



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

MISC NO 77 OF 2020

SWALEH HASSAN & ALI ATHMAN.....APPLICANTS

VERSUS

JOSEPHINE MURUNGI.....RESPONDENT

RULING

1. For determination is the applicants' Notice of Motion dated 19th October 2020, as well as the respondent's Notice of Preliminary Objection dated 18th November 2020.

2. The applicants' Notice of Motion is brought under Section 1A, 1B, 3, 3A, 79G, and 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules and seeks the following orders:-

a) Spent

b) Spent

c) THAT this Honorable Court be pleased to enlarge time and grant the Applicant leave to file an appeal out of time against the Judgment delivered on 19th June 2020 in respect of Mombasa CMCC CIVIL SUIT NO. 2090 OF 2000.

d) THAT the Memorandum of Appeal dated 29th September 2020 marked as annexure "SH-1" herein be deemed as properly on record and or as filed within time.

e) THAT the costs of this application and appeal be borne by the respondent

f) THAT this Honourable Court be pleased to issue any other or further orders as it may deem fit and just to grant.

3. The application is supported by the affidavit of Swaleh Hassan and is based on the grounds that, Honorable Makori delivered a judgment on 19th June 2020, which dismissed the suit herein for lack of jurisdiction. That the court directed a copy of the judgment to be availed to the parties, but later that afternoon, the court was closed down due to covid-19 infections, and when the court resumed the applicants were not able to trace the file, until 25th September 2020 when they were supplied with the handwritten copy of judgment. The applicants aver that the delay of filing the appeal was caused by events outside their control, and pray court to grant them leave to appeal out of time.

4. The supporting affidavit reiterates the grounds in the application and adds that, after court resumed from a 14 day closure due to covid-19 infections, the applicants could not trace the court file, until 25th September 2020 when the handwritten judgment was availed. That the applicants are dissatisfied with the decision of the trial court, that it had no jurisdiction, yet the applicants believe that the issue before court was that of trespass which the trial court has jurisdiction over. Mr. Swaleh pleads with court to invoke its overriding objectives and allow the filing of the appeal through the Memorandum of appeal marked as "SH-1".

5. The respondent objected to the application through a Notice of Preliminary Objection dated 18th November 2020 and prayed to court to strike out the application with costs on the grounds that there is no provision in law for the filing of a miscellaneous civil application, making this application irregular that ought to be struck out since the court has no jurisdiction to hear it. That the applicants are seeking serious orders from court, but have approached court in a casual manner and for this reason the application should be dismissed with costs.

6. The respondent also filed a replying affidavit by Gikandi Ngibuini, the advocate on record for the respondent. He claims that the application fails to address the question of delay, from the time the judgment was entered on 19th June 2020 in Chief Magistrate Civil Suit

2090 of 2000, until filing of the application. Mr. Gikandi states that the applicants should have filed the memorandum of appeal, then approached court for leave to have it deemed as filed, but till date no memorandum has been filed. He also states that there is no provision in law for filing a miscellaneous civil application to enlarge time, making this application irregular and ought to be struck out. He concludes that the allegations that the trial court file was misplaced has not been supported by any evidence.

7. On 23rd November 2020 when the application came for interparties hearing, the court directed that the application dated 19th October 2020 and the notice of preliminary objection dated 18th November 2020 be heard together by way of written submissions.

8. The applicants submits that the delay in filing the appeal can be attributed to the unprecedented times and relied on **Kenya Power & Lighting Company Ltd V Rose Anyango & Anor (2020)EKL**R, where the court took judicial notice that between 16th March 2020 to the date of filing that application, there was downscaling of court services owing to covid-19 pandemic. The applicants further submits that from the reading of the annexed Memorandum of Appeal, the intended appeal has chances of success and that it raises serious grounds that merit the consideration of this Honourable Court. On the respondent's preliminary objection, the applicants' states that they are properly before the court vide a miscellaneous application and not precluded by any express statutory provision.

9. The respondent submits that the four months delay, between the judgment date and filing of this application has not been sufficiently explained nor have they provided evidence to explain. That the applicants have not justified their use of miscellaneous application to approach court to seek enlargement of time and this should be struck out. The respondent relied on the Supreme court decision in **Nicholas Kiptoo Arap Salat V IEBC and 6 others (2013) EKL**R to outline the principles that a court should consider when exercising its discretion under Section 79G of the Civil Procedure Act on extension of time.

10. I have considered the pleadings, submissions filed herein as well as the authorities relied upon. The issue for determination is whether court should enlarge time to allow the applicants to file their memorandum of appeal out of time.

11. The applicants plead that they could not trace the court file for three months after the judgment was delivered, and consequently are seeking leave to file an appeal out of time. The respondent on the other hand objects to the prayers sought by the applicants; firstly for the use of miscellaneous application to seek extension of time and secondly for the unexplained delay in filing this application.

12. The lower court delivered its judgment on 19th June 2020. The applicants ought to have filed the appeal within 30 days, which ended on 19th July 2020. The applicants have a two months delay, putting them outside the mundane of Section 79G of the Civil Procedure Act which provides that:-

“An appeal from the 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.”

13. The applicants claim that the delay in filing the appeal in time was occasioned by the closure of court due to covid-19 pandemic and the delay in tracing the court file after the court was re-opened. The applicants plead with court to apply Section 95 of the Civil Procedure Act and enlarge time for filing the appeal.

14. The respondent in her Notice of Preliminary Objection states that there is no provision in law for filing a miscellaneous civil application for the purpose of enlarging time. Indeed the applicants have not cited the Order under which the application has been brought under. However this mishap does not go to the root of the issue for determination. Section 1A and 1B of the Civil Procedure Act provides for the court's duty to apply the Overriding Objective in ensuring that there is just determination of the proceedings.

15. The respondent's replying affidavit avers that the Applicants would have filed the Memorandum of Appeal first and then have it deemed as though it was filed in time. From my reading of Section 79G of the Civil Procedure Act together with Section 95 of the same Act, the Court has the discretion to enlarge the time fixed for filing an Appeal from the lower court to the High Court, if the intended appellant has satisfied court that he had a good and sufficient cause for not filing the appeal in good time. Once the time for filing has been enlarged by court under Section 95 of the Civil Procedure Code, then the applicant can file the Memorandum of Appeal within the time stipulated by Court.

16. The applicants' delay of two months from the day the 30 days expired to the filing of this application in my view is not inordinate and is excused by this court, taking into consideration the social context of covid-19 disruption and the measures that were taken by the Judiciary of closing down the court. Even when the court resumed, the number of staff working at the registry was reduced and that may have caused a delay in tracing the applicants' court file. Further to that, I have perused the draft Memorandum of Appeal annexed to the supporting affidavit. I find it raises serious question of jurisdiction that ought to be heard and determined before this Honourable court.

17. The upshot of this Ruling is that I find the Notice of Motion dated 19th October 2020 has merit and allow it, and the Notice of Preliminary Objection dated 18th November 2020 is overruled. I therefore make the following orders:-

a) Leave is granted to the applicants to file an appeal against the Decree and Judgment of Honorable E. Makori at Chief Magistrate Court in Mombasa delivered on 19th June 2020 in CC No. 2090 of 2020.

b) That the Memorandum of Appeal shall be filed within seven (7) days from the date of this ruling.

c) The costs of the application shall be in the cause.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 2ND DAY OF JUNE, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE