



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL CASE NO. E10 OF 2020

GEORGE ORARO.....1ST APPELLANT

CHRISTINE ORARO.....2ND APPELLANT

VERSUS

JUMA OYIENDE JABEL.....RESPONDENT

RULING

George Oraro and Christine Oraro (**hereinafter referred to as appellants**) have come to this court on appeal against the ruling of the SPM (the Honourable Mr. Nyaberi) delivered on the 24/4/2020 in Winam P.M. C.E No. 75 of 2018 – George Oraro and Christine Oraro vs Juma Oyienda Jabel. Accompanying the appeal is a notice of Motion dated 30/10/2020 seeking orders that the appellants be granted leave to appeal out of time against the whole Ruling and Orders of Hon. Mr. H. M. Nyaberi, Senior Principal Magistrate, delivered on the 24th day of April, 2020 at Winam;

The Memorandum of Appeal dated 13th July, 2020 and filed on the 27th day of October, 2020 be and is hereby deemed filed and served upon the respondent within the time so enlarged by the granting of the orders of this court; Costs of this application be provided for. The application is based on grounds that the Ruling and Order against which leave to appeal is being sought was delivered by Hon. Mr. H. N. Nyaberi on the 24th April, 2020 during the time when court operations had been significantly scaled down in a bid to stem the spread and transmission of Covid-19 pandemic;

As a result of the scale down mentioned above, all judicial and administrative activities were greatly impacted which rendered it impossible to file the appeal within the duration prescribed under Section 79G of the Civil Procedure Act, Chapter 21 Laws of Kenya. There was thereafter inadvertent delay and confusion in receiving the lodged memorandum of appeal the consequences of which ought not to be visited upon the appellants. The respondent will not suffer any prejudice should this application be allowed.

In the replying affidavit, the respondent through Counsel states the Principal Magistrates court at Winam delivered a ruling in Winam P.M. C.E &L. C. NO. 75 of 2018 George Orarao & Christine Oraro, vs. Juma Oyiende Jabel on the 24th April, 2020 whereby it allowed the respondent's application dated 23rd September 2020.

That during the delivery of the ruling, Ms. Munuango Advocate held brief for Mr. Mwesigwa, the advocate for the Appellants herein. That the Appellants being dissatisfied with the ruling of the court did not request for the typed proceedings and certified copies of the ruling to enable them lodge the appeal to this Honourable Court. That the Memorandum of Appeal by the Appellants is dated the 13th July, 2020 and filed in court on 27th October, 2020, almost six (6) months after the delivery of the ruling.

That the Appellants have not shown any attempt to lodge the Memorandum of Appeal before the lapse of the required 30 days but was prevented from doing so by the closure of the court registry or the covid-19 situation.

That scaling down operations by the Honourable Chief Justice on the 16th March, 2020 did not constitute a complete closure of court's operations as alleged by the Appellants. That the entire operations of the court were not stopped by the press statement made by the Chief Justice.

That the practice Directions gazette by the Honourable Chief Justice in the same month encouraged courts to continue dealing with cases remotely. That court registries remained opened allowing filing of urgent pleadings including Memorandum of Appeals with statutory time lines.

That the courts operations fully resumed on the 15th June, 2020 and the Appellants filed the Memorandum of Appeal on the 27th October, 2020 which is five (5) months after and the only explanation given by the Appellants was that it was impossible for them to file the appeal.

That the delay of 5 months after courts resumed operations in June is inordinate and inexcusable. That the explanation given by the Appellants for the delay in filing the Memorandum of appeal and this application for leave is not sufficient reason for this court to exercise discretion to grant the leave sought. That the reason for failure to file a Memorandum of Appeal was negligent on the part of the Appellants.

I have considered the application and rival submissions and do find that the ruling was delivered on 24/4/2020 in the presence of both counsel for the applicant and the Respondent. The applicants have not disputed the fact that they did not apply for the proceedings of the case in the lower court for purposes of appeal. The courts operations fully resumed on the 15th of June 2020 and yet the appellants filed their memorandum of appeal that is dated 1st of July 2020, on the 27th of October 2020 and lodged the application herein dated 30th November, 2020, on 5th November 2020.

To begin with, it was highly irregular for the applicants to file an appeal out of time before leave was granted. This was the import of the decision of the court of appeal in **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR where the court observed as follows**

“We buttress this Court’s position in *Nicholas Salat* when this Court stated thus:

“...In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that *Petition No. 10 of 2014* has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the least (sic) he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. *Petition No. 10 of 2014* having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.”

The supreme court of Kenya has set out the conditions for extension of time in **the Nick Salat Case** as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;**
- 5. whether there will be any prejudice suffered by the respondents, if 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”**

In this case the applicant has explained the delay from march 2020 to the 15th of June 2020 thus the scaling down of the courts activities due to the corvid -19 pandemic but has not explained the delay from 15th June 2020 to the 5th of November 2020 when the courts activities resumed and documents were being filed and served electronically and communication was via mobile phones and matters were being conducted through virtual hearings. I do find that the reasons given for delay are not satisfactory hence no special circumstances to grant an extension of time. The application is dismissed with costs.

DATED AT KISUMU THIS 5th DAY OF MAY, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE