



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC 370 OF 2017**

**PETER NYOIKE GITHUKA (suing as the legal representative**

**Of the estate of the late NJUGUNA**

**CHEGE (DECEASED).....APPLICANT /PLAINTIFF**

**VERSUS**

**GITHINJI WAWERU .....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**LAND REGSITRAR MURANGA.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**HON ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT/DEFENDANT**

**RULING**

1. The application dated 18<sup>th</sup> December 2019 and filed 20<sup>th</sup> December 2019 seeks the following orders;
  - a. That the applicant be granted leave to file his notice of appeal out of time.
  - b. The costs of this application be provided for;
2. The application is premised on the following grounds;
  - a. That the applicant was caught out of time with the ongoing consultation within the family over the appeal.
  - b. That the appeal is arguable and has overwhelming chances of success.
  - c. That none of the respondents shall be prejudiced by the application.
  - d. That the delay was not inordinate as it was occasioned in procuring a copy of the said judgment and vigorous consultation within the family on taking up the appeal.
  - e. That in the interest of justice that the orders sought may be granted.
3. The Plaintiff applicant in his supporting affidavit sworn on the 18<sup>th</sup> of December 2019 deposes that after the delivery of the judgment on 28/11/2019 his counsel was only able to procure a copy of the judgment on the 11/12/2019. That by the time he was informed of the outcome of his case and proceeded to inform and consult with his family in order to make a collective decision on the appeal, the stipulated 14 days within which to file the notice of appeal had lapsed. The Applicant believes he has an arguable appeal as per the annexed memorandum of appeal. That there has not been unreasonable delay in bringing the appeal. That the Respondents shall not be prejudiced by a grant of the orders sought. He implored on the court to exercise its discretion in his favour in the interests of justice.
4. Annexed to the application is a draft notice of appeal and a draft memorandum of appeal which are yet to be filed.
5. The application is unopposed despite the Respondents being duly served as shown on the return of service on record.
6. The Supreme Court set out certain guiding principles, on the question of extension of time in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2015] eKLR**. The court set out the **principles that a Court should**

**consider in exercise of such discretion:**

- a. **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;
- b. a party who seeks...extension of time has the burden of laying a basis to the satisfaction of the Court;
- c. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
- d. [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;
- e. whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. whether the application has been brought without undue delay; and,
- g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

7. It is upon the Applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the Applicant with those of the Respondent. This was well stated in the case of **M/s Portreitz Maternity Vs James Karanga Kabia, CA No. 63 of 1997** where the Court stated:

“That the right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

8. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point. In the case of **Monica Male & Anor Vs R, CA No 246 of 2008**, the court stated:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

9. It should not be supposed that the discretion is entirely unfettered as Lord Romilly MR explained in **Haywood V Cope, (1858) 25 beav 140:**

“... the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So, the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so.”

10. It is trite that upon the delivery of judgment any party desiring to file an appeal must file a notice of appeal in the court in which the decision emanated from with a copy to the Court appealed to. The Judgement in this case was delivered on the 28/11/19 and going by the procedural rules, the notice of appeal ought to have been filed by the 14/12/19. The same was not filed.

11. The application for extension of time within which the Applicant could file the notice of appeal was filed on 20/12/2019 about 27 days from the date of the judgement on 28/11/2019. The reasons offered are that his counsel did not obtain a copy of the judgment until nearly two weeks after the delivery of the judgment. The reasons attributed for the delay in obtaining the judgement has neither been explained. From the record the judgement was delivered in the presence of the Applicant’s counsel. In any event one does not require a copy of the judgement to file a notice of appeal.

12. The second reason for the delay adduced by the Applicant is that he had to go and widely consult with the family on the appeal which consultation took time to conclude.

13. There is no cut and shut case in determining what delay is and in most cases the court looks at the circumstances of each case. In this case the delay in filing notice of appeal given the date this application was made is about 27 days meaning that the delay was about 13 days. This in my view cannot be said to be inordinate delay as to disentitle the Applicant the relied sought.

14. In respect to the prejudice likely to be suffered by the Respondent should the application be granted, it is to be noted that the Respondents did not file any opposition to the application despite being served.

15. I allow the application in the following terms;

- a. The time within which the applicant ought to have filed a Notice of Appeal is extended by Thirty (30) days from the date of this ruling.
- b. If the Applicant does not file the Notice of Appeal within the time stipulated in (a) above the window granted to file the Notice of Appeal shall automatically lapse.

16. I make no orders as to costs.

17. It is so ordered.

**DATED, DELIVERED AND SIGNED VIA EMAIL THIS 7<sup>TH</sup> DAY OF MAY 2020.**

**J G KEMEI**

**JUDGE**

**ORDERS**

In light of the declaration of measures restricting court operations due to the COVID - 19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 20th March 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice No. 3137, this ruling has been delivered to the parties by electronic mail/video conferencing. In this case the parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court

**J.G. KEMEI**

**JUDGE**