



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 11 OF 2018**

**ELIZABETH GATWIRI MBAYA.....1<sup>ST</sup> PLAINTIFF**

**SUSAN WAVINYA JULIUS.....2<sup>ND</sup> PLAINTIFF**

**PHOEBE NDUKU KIVUNGO.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**JANE SYOMBUA KYALO.....1<sup>ST</sup> DEFENDANT**

**JOHN MUTUKU KISUVI.....2<sup>ND</sup> DEFENDANT**

**MICHAEL KYALO KISUVI.....3<sup>RD</sup> DEFENDANT**

**STEPHEN MUSAU KISUVI.....4<sup>TH</sup> DEFENDANT**

**BERNARD MUTINDA KISUVI.....5<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR, MACHAKOS**

**DISTRICT LANDS REGISTRY.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide a Notice of Motion dated 14<sup>th</sup> August, 2020 that was brought pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, and Order 51 Rule 1 of the Civil Procedure Rules 2010, the Plaintiffs are seeking for the following orders:

***a) That this Honourable Court be pleased to extend the time for lodging and serving the Notice of Appeal by the Plaintiffs against the Judgment of the Court delivered on 24<sup>th</sup> April, 2020.***

***b) That costs of this Application be in the cause.***

2. The Application was supported by the Affidavit of the Plaintiffs' advocate who deponed that by a Judgment delivered on 24<sup>th</sup> April, 2020 during the then subsisting country-wide scaled down of the court's activities and operations due to the Covid-19 disease pandemic, the Plaintiffs' case was dismissed.

3. The Plaintiffs' advocate deponed that the Judgment was delivered without notice to him; that even if such notice was issued, his attendance to court would have been hindered by the then subsisting inter-county restrictions on movement and that the Judgment was equally not sent online by the court's registry via the email address provided for in line with the Chief Justice's practice directions geared towards mitigating the spread of Covid-19 dated 16<sup>th</sup> March, 2020.

4. The Plaintiffs' advocate deponed that on 6<sup>th</sup> December, 2019 when the matter was slated for Judgment, he personally inquired from the court's registry which informed him that the same would be delivered on notice and that upon further inquiry, the court file could not be traced from the court's registry as the matter was understandably pending Judgment.

5. Counsel deponed that upon resumption of court activities in June, 2020, he instructed a court clerk to enquire on the availability of the physical court file and whether the Judgment had been delivered; that his efforts did not bear fruits until 3<sup>rd</sup> August, 2020 when the court assistant retrieved the file from the archives whereupon a copy of the Judgment was sent to him on email and that upon perusal of the Judgment, he found out that the same had been delivered on 24<sup>th</sup> April, 2020 without notice to the Plaintiffs' advocates.

6. The Plaintiffs' advocate deponed that the said Judgment has far reaching adverse effects against the Plaintiffs' proprietary interests over the suit property as the Defendants are likely to commence eviction proceedings against the Plaintiffs; that he has been instructed by the Plaintiffs to prefer an Appeal to the Court of Appeal against the entire Judgment and that the Notice of Appeal could not be filed within the stipulated time.

7. According to the Plaintiffs' advocate, the instant Application is seeking leave and/or extension of time beyond the stipulated fourteen (14) days within which to file the Notice of Appeal which has since lapsed.

8. The Application was opposed by the Respondents vide their Grounds of Opposition dated 7<sup>th</sup> October, 2020. The Respondents argued that the Applicants had failed to demonstrate the arguability of their case by failing to attach a draft Memorandum of Appeal showing the grounds they intend to argue their Appeal.

9. The Defendants averred that the Applicants had failed to sufficiently demonstrate the reasons for the delay in filing their Appeal; that by virtue of filing this Application fourteen (14) days after discovering that Judgment had been entered constituted inordinate delay and that equity aids the vigilant and not the indolent.

10. The Defendants finally averred that there exists no tangible proof by evidence to show that the Applicants made any follow-ups with the registry on the whereabouts of the court file; that mere allegations should not suffice as adequate follow-ups and that the Application is an abuse of the court process, an afterthought and lacked in substance and therefore frivolous, unnecessary and should be dismissed with costs.

