



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC MISCELLANEOUS APPLICATION No. E004 OF 2021**

**ROBOT OMUMU.....APPLICANT**

**VERSUS**

**FRANCIS NASHON OJANGO.....RESPONDENT**

**RULING**

1. By Originating Summons dated 17<sup>th</sup> February 2021, the applicant seeks the following orders:

1. *THAT leave be granted to the applicant **ROBOT OMUMU** to file an Appeal against **FRANCIS NASHON OJANGO** out of time.*
2. *THAT costs of this application abide the results of the intended suit.*

2. The application is supported by an affidavit sworn by the applicant. He deposed that he was the first registered owner of land parcel number Marama/ Shiatsala/1298 measuring 5.3 acres having inherited it from his deceased father and that in 1967 he was approached by Essau Indetie Ojango (the respondent's father) with the intention of buying an acre of the property at a consideration of KShs 15,000. That the respondent's father paid KShs 8,000 and with a promise of completing payment of the purchase price, took the applicant's title deed. That the applicant realised in 1993 that the respondent's father had proceeded to transfer the whole 5.3 acres to himself. He further deposed that he reported the respondent's father to the local administration who advised that he refunds the money but the respondent's father refused to sign an acceptance form.

3. The applicant further stated that later on he received court summons which he entered appearance but due to the fact that the respondent acted in prejudice, most of the subsequent summons never reached him as a result of which he failed to attend court and the respondent was heard ex parte and orders/ rulings were made without his involvement. That he instructed advocates to represent him, some of whom failed to make his attendances in court favourable due to breakdown in information sharing. That later in 2014, judgment was entered against him ex parte and he made unsuccessful efforts to have the orders set aside or reviewed. He concluded by stating that he therefore made a decision to appeal against a judgement dated 7<sup>th</sup> August 2014 and subsequent court orders.

4. The respondent filed a replying affidavit in which he deposed that the ex parte judgement against the applicant in 2010 was set aside and the applicant was granted leave to file his defence as per the ruling of the court delivered on 7<sup>th</sup> March, 2011 but the applicant chose not to file his defence. That the applicant had legal representation, even filed notice to act in person and also wrote letter seeking to be supplied with certified proceedings for the purposes of lodging an appeal and he cannot therefore claim not be aware of whatever was happening. He further deposed that the instant application is meant to buy time and that the applicant only woke up when the respondent moved the court to execute the eviction order. He therefore prayed that the application be dismissed with costs.

5. The application was canvassed through written submissions which the parties duly filed.

6. The applicant relied on **Section 79G** of the **Civil Procedure Act** and argued that he has a good and sufficient cause for not filing the appeal on time since he encountered a number of challenges including hearing impairment, failure to be served with notices to attend court on several occasions, losing on his advocate on record among others. Relying on the case of **First American Bank of Kenya Ltd vs Gulab P Shah & 2 others Nairobi (Milimani) HCCC NO. 2225 Of 2000 [2002] 1 EA 65**, he argued that he has an arguable case meriting audience by the court. He urged the court to allow the application to afford him justice.

7. In reply, the respondent disputed the applicant's claim that he has a hearing impairment and referred the court to portions of proceedings where, according to him, the applicant appeared in court in person and coherently articulated his case. Further, that the applicant is not clear on what orders he intends to appeal against and that the application should be struck out for ambiguity. That the substantive judgment was delivered on 7<sup>th</sup> August 2014 and the applicant has been making applications for stay, review and setting aside at the subordinate court

whenever the respondent made an application to execute the decree and all the applications were prepared, filed and prosecuted by legal experts. He submitted that the application is frivolous, ambiguous and a blatant abuse of court process which should be dismissed with costs.

8. I have considered the application, the affidavits and the submissions. The only issue for determination is whether the relief sought should issue.

9. The principles applicable to an application for enlargement of time were discussed by the Supreme Court in the case of in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] eKLR as follows:

*This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:*

- 1. 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;*
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- 6. Whether the application has been brought without undue delay; ...*

10. As is manifest, the supporting affidavit filed by the applicant focuses a lot on explaining the substantive dispute between the parties and is rather thin on the circumstances that led to failure to file appeal on time. Neither the case in respect of which an appeal is to be filed nor the decision to be appealed against is specified. From the annexed proceedings and based on the position taken by the respondent, I assume that the case referred to is Butere PMCC No. 148 of 2010 and that judgment was delivered on 7<sup>th</sup> August 2014. I also assume that the proposed appeal is against the said judgment. A copy of the judgment or ensuing decree have not been availed.

11. In terms of **Section 16A** of the **Environment and Land Court Act, 2011**, an appeal from the subordinate court to this court is to be filed within 30 days of delivery of the judgment or ruling. The present application was filed on 19<sup>th</sup> February 2021, over six and a half years after delivery of the judgment. A delay of six and a half years is certainly not a small matter.

12. The applicant's claims that he encountered a number of challenges including having hearing impairment and failure to be served with notices to attend court on several occasions are not supported by the record. On the contrary, the record shows that the applicant has been litigating actively with legal representation after the date of delivery of the judgment. On 16<sup>th</sup> February 2015 he was represented by an advocate when the matter was fixed for notice to show cause. He equally had an advocate representing him on 5<sup>th</sup> March 2015, 23<sup>rd</sup> March 2015 and many other subsequent attendances both in court and at the registry. I agree with the respondent that the applicant had ample legal representation. If he is not happy with the quality of the representation then that is a matter to be raised in another forum between him and his advocates.

13. The allegations of hearing impairment are also not supported by the proceedings. Even if I had found that he had any such impairment, it would not have been of any significance in the present application since he had legal representation.

14. The applicant has not offered any plausible and satisfactory explanation for the delay to warrant exercise of discretion in his favour. That being the case, Originating Summons dated 17<sup>th</sup> February 2021 is without merit. I dismiss it with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF MARCH 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the applicant

Mr Otinga for the respondent

Court Assistant: E. Juma