



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC MISCELLANEOUS APPLICATION NO. 72 OF 2018

SHARRIF IBRAHIM FARAH.....APPLICANT

VERSUS

KAMENCHU M'MINGAINE .... 1<sup>ST</sup> RESPONDENT

MBURUNGA .....2<sup>ND</sup> RESPONDENT

RULING

1. The applicant has brought an application dated 24.3.2021 under **Sections 1, 1B, 3A and Order 50 Rule 6 Civil Procedure Rules**, seeking the court to extend time within which to file an appeal against the judgment issued in **Meru CMCC No. 381 of 2011**. The application is supported by an affidavit of Sharrif Ibrahim Farah sworn on 24.3.2021.

2. The grounds are that the applicant had by application dated 30.10.2019 applied for an extension of time to file an appeal out of time which was orally argued on 12.2.2020 with the court reserving its ruling to 23.4.2020 but due to Covid 19, the applicant only established on 5.3.2021, that the ruling was delivered on 30.4.2020 without any confirmation to him. The applicant states if the application is not allowed, he stands to lose his 5 acres of land.

3. The application is opposed through a replying affidavit by the 2<sup>nd</sup> respondent sworn on 4.5.2021. The reasons given are that the applicant has laid no basis for the failure given that there was no lengthy Covid 19 break; the delay is inordinate; there will be prejudice to the respondents since the matter was instituted in 2011; litigation must come to an end and that it has taken the applicant two years to come back to court.

4. The 1<sup>st</sup> respondent has opposed the application through a replying affidavit sworn on 10.5.2021. The basis is that the ruling was made on 30.4.2020 and the applicant was given 14 days to file the appeal and copies of ruling were supplied to all parties through email.

5. That the courts re-opened fully in July 2020 but the applicants' advocate took no action or initiative to follow up on the matter with the registry. That the application is being filed a year later which is an abuse of the court process and a waste of court's time which is causing the 1<sup>st</sup> respondent financial strain.

6. The applicant filed a supplementary affidavit on 15.6.2021, attributing the non-compliance to his advocates on record which wrongs should not be visited upon him and insists that given an opportunity by way of extension of time, he shall abide by any directions the court may impose.

7. Through leave of court, parties put in written submissions dated 21.9.2021 and 7.10.2021 respectively.

8. The applicant submits that there are two issues for determination: - whether a notice of delivery of ruling was issued and secondly if the court should extend time. Reliance is placed on ***Velos Enterprises Ltd-vs- Paragon Electronics Ltd [2018] eKLR citing with approval Oshwal Academy (Nairobi) & Another -vs- Induvishwanath[2017] eKLR on omission of the court to comply with basic rules of natural justice in notifying a party on an impending judgment: Azim Jiwa Rajwani -vs- fidelity Commercial Bank (Now SBM Bank Ltd) [2021] eKLR citing with approval Leo Sila Mutiso -vs- Hellen Wangari Mwangi [1999] 2 E.A 231*** on the factors to consider on whether to extend time such as delay; reason for the delay; chances of the appeal succeeding and the degree of prejudice to the respondents; ***Fakir Mohammed -vs- Joseph Mugambi & 2 Others [2005] eKLR*** on the proposition that the number of factors to consider was unlimited and may include the effect of the delay on public administration, importance of compliance with time limits, the resources of parties and whether the matter raises issues of public importance; ***Muringa Co. Ltd -vs- Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019*** on other factors to consider such as the need to balance the interests of the parties against the timely resolutions of disputes; ***Andrew Kiplagat Chemaringo -vs- Paul Kipkorir Kibet [2018] eKLR*** on the proposition that the law does not set out any minimum or maximum period of

delay but only if the same is satisfactorily explained which should be plausible with valid and clear reasons.

9. The 2<sup>nd</sup> respondent submits the ruling was supplied to all advocates the denial was a sham and the reasons of Covid pandemic was baseless since the court resumed full operation in July 2020. The 2<sup>nd</sup> respondent therefore submits the delay is unexplained, inordinate, inexcusable, the conduct of the applicant and his advocates was wanting, the application was an exercise in futility to validate a notice of appeal filed out of time; the failure to peruse the court file had not been explained. Reliance was placed on **Imperial Bank Ltd (In Receivership) & Another –vs- Alnashir Popa & 18 Others [2018] eKLR, and Jimcab Services Ltd –vs- Bartholomew Benard Osodo & Another [2018] eKLR.**

10. The 2<sup>nd</sup> respondent submits further, the applicant had failed to demonstrate due diligence in the observance of timelines set in law and this being a second application, it showed lack of seriousness on both the applicant and his advocates on record.

