



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC MISCELLANEOUS APPLICATION NO. 9 OF 2021

SIMON MAYAKA MAYAKA.....APPLICANT

VERSUS

HEBISIBA BWARI MAYAKA.....RESPONDENT

RULING

INTRODUCTION

1. This ruling is in respect of the Applicant's Notice of Motion dated 2nd July, 2021 seeking leave to file an appeal out of time. The Applicant seeks to appeal against a ruling of the lower court delivered on 26th March 2015. The application is anchored on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 2nd day of July, 2021.
2. In the said affidavit the Applicant deposes that he is the registered owner of land parcel number BASSI/BOGETAORIO/497 measuring 3.2 Hectares which he wanted to divide equally among his 4 wives. The Respondent who is one of his wives filed a case at the Land Disputes Tribunal and he filed an appeal to the Kisumu Provincial Appeals Committee which resolved the matter and the ruling was adopted by the court. He deposes that he is dissatisfied with the said ruling as the same was not in line with the decision of the Appeals Committee. He attributes the delay in filing the appeal to the non-availability of the court file.
3. The application is opposed by the Respondent through her Replying Affidavit sworn on 9th November, 2021 in which she explains that the Applicant filed case in the lower court being Misc Application No. 48 of 2009 which was by consent of the parties referred to the Chief for arbitration in line with the provisions of Order 46 of the Civil Procedure Rules.
4. She further deposes that the Chief prepared a report dated 23rd August 2013 which was subsequently adopted as a judgment of the court and a decree to that effect was issued in 2015.
5. It is the Respondent's contention that if the Applicant was dissatisfied with the Chief's award, he ought to have filed an objection before the same was adopted as a judgment of the court as the award cannot be challenged by way of appeal after it has been adopted. She deposes that the application is an afterthought aimed at dispossessing her of her land.
6. The Respondent further contends that the Applicant has not placed any evidence before the court to show what efforts he made to trace the file so as to file the appeal within time. She also deposes that the judgment sought to be challenged has been overtaken by events as the suit property has since been sub-divided as per the judgment of the court.
7. The court directed that the application be canvassed by way of written submissions and both parties filed their submissions, which I have considered.

ISSUES FOR DETERMINATION

8. There are only two issues for determination:

- i. Whether a decision emanating from an arbitration process under order 46 of the Civil Procedure Rules can be challenged on appeal.
- ii. Whether the Applicant has satisfied the conditions for leave to appeal out of time

9. With regard the first issue, it is not clear whether the order against which the Applicant seeks to appeal was as a result of proceedings of the Land Disputes Tribunal or a Miscellaneous application filed in the lower court, which was referred to the Chief for arbitration under the provisions of Order 46 of the Civil Procedure Rules. In his Supporting Affidavit the Applicant has deponed that the Respondent filed a case at the Land Disputes Tribunal after which the Applicant appealed to the Provincial Appeals Tribunal. According to the Applicant, the award of the Provincial Appeals Tribunal was then adopted as a judgment of the court but the court revised the manner in which the suit property was to be divided.

10. However, according to the Respondent, the Applicant filed a case in the lower court vide Kisii CM Misc Civil Case No. 48 of 2009 after which the parties consented to have the matter referred to the Chief for arbitration under order 46 of the Civil Procedure Rules. Thereafter, the report of the Chief was adopted by the court.

Order 46 rule 18 (2) provides that:

Rule 18(2)

“upon the judgment being entered, a decree shall follow and no appeal shall lie from the such decree except in so far as the decree is in excess of or not in accordance with the award.”

11. From the above provision of the law is clear that the decree issued pursuant to an award under Order 46 may be challenged if it is in excess of or not in accordance with the award.

12. Moving on to the second issue, section 79 G of the Civil Procedure Act provides as follows:

Section 7G

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 required for the preparation and delivery to the appellants of a copy of the decree or order”.

13. Under the provision to section 79G of the Civil Procedure Act, an appeal may be admitted out of time if the Appellant satisfies the court that he has a good and sufficient cause for not filing the appeal in time.

14. The Supreme Court in the case of **Nicholas Kiptoo Arap Korir V Independent Electoral and Boundaries Commission and 7 Others Supreme Court Application No 16 of 2014** laid down the following principles that the court should consider in the exercise of its discretion to extend time:

- i. Extension of time is not a right of a party. It is an equitable remedy that is available to a deserving party at the discretion of the court.*
- ii. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.*
- iii. As to whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis.*
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court*
- v. Whether there will be any prejudice to be suffered by the Respondents if extension is granted.*
- vi. The application should be brought without undue delay and;*
- vii. In certain cases like election petitions, public interest should be a consideration for extending time*

15. Applying the above principles to the instant case, the question I must determine is whether the Applicant has shown sufficient cause for the delay in filing the appeal. In his Supporting Affidavit, the Applicant has stated that the delay in filing the appeal was due to the non-availability of the court file. However, he has not demonstrated what efforts he made to trace the file. Not a single letter is attached to his affidavit to show that he applied for the proceedings or enquired about the availability of lower court file for a period of over six years.

16. Considering that the Applicant has all along been represented by Counsel, I find it difficult to believe that he only made oral enquiries about the lower court file. Additionally, the Respondent has stated on oath that the suit property has since been sub-divided and therefore she is likely to be prejudiced if leave is granted to the Applicant to appeal out of time.

17. In the circumstances, and more particularly because the inordinate delay of six years has not been explained to my satisfaction, I am disinclined to grant the application and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 3RD DAY OF FEBRUARY, 2022.

J.M ONYANGO

JUDGE