgment of the trial court, she instructed her advocates on record to appeal which they did and they wrote letters dated 14th and 17th December 2018 requesting for certified copies of the judgment and proceedings. She filed her appeal on 18th January 2019 and served the same upon the respondents. She contends that the certified copies of the judgment and proceedings were not supplied in good time hence the delay and she is desirous of prosecuting this appeal which has a good chance of success. That the delay in filing the appeal was not intentional or deliberate but the same was beyond her control.

5. The appellant filed her submissions on 1.9.2020 where she reiterated her averments set out in her application and affidavits. She relied on the following cases; **Diplack Kenya Limited V William Muthama Kitonyi [2018]eKLR, Samuel Mwaura Muthumbi V Josephine Wanjiru Ngugi & Another [2018]eKLR, Apa Insurance Limited V Michael Kinyanjui Muturi [2016]eKLR.**

6. The case for the 1st respondent is contained in his application filed on 14.10.2019 and the grounds of opposition filed on 23.6.2020. She avers that judgment was delivered on 13th December 2018 and the appellant filed her memorandum of appeal on 18th January 2019 and has no reasonable excuse or justification for failing to file the appeal within 30 days, further she only filed her record of appeal after the court on its own motion directed so. That the appellant had also filed an application for stay of execution of the judgment at the trial court on 11th July 2019 which application is yet to be determined due to constant delays and adjournments on her part yet she is still in occupation, use and enjoyment of the suit land despite there being a judgment against her.

7. Further, the 1st respondent averred that the appellant benefited from interim orders for 8 years before the determination of the suit in the trial court and has demonstrated that she is not in a hurry to have the appeal determined. All the while the 1st respondent continues to suffer prejudice as the appellant still occupies the land and collects rent from developments. The appellant's inadvertence, accident or ignorance cannot come to her aid as she desires to have the matter pending before court ad infinitum.

8. The 1st respondent further states that Order 42 of the Civil Procedure Rules does not require one to have certified copies of the proceedings and judgment at the time of filing the memorandum of appeal.

9. In his submissions, the 1st respondent reiterated what she had stated in her application, the affidavit in support and the grounds of

opposition.

10. The issue for determination is **whether to allow the appeal to be prosecuted or whether to dismiss the same**. Thus the court will deal with the two applications at the same time.

11. Section 79G of the **Civil Procedure Act** 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”.

12. It is not disputed that judgment in the trial court was delivered on 13th December 2018 and the appellant filed her memorandum of appeal on 18th January 2019, a period of 35 days. However I do opine that it would be prudent for this court to take into consideration the provisions of **Order 50 Rule 4 of the Civil Procedure Rules** which states as follows:

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act Provided that this rule shall not apply to any application in respect of a temporary injunction.”

13. In **Francis Likhabila v Barclays Bank of Kenya [2020] eKLR** the court quoted **Gabriel Osimbo v Chrispinus Mandare [2020] eKLR** with approval where *Okwengu JA* in agreeing with the decision of *J. Mohammed, JA*, held as follows;

“I have read the draft judgment prepared by J. Mohammed JA. I am in agreement that this appeal should be allowed. With due respect, the learned Judge misconstrued the purport of Order 50 Rule 4 of the Civil Procedure Rules. The rule simply provides the manner of computing time. It does not provide for any specific time for doing or taking any action. Thus, Order 50 Rule 4 does not contradict section 75G of the Civil Procedure Act, which provides a time limit of 30 days for filing an appeal. Order 50 Rule 4 simply provides how these days are to be computed if the period falls within the High Court vacation.

Taking into account Rule 4 in computing the 30 days, it is evident that the appellant’s appeal which was filed on 7th February, 2011 was filed within time as it was affected by the High Court vacation and the period, 21st December, 2010 to 13th January, 2011 had to be excluded in computing the time. The learned Judge was therefore wrong in dismissing the appeal.”

14. Similarly in the instant case, the 30 day period prescribed under Section 79 G of the Act fell within the court’s Christmas recess in the year 2018. Consequently, the days falling between 21st December 2018 and 13th January 2019 ought to be excluded when computing the time within which the appellant was required to file her appeal and as such, I find that the 30 day period should have expired on 5th February 2019. The end result is that the appeal was filed well within the time stipulated by the law.

15. For the foregoing reasons, I find that the appellant’s application for enlargement of time is uncalled for and misplaced, while that of the 1st respondent is unmerited. Thus both applications are hereby dismissed and each party is to bear their own costs of the applications. It is however noted that the lower court file has been availed, the record of appeal is also filed and the appeal was admitted way back on 9.7.2019. It follows that this suit is ripe for hearing and the matter should therefore proceed to hearing.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF APRIL, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 28.1.2021. 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 Ruling 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