



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELCA CASE NO. 30 OF 2021

PAUL OMUKE SIDEDE.....APPELLANT

VERSUS

JAMES OKUMU KIZITO.....1ST RESPONDENT

JAMES JUMA OPENJIH.....2ND RESPONDENT

RULING

Application seeking leave of the court to file an appeal out of time: application allowed.

Introduction

1. By a plaint dated 11/09/2018, the appellant in **Bondo PM. ELC No. 71 of 2018** sought to be declared the registered owner of NORTH SAKWA/NYAWITA/7070 and NORTH SAKWA/NYAWITA/7071 (**the suit properties**). Interlocutory judgement was entered against the 1st respondent on 19/2/2019. The 2nd respondent filed a defence dated 21/09/2018 and denied the appellant's assertions and claimed to be a bonafide purchaser for valuable consideration. Pleadings closed and after hearing the parties, the court rendered a judgement on 19/12/2019 dismissing the plaintiff's suit with costs to the 2nd respondent. Dissatisfied and aggrieved by the decision of the court, the appellant filed an appeal in **Siaya HC. Civil Appeal No.2 of 2020**. The court by a ruling dated 27/01/2020 summarily rejected and struck out the appeal on grounds of want of jurisdiction. Seized with the ruling of the high court, the appellant filed a motion dated 25/05/2021 seeking several orders. That motion is the subject of this ruling.

Appellant's case

2. Prayer numbers 1 and 2 of the motion are spent. The appellant seeks; (i) to be granted leave to appeal out of time against the judgement of the lower court and, (ii) for the memorandum and record of appeal to be deemed as duly filed. The motion was primarily grounded on; (i) the appellant is aggrieved and dissatisfied by the judgement of the lower court, (ii) he had instructed counsel to file an appeal however, time had run out, (iii) it is in the interests of justice that the motion be allowed and, (iv) the respondents will not be prejudiced. The motion is supported by the affidavit of the appellant dated 25/05/2021. He contends that, (i) though he filed an appeal in time, there was oversight on the part of his advocate by filing an appeal in Siaya High Court instead of the Environment and Land Court, (ii) Siaya High Court notified him of its ruling late in the day using an erroneous email address and, (iii) corona virus pandemic had interfered with court operations. The appellant has annexed a memorandum of appeal to his motion. A record of appeal dated 10/12/2020 too, has been filed.

1st and 2nd Respondent's case

3. In opposition to the motion, the 1st respondent filed a replying affidavit dated 26/6/2021 while the 2nd respondent filed a replying affidavit dated 25/06/2021. The two affidavits raise similar grounds in urging the court to dismiss the motion with costs to them. They contend that; (i) at the outset of the corona pandemic, the court set up mechanisms to carry out its operations, (ii) appellant's ignorance of filing an appeal in the wrong court should not be meted on the respondents, (iii) the appellant's advocates acted on the appellant's instructions and counsel's mistakes should be borne by the appellant, (iv) the appellant is guilty of inordinate delay, (v) there was no error in the email address used by the court in communicating with the appellant's advocates and, (vi) the appellant's affidavit in support is an afterthought.

Appellant's submissions

4. The appellant filed his written submissions dated 15/06/2021. In his submissions the appellant has placed reliance on **Article 159(2) (d)** of the **Constitution**, **Sections 3A and 79G** of the **Civil Procedure Act**, **Order 50 Rule 6** of the **Civil Procedure Rules** and **Section 16A** of the **Environment and Land Court Act** as the statutory provisions granting this court jurisdiction to grant the orders sought. He equally placed reliance on several judicial decisions including; **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Ano. (2018) eKLR**, **Philip Chemwolo & Ano. v Augustine Kubede (1982-88)**, **Richard Nchapi Leiyagu v IEBC & 2 others**. He urged the court to allow the motion

and prayed for the leave to file an appeal out of time to act as a stay of execution of the decree because he stands to suffer substantial loss if a stay of execution is not granted. The appellant framed one issue for determination; whether the honourable court should grant leave to the appellant to file an appeal out of time against the decision of the lower court.

1st and 2nd Respondent's submissions

5. Both the 1st respondent and 2nd respondents filed submissions dated 26/07/2021. The 1st respondent contended that the motion was filed over a year after the judgment had been delivered and that the delay was deliberate. He urged the court to dismiss the application for stay of execution because a decree had not been extracted. He argued that the motion was an afterthought, lacks merit and should be dismissed with costs.

