



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC MISC NO. E003 OF 2021**

**DANIEL MUTHURI.....APPLICANT/APPELLANT**

**VERSUS**

**NICHOLAS KARANI KITHINJI.....RESPONDENT**

**RULING**

1. Before me is an application dated 20/01/2021 brought under Sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act, Order 42 Rule 6 (1) & (2), Order 50 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010. The applicant is seeking leave to file an appeal out time against the judgment of the Hon. Susan Ndegwa, PM delivered on 14<sup>th</sup> September 2020 in Githongo PMCC No. 51 of 2017. The applicant also desires that the Notice of Appeal and memorandum of appeal annexed hereto be deemed as duly filed and served, and that costs be provided for.

2. In his supporting affidavit dated the applicant avers that judgment was delivered on 14<sup>th</sup> September 2020 without his knowledge and he immediately requested for a copy of the said judgment vide a letter dated 23<sup>rd</sup> September 2020. The said judgment has so far not been availed.

3. The applicant contends that he was aggrieved by the judgment and he instructed his advocates on record to lodge an appeal, hence the memorandum of appeal was filed on 15/10/2020. However, he was informed that the computers at the Court registry were slow highlighting complexities associated with online filing subsequently leading to time running out to file an appeal. He avers that the delay was not inordinate as to be inexcusable.

4. The respondent opposed the aforementioned application vide the replying affidavit dated 11<sup>th</sup> February 2021, averring that the applicant is a litigious and greedy person who has filed myriad of cases and applications since 1993. That the application herein lacks merit, is an abuse of the court process and an afterthought which is meant to deny him the enjoyment of the fruits of his judgment and hence should be dismissed.

5. The respondent further states that 4 months have gone by since the time of the delivery of the judgment on 4/09/2020, and there is no explanation for the delay neither has the applicant attached the copy of the judgment, decree or certificate of costs. The applicant has not demonstrated his readiness and willingness to deposit the decretal sum in joint interest earning account or that his intended appeal is an arguable one thus his application lacks merit.

6. The applicant did file a supplementary affidavit dated 17.02.2021 averring that the respondent fraudulently and/or colluded with his father in respect of the sale of the suit land which the applicant has developed. That vide a consent dated 30.4.2012, his father was to transfer 1 acre to him. Further there is no express and/or implied condition for the applicant to deposit decretal sum in a joint interest earning account.

7. I have considered all the arguments advanced by the parties herein. 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 against, 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:***

***Provided 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.”***

8. Section 95 there of provides that :-

***“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.”*

9. In the case of Lucy Njeri Njenga v Gakuo Kimu & 3 others [2017] eKLR, the court stated that;

***“It is clear therefore that whether or not to extend time to appeal is at the discretion of the Court to be exercised judicially. Each case must be considered on its merits. Most importantly, there must be “sufficient cause” to explain why the appeal was not filed in time”.***

10. It is not in dispute that judgment before the trial court was delivered on 14<sup>th</sup> September, 2020 and this application was filed on 21<sup>st</sup> January 2021. A letter dated 23.9.2020 and stamped on the same date at Githongo court has been availed by the applicant showing that the latter did request for a copy of the judgment. He also contends that when they tried to file the memorandum of appeal, the court systems were down. To this end, the appellant has provided the judiciary receipt for filing a memorandum of appeal dated 15/10/2020.

11. I find that indeed there was a delay in filing the appeal. However, this delay has been satisfactorily explained, particularly by annexure “DN-2”, the judiciary receipt. Thus the applicant has met the “*sufficient cause criteria*”. In the circumstances, the application is allowed. The costs of the application shall abide the outcome of the appeal. The memorandum of appeal is to be placed in a new appeal file and not this miscellaneous suit which is marked as closed.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 12<sup>TH</sup> DAY OF MAY, 2021 IN PRESENCE OF:**

C/A: Kananu

All parties absent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**