11. The record shows parties appeared before the court on 12.2.2020 and indicated they relied on their respective pleadings upon which the court reserved the ruling for 23.4.2020. The ruling indicates the same was delivered through electronic mail to the parties.

12. There is no sworn affidavit by the applicant's lawyer on record to give details on whether if at all the ruling was to be delivered on 23.4.2020, they ever attended court and or logged in online and if at all the ruling was not ready, the outcome thereof.

13. Secondly, the applicant has not indicated the exact date the advocates on record made enquiries at the court registry in vain or so soon thereafter to follow up the progress.

14. Thirdly, the applicant has not attached any letter or email which his lawyers on record made complaining or enquiring why there was delay in delivering the ruling.

15. Fourth, there is no indication where exactly the lawyers of the applicant got the information from that the ruling was to be delivered on notice and that there was nothing forthcoming from the court. The source of this misleading information has also not been owned up by the specific lawyer who was allegedly told the ruling shall be on notice and who also misadvised the applicant that the ruling had not been delivered.

16. In the supplementary affidavit, the applicant seems to take a U-turn and heap blame on the mistakes of his advocates on record which in his view should not be visited upon him to lose his 5 acres of land. Unfortunately, there is no affidavit sworn by the staff of the law firm admitting the mistakes or lack of follow-up.

17. Whereas the court has discretion to extend time, the discretion to do so must be exercised judiciously to a deserving party where there is sufficient reason why the appeal was not filed on time or at all while considering the length of the delay, the reasons for the delay and the prejudice likely to be occasioned to the respondent. See **Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral & Boundaries Commission.**

18. There is no dispute the court on 30.4.2020 extended the period to file an appeal for 45 days and not 14 days as averred in the affidavits by the applicant.

19. There is no doubt if at all the applicant was diligent enough after the ruling was not delivered as scheduled or at all would have discovered that the ruling was delivered on 30.4.2020 and perhaps lodge the appeal.

20. The applicant says he discovered the ruling was delivered in March 2021 yet even assuming there was scaling down of court operations due to Covid 19, courts resumed full operations in July 2020. The delay in my considered view is inordinate and unexplained at all.

21. Further, this was the second time the applicant was failing to comply with the timelines and for reasons not explained at all. The applicant in the supporting affidavit blames the court for not issuing a ruling notice and proceeding to deliver the ruling without notification to the parties. The initial ruling date was taken by consent of the parties. Similarly, the ruling itself indicate it was electronically emailed to the respective lawyers for the parties.

22. The applicant's lawyers on record have not sworn any affidavit to deny that the ruling was delivered to their emails on 30.4.2020. Under **Sections 1A, 1B of the Civil Procedure Act** as read together with **Sections 3 and 13 of the Environment and Land Court Act**, advocates of parties under a duty to help the courts further the overriding objective to expeditiously dispense justice in a timely, cost effective and proportionate manner.

23. The respondents have expressed reservations and rightly so over inaction and or lack of diligence on both the applicant and his advocates to which it has resulted to financial constraints on their part.

24. The court is also enjoined to established whether despite the prejudice and or inordinate delay, justice can still be achieved if time were to be extended and the appeal filed out of time.

25. In the instant application, the applicant has not attached a draft memorandum of appeal. He has also not told the court the status of the subject land under dispute. The applicant lost in the trial court for he was unable to prove ownership of the subject land given the nullification of the adjudication section through a decree of the court which is binding to this court and the re-gazettement of the adjudication area. There is no indication if the applicant has been issued with a fresh parcel number of the land.

26. In absence of an explanation that there would be merits in the intended appeal, my finding is that the application herein lacks merits. The same is dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 9<sup>TH</sup> DAY OF MARCH, 2022**

**In presence of:**

Orimbo for applicant – present

Miss Masamba for respondents – present

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**