



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC MISC NO. E034 OF 2021

AHMED CHEGE GIKERA.....APPLICANT

VERSUS

JOHN MAINA MBURU.....1ST RESPONDENT

JOHN GITHINJI MWANGI.....2ND RESPONDENT

JOHN WAWERU WANJOHI.....3RD RESPONDENT

RULING

1. The Applicant filed the instant Application dated 13/8/2021 expressed to be under Order 42 & 51 rule 1 of the Civil Procedure Rules, section 1A 1B & 3A and 63 of the Civil Procedure Act seeking orders that;

a. That the Honorable Court be pleased to enlarge time to file an appeal against the Ruling of the Court in MCL & E No 40 of 2015 delivered on the 10/6/2021

b. That costs of the application be provided for.

2. The application is premised on the grounds set out as; That the Advocate on record was unable to log online during the delivery of the Ruling and attempts to trace the file at the registry immediately was unsuccessful. That the Applicant became aware of the ruling on the 9/8/2021 when the clerk of Prof Kiama Wangai & Co Advocates perused the Court file. That the appeal has high chances of success. That it is in the interest of justice that the orders be granted.

3. In support of the application the Applicant vide his replying affidavit sworn on the 13/8/2021 ricocheted the contents of the grounds aforesaid word for word.

4. The application is opposed by the Respondents through the Replying affidavit of John Maina Mburu sworn on the 9/9/2021. Terming the application misconceived, vexatious and frivolous, the deponent argued that the Applicant has not furnished any evidence to support the claim that his Advocate had difficulty in accessing the online Court. That the application has been brought two months later despite the Applicant's Advocate being aware of the ruling date. In the overall that the Applicant has failed to explain the inordinate delay as well as show sufficient reasons to warrant the enlargement of time. He urged the Court to dismiss the application.

5. Despite the directions of the Court taken on the 4/10/2021 directing the parties to file written submissions by 25/10/2021, none complied.

6. That notwithstanding, I shall proceed to determine the application on the basis of the pleadings on record and on its merit.

7. The key issue for determination is whether the Applicant is entitled to an order enlarging time for purposes of filing an appeal.

8. Section 79G of the Civil Procedure Act provides as follows;

“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 , 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:

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.”

9. The above provision shows that an appeal from the subordinate Court to this Court must be filed within a period of 30 days from the date of decree appealed from. Where the lower Court has certified a certain period as having been taken for the preparation and delivery to the appellant of the decree or order such time may be excluded from the computation of time limited for the filing of the appeal. It is also clear that where time has expired for purposes of filing of the appeal, the appeal may still be admitted out of time if the appellant satisfies the Court that he had a good and sufficient ground for failing to file an appeal out of time.

10. Order 50 Rule 5 Civil Procedure Rules provides as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

that the costs of any application to extend such time and of any order made thereon be borne by the parties making such application, unless the Court orders otherwise.”

11. Enlargement of time is at the discretion of the Court. Section 95 of the Civil Procedure Act provides as follows;

“Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

12. Courts have held that discretion of a judge ought to be exercised judiciously and not in a whimsical or capricious manner. See the case of **Shah vs. Mbogo [1967] EA166**.

13. I am guided by the decision by the Supreme Court of Kenya decision in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others (M.K. Ibrahim & S.C. Wanjala SCJJ) [2013] eKLR** in which the principles that guide the applicable threshold and which I fully adopt were restated as follows: - 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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; whether there will be any prejudice suffered by the Respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.

14. From the decision above, the issues I am enjoined to bear in mind in deciding the application are; the reason for the delay; whether the delay has been explained to the satisfaction of the Court and the prejudice suffered by the Respondent if the application is granted.

15. The impugned ruling was delivered on the 10/6/2021. Going per section 79G of the Civil Procedure Act, the Applicant ought to have filed his appeal by the 10/7/2021. It is evident that as at the time of filing this application on the 13/8/2021 he had not filed any memorandum of appeal. There is a draft memorandum annexed to the application. This application was filed 2 months after the delivery of the ruling. Is the delay inordinate? Looking at the express provisions of the law certainly there is a delay in filing the appeal, hence the application for enlargement of time.

16. When is time said to be inordinate? In the case of **Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & another [2014] eKLR** the Court stated as follows;

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case.”

17. The Court of Appeal in **Richard Nchapi Leiyagu -vs- IEBC & 2 others- Civil Appeal No. 18 of 2013**, held that the conduct of the Applicant must also be looked into. The Court stated as follows;

“We agree with the noble principles which go further to establish that the Court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

18. Similarly in the case of **Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR** the Court had this to say;

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the Court”

19. Evidently even though there is no rule on what constitutes inordinate delay, the Court is being called upon to look at the reasonableness of the delay, the conduct of the party, the prejudice that the Respondent party may suffer and overall circumstances of each case.

20. In this case, the key issue is whether the Applicant has proffered a good and sufficient ground for the delay. It is the sufficiency of the explanation that unlocks the discretion of the Court in favour of the Applicant.

21. The Applicant states that his Advocate on record was unable to log in the online Court system when the said ruling was being delivered. The Court takes judicial notice that since the advent of the Corona Virus also known as COVID -19 pandemic, the Court, under the directions of the Honourable Chief Justice, adopted online hearings. It is evident that the Applicants Advocate was notified of the ruling date and the only challenge was inability to go online. The reasons for this set of circumstances or inability to access the online Court have not been explained. What is relevant in this case is that he had notice of the ruling date. Having been notified of the ruling date, there was nothing to bar the Advocate from perusing the file the next day or such other time or at best access the said ruling online or request for the ruling from the Registry.

22. The second reason advanced by the Applicant is that thereafter the file went missing in the registry. The Applicant failed to show any evidence, either correspondence by himself or his counsel requesting for the certified copy of the ruling from the Registry. Neither is there any correspondence from the Registry stating that the file was unavailable. Indeed it is the Applicant's averment that his Advocate's clerk perused the file on 9/8/2021. He does not state when the file became available if indeed it was missing.

23. The totality of the affidavit evidence on record and which the Court has considered is that the Applicant has not explained the delay in filing the appeal to the satisfaction of the Court. I am not persuaded that the Applicant is deserving of the exercise of the discretion of the Court in his favour.

24. In the upshot the application is unmerited. It is dismissed with no orders as to costs.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 4TH DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

No appearance for the Applicant/Intended Appellant

Mr. Warutere holding brief for Kanyi for the 1st, 2nd and 3rd Respondents

Ms. Phyllis Mwangi – Court Assistant