



**REPUBLIC OF KENYA**

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

**ELC. MISC. APPLN. NO. 1 OF 2020**

**VOKEN MUTUNGA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JUVENALIS MUSYOKI KAVITA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**STEPHEN MUNYAO MUTUA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 13<sup>th</sup> January, 2020 filed under a Certificate of Urgency, the Plaintiff/Applicant seeks the following orders:

**a. Spent.**

**b. That this Honourable Court be pleased to order a stay of all proceedings before the trial Magistrate Hon. D. Orimba, SPM in Kangundo PMCC ELC No. 59 of 2019 pending the hearing and final determination of this Application.**

**c. That this Honourable Court be pleased to extend time and grant leave to the Applicant to lodge an Appeal against the Ruling of Hon. D. Orimba, SPM in Kangundo PMCC ELC No. 59 of 2019 and the Memorandum of Appeal annexed hereto granted to be deemed as duly filed with leave of the court.**

**d. That upon granting the prayers above, this Honourable Court be pleased to order a stay of all proceedings before the trial Magistrate Hon. D. Orimba, SPM in Kangundo PMCC ELC No. 59 of 2019 pending the hearing and determination of the Appeal subject to this Application.**

**e. That costs of this Application abide the outcome of the Appeal.**

2. The Application was supported by the Affidavit of the Applicant herein. The Application was opposed by the Respondents' advocate vide her Replying Affidavit sworn on 9<sup>th</sup> March, 2020. The Application is premised on the grounds, *inter alia*, that on 20<sup>th</sup> November, 2019, the trial Magistrate overruled the Applicant's advocate's objection to the production of secondary documentary evidence by the Respondents that had not met the standards and requirements set out in the Evidence Act.

3. According to the Applicant, the trial court further allowed, *suo moto*, an Application dated 18<sup>th</sup> October, 2020 filed by the Respondents seeking leave to introduce fresh documentary evidence without according the Applicant or his advocate an opportunity to be heard or respond to the Application and that despite leave to Appeal being granted to lodge an Appeal, a hearing for the Defence case was fixed for 22<sup>nd</sup> January, 2020.

4. The Applicant deponed that by allowing the Application dated 18<sup>th</sup> October, 2020 without giving him or his advocate an opportunity to respond to it is irregular and amounts to miscarriage of justice and that unless the order staying all proceedings of the trial court is granted, he will suffer prejudice and irreparable loss.

5. In response to the Application, the Respondents' advocate deponed that the Application is an afterthought and frivolous; that there has been inordinate delay which has not been explained in filing the Application and that the Respondents' Application dated 18<sup>th</sup> October, 2019 was unopposed hence the court proceeded to allow the application and fixed a hearing date.

6. The Respondents' counsel deponed that the Applicant would have an opportunity to scrutinize and raise objection over the documents at the hearing and that the Applicant's Application is an abuse of the court process since the Applicant can ask the trial court to set aside its Ruling.

7. The Respondents' advocate deponed that the list of documents that were sought to be introduced by the Respondents were filed on 7<sup>th</sup> January, 2020 after the lapse of 30 days leave to Appeal granted to the Applicant on 20<sup>th</sup> November, 2019 and that the documents have not been admitted as exhibits hence the Applicant will have an opportunity to examine, cross-examine and raise objections during trial.

#### **Submissions:**

8. The Applicant submitted that based on the case of **Mwangi vs. Kenya Airways Ltd (2003) KLR**, the delay to file the Appeal is not inordinate since his advocate closed office for Christmas and new year break before he could instruct them; that the Appeal is arguable since the trial court ignored his advocate's objection and allowed the Respondents' Application aforesaid *suo moto* and that no prejudice will be suffered by the Respondents.

9. The Respondents submitted that no sufficient evidence has been adduced by the Applicant why he did not file the Appeal on time.

#### **Determination:**

10. I have considered the Application, the rival Affidavits and submissions. The issues that fall for determination are *whether there is good and sufficient cause to warrant granting the Applicant leave to file an Appeal out of time and stay the trial court proceedings pending the hearing and determination of the Appeal.*

11. Section 79 G of the Civil Procedure Act provides that:-

*“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 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.”*

12. The Applicant has averred in his Further Affidavit that his advocates closed offices for Christmas and New Year break before he could instruct them to file the appeal within the set timelines.

13. In respect to extension of time to file an Appeal out of time, in the words of the Court of Appeal in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application NBI 251 of 1997** it was stated:

*“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which the Court takes into account in deciding whether to grant an extension of time are first, the length of the delay, secondly, the reason for the delay, thirdly, possibly, the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted.” See **Mwangi vs Kenya Airways Ltd [2003] KLR, First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65.**”*

14. The learned judges of the Supreme court in **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** held that:

*“... It is clear that the discretion to extend time is indeed unfettered..”*

15. It follows from the above decisions that the court can allow an Appeal to be filed out of time if a party shows sufficient cause despite the 30 days limit to file Appeals. Indeed, the court in **Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] eKLR** held that:

*“In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159.”*

16. The use of the word 'may' connotes the discretionary power of the court. What is 'good and sufficient cause' was discussed in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** as follows:

*“...though the provision for extension of time requiring 'sufficient reason' should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the Appellant.”*

17. The Supreme Court of India in **Civil Appeal 1467 of 2011 Parimal vs. Veena Bharti (2011)** observed that:

*“Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently ...”*

18. Again under the provisions of Order 50, Rule 6 of the 2010 Rules, the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired.

19. In *First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others* (*supra*) the court stated that whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant is a factor for the court to consider when faced with such Applications. However, it is imperative to note that the court in *Fakir Mohammed vs. Joseph Mugambi & 2 Others [2005] eKLR* held that the principles are not exhaustive.

20. The current Application was filed on 21<sup>st</sup> January, 2020. The Ruling that the Appellant is seeking to Appeal against was made on 20<sup>th</sup> November, 2019. The Applicant should have filed his Memorandum of Appeal by 19<sup>th</sup> December, 2019. The Applicant's counsel or the Applicant has not informed the court why the Memorandum of Appeal was not filed within 30 days after the delivery of the said Ruling.

21. The Applicant's advocate having closed offices for the Christmas vacation after the delivery of the said Ruling cannot be a sufficient reason for the delay in filing the Appeal. Indeed, if the Appeal was to be filed on or before 19<sup>th</sup> December, 2019, I do not see why the Memorandum of Appeal could not have been filed before the advocate closed his offices for Christmas holidays, which holidays usually commences around 24<sup>th</sup> December of every month.

22. In any event, the admission of the impugned documents in evidence is a matter which can be canvassed during the hearing in the trial court and on Appeal once the Judgment has been delivered. The Applicant will not suffer any prejudice that cannot be rectified by this court, or the Court of Appeal, after trial, considering that the issue of the admissibility of documents he objected to will form part of the main Appeal, if at all an appeal will be filed.

23. For those reasons, I find the Applicant's Application to be unmeritorious. The Application dated 13<sup>th</sup> January, 2020 is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 25<sup>TH</sup> DAY OF JUNE, 2021.**

**O. A. ANGOTE**

**JUDGE**