11. The Application was canvassed by way of written submissions. Counsel for the Applicants submitted that Section 7 of the Appellate Jurisdiction Act provided as follows:

*“The High Court may extend the time for giving notice of intention of appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired;*

*Provided that in the case of a sentence of death no execution of time shall be granted after the issue of the warrant for execution of that sentence.”*

12. Counsel submitted that the principles that guide a court in considering an Application for extension of time to file an Appeal out of time were laid out by the Court of Appeal in **Stanley Kahoro Mwangi & 2 Others vs. Kanyamwi Trading Company Limited (2015) eKLR**, where the court stated that:-

*“The Principles guiding the court on an Application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an Application are discretionary and unfettered. It is therefore upon an Applicant under this rule to explain to the satisfaction of the court that he is entitled to the discretion being exercised in his favour.”*

13. Counsel submitted that there exist unique circumstances in this case which undoubtedly proffers a plausible explanation and reasons for the delay on the part of the Plaintiff in filing a Notice of Appeal; that this matter was slated for Judgment on 6<sup>th</sup> December, 2019 when the same was not delivered and that they were advised that the same would be delivered on notice.

14. Counsel referred the court to the case of **Edward Njane Nganga & another vs. Damaris Wanjiku Kamau & Another [2016] eKLR**, where the court held as follows:

*“...I have considered the peculiar circumstances of this case. The Judgment appealed from was delivered in the absence of the Applicant/his counsel; there was no inordinate delay in bringing the Application; other than arguing that this court lacks jurisdiction to grant the orders sought, the Respondents have not demonstrated what prejudice if any they would suffer if the Application is allowed, inclined discretion vested in this court in favour of the Applicants as no substantial prejudice will be occasioned on the Respondent.”*

15. Counsel submitted that the instant Application was merited and that it was in the interest of justice and fairness that the same is allowed by court as prayed.

16. Counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that indeed the court has jurisdiction to entertain this Application pursuant to Section 7 of the Appellate Jurisdiction Act, Cap 9, Laws of Kenya and that the Plaintiffs have not met the criteria for extension of time as laid down by the Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, where the court held as follows:-

*“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as under-lying principles that a court should consider in exercise of that discretion of the court;*

- i) Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- v) Whether there would be any prejudice suffered by the Respondents if the extension is granted;
- vi) Whether the Application has been brought without undue delay; and
- vii) Whether in certain cases like election petitions, public interest should be a consideration for extending time.”

17. Counsel submitted that the Plaintiffs have failed to meet any of the abovementioned criteria and have only explained, though unsatisfactorily, the period before they became aware of the Judgment and that the whole period of delay must be satisfactorily explained for an order of extension of time to be granted. Counsel relied on the case of **County Executive of Kisumu vs. County Government of Kisumu & 8 Others [2017] eKLR**, where the Supreme Court stated as follows:

*“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court had settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all parties herein have relied upon.”*

18. Counsel submitted that the court cannot exercise its discretion for extension of time in the circumstances since there is no material placed before it to unlock its flow of discretionary favour.

19. This suit was commenced by way of a Plaint dated 4<sup>th</sup> December, 2017. The main suit was heard and the court entered Judgment on 24<sup>th</sup> April, 2020 dismissing the Plaintiffs’ suit. On the day the Judgment was delivered in Chambers, and in the absence of the parties, the court noted as follows:

*“The Judgment is delivered in the absence of the parties due to Covid-19. Judgment to be dispatched electronically.”*

20. I have perused the record and have not come across the communication that the registry made in respect to the Judgment to the Plaintiffs’ advocate. Indeed, considering that the Judgment of this court was delivered in the absence of the parties due to the prevailing Covid-19 pandemic, and the court having directed that the said Judgment will be dispatched to the parties electronically, it was the duty of the court registry to inform the parties about the delivery of the Judgment.

21. Considering that the failure to attend court on the day of the Judgment was not of the Plaintiffs’ making, and in view of the fact that the Plaintiffs’ advocate was not informed about the delivered Judgment by the court registry, it is my finding that the Plaintiffs have given a satisfactory explanation as to why they did not file a Notice of Appeal within the requisite period of fourteen (14) days.

22. In the circumstances, I allow the Plaintiffs’ Application dated 14<sup>th</sup> August, 2020 as follows:

**a) The time for lodging and serving the Notice of Appeal by the Plaintiffs against the Judgment of the court delivered on 24<sup>th</sup> April, 2020 be and is hereby extended for fourteen (14) days.**

**b) Each party to bear his own costs.**

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 7<sup>TH</sup> DAY OF MAY, 2021.**

**O. A. ANGOTE**

**JUDGE**