



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC MISC. NO. E004 OF 2020

JAMES NGATIA WACHIRA1ST APPLICANT

ELIJAH MACHARIA WACHIRA2ND APPLICANT

VERSUS

TITUS MURAGURI WAROTHE 1ST RESPONDENT

LUCY WANJIRU CHEGE.....2ND RESPONDENT

RULING

1. By a notice of motion dated 26th November, 2020 expressed to be based upon **Article 159 of the Constitution of Kenya, 2010, Sections 3A, 75, 79G and 95 of the Civil Procedure Act (Cap. 21), Order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the law**, the Applicants sought leave to file an appeal out of time against the judgment and decree of the trial court in *Nyeri CMCC No. 206 of 2018* dated 9th April, 2020.

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Applicant, James Ngatia Wachira, on 26th November, 2020 and the exhibits thereto. The Applicants contended that they were unaware of the delivery of judgment on 9th April, 2020 due to restrictions on movement imposed at the material time due to Covid-19 pandemic. They contended that they only became aware of the judgment in October, 2020 whereupon they took steps to file the instant application in November, 2020. It was their contention that the failure to lodge an appeal on time was occasioned by circumstances beyond their control. They consequently asked the court to grant the application.

3. There is no indication on record to show that Respondents ever filed a response to the application despite service. There is on record an affidavit of service sworn by a process server on 22nd March, 2021 indicating that the Respondents were duly served with the application on 22nd March, 2021.

4. The court has considered the Applicants' notice of motion dated 26th November, 2020 together with the supporting affidavit. The court notes that there is no opposition to the application. The court is aware that the power of the court to grant or decline the application is discretionary. However, such discretion ought to be exercised judiciously. In the case of **Thuita Mwangi v Kenya Airways Limited [2018] eKLR** it was held, *inter alia*, that:

It is well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first; the length of the delay; secondly; the reason for delay; and thirdly; (possibly) the chances of the appeal succeeding if the application is granted."

5. The court has considered the period of delay and the explanation advanced for the delay to file an appeal on time. The court is of the opinion that the explanation rendered is not unreasonable even though the Applicants could, perhaps, have been more diligent. The court accepts that the prevailing Covid-19 situation could have prevented the Applicants from knowing the date of delivery of the judgment. Accordingly, the court is inclined to grant the application for leave on terms.

6. The upshot of the foregoing is that the court finds merit in the Applicants' application. Consequently, the notice of motion dated 26th November, 2020 is hereby allowed in the following terms:

(a) *Leave be and is hereby granted to the Applicants to lodge an appeal out of time against the judgment and decree of the trial*

court in Nyeri CMCC No. 206 of 2018.

(b) The Applicants shall file and serve their memorandum of Appeal within 14 days from the date hereof in default of which the leave shall lapse.

(c) There shall be no order as to costs on the application.

Orders accordingly.

Ruling dated and signed in chambers at Nyeri and delivered via Microsoft Teams platform this 16th day of June 2021.

In the presence of:

Ms Nanjala holding brief for Mr. Ombongi for the Applicants

No appearance for the Respondents

Court assistant - Wario

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Y. M. ANGIMA

ELC JUDGE