6. The 2nd respondent contended that the delay in filing an appeal was deliberate and the reasons proffered for the delay did not hold water. He urged the court to dismiss the motion with costs. He framed one issue for determination; whether the court should grant leave to the appellant to file appeal out of time.

Analysis and determination

7. Having considered the motion, supporting affidavit and annexures, replying affidavits and rival submissions, the court considers that these are the issues falling for determination; (i) whether the appellant shall be granted leave to file an appeal out of time and, (ii) whether the memorandum of appeal dated 7/12/2020 and annexed to the appellant's motion shall be deemed as duly filed, (iii) whether the record of appeal dated 10/12/2020 shall be deemed as duly filed.

I will proceed to analyze the legal and jurisprudential framework on these issues.

8. Before I delve into the issues for determination, I wish to make an observation that though the appellant has veiled his submissions to depict that the motion is for leave to file an appeal out of time and for stay of execution pending the hearing and determination of the appeal, the prayers on the face of the motion demonstrates that prayer number 2 which sought stay of execution was spent at the interim stage. The only prayers pending for determination are prayers 3, 4 and 5 of the motion. Consequently, this court will refrain from considering any submissions by the parties on stay of execution pending the hearing and determination of the appeal.

9. The provisions of law that clothes this court with discretionary jurisdiction to grant leave to file an appeal out of time lies with **Sections 79G and 95 of the Civil Procedure Act** and **Section 16A of the Environment and Land Court Act** and in order for a party to succeed in such a motion, an appellant must satisfy the court that he has a good and sufficient cause for not filing the appeal in time.

10. The principles that guide courts in allowing or declining a motion seeking leave to file an appeal out of time was settled by the Supreme Court of Kenya in the case **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** where the court set out the principles as follows: -

“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; and*
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

11. Has the appellant met the principles outlined in the **Nicholas Kiptoo Arap Korir Salat case (ibid)**? Though the provisions of law do not set out the maximum or minimum period of delay, an applicant has to demonstrate that he has good and sufficient cause for the delay.

12. The main ground the appellant has proffered for the delay is that being dissatisfied and aggrieved by the lower court's decision dated 19/12/2019, he appealed in **Siaya HCCC Civil Appeal No.2 of 2020** however, the court by a ruling dated 27/01/2020 summarily struck out the appeal for want of jurisdiction. This decision was remitted by the court to the appellant on 4/12/2020. It is common knowledge that corona virus is a novel pandemic and it has affected the operations of various sectors in the country and institutions have had to grapple with innovative ways of carrying out its operations. This is a plausible explanation as to why the court took close to one year before communicating the outcome of its ruling to the appellant. The appellant has demonstrated that he was indeed keen to pursue an appeal, and his counsel filed an appeal in a timely manner albeit in a court without jurisdiction. It is the considered view of this court that the mistake of the advocates should not be meted on the appellant.

13. Though in the instant motion, the period for delay to file an appeal in the right forum is approximately 1 year and 5 months. It is the finding of this court that the period of time is not inordinate to warrant denial of the appellant the right to argue his case on appeal.

14. The court has had a chance to look at the memorandum of appeal annexed to the appellant's motion. It is the considered view of this court that the grounds set out therein establishes an arguable case with possibility of success and the appellant should not be denied access to the seat of justice.

15. The respondents have not demonstrated to this court prejudice if any, that they will suffer if the motion is granted.

16. It is the finding of this court that the appellant has met the criteria for the grant of leave to file an appeal out of time and the motion is merited.

17. Consequently, this court makes the following disposal orders;

a) The appellant is granted leave to appeal out of time in terms of prayer 3 of the motion dated 25/05/2021.

b) The draft memorandum of appeal dated 7/12/2020 be deemed as duly filed.

c) The record of appeal dated 10/12/2021 be deemed as duly filed.

d) Lower court file to be availed to this court within 30 days from today.

e) Case to be mentioned for directions on 24/11/2021

f) Costs to the respondents.

Ruling delivered in open and virtual court.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 1ST DAY OF NOVEMBER 2021

A. Y. KOROSS

JUDGE

In the Presence of:

Mr. Okumu h/b for Mr. Rodi for Appellant

James Okumu Kizito 1st respondent

James Juma Openjih 2nd respondent

Court assistant: Sarah Ooro

A. Y. KOROSS

JUDGE

1/11/2020