



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC APPEAL NO.15 OF 2015

STEPHEN WAKHU.....1ST APPELLANT

JOHN MUYOBI ONDWASI.....2ND APPELLANT

ABRAHAM ONDWASI.....3RD APPELLANT

VERSUS

GEORGE ALFRED CHITUYL.....RESPONDENT

RULING

1. The Respondent/Applicant brought an application under Order 42 Rule 6 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act and all other enabling of the law seeking for the following orders;

a. Spent

b. Spent

c. That the Honourable Court be pleased to grant the applicant leave to appeal out of time against the ruling of the Honourable Judge A.K. Kaniaru delivered on the 25th of July 2019.

d. Spent.

e. That this Honourable Court be pleased to stay the execution of the judgment delivered on 25th July 2019 in its entirety pending the hearing and determination of the intended appeal.

f. That this Honourable Court be pleased to allow the firm of Ndalila & Company Advocates to come on record on behalf of the Applicant.

g. That the Memorandum of Appeal and Notice of Change of Advocates annexed hereto be deemed as duly filed.

h. That the costs to and incidental to this application be provided for.

2. The application was based on the following grounds inter alia;

i. That the applicant learnt recently upon perusal of the court's file that judgment had been delivered against him on the 25th July 2019 as he was not aware that the same had already been delivered.

ii. That the applicant in expressing his dissatisfaction towards the judgment intends to appeal even though at the time he became aware of the said judgment the window for seeking an appeal already closed down.

iii. That it's a result of the foregoing that he has proceeded to file this application to seek orders for enlargement of time to file an appeal out of time and for stay of execution pending the hearing and determination of the application and the appeal itself.

iv. That the applicant stands to suffer both substantial and irreparable harm if orders of stay of execution and enlargement of time are

not issued urgently.

v. That the applicant has an arguable and meritorious appeal which has a high chance of success.

3. The Appellants/Respondents filed their Replying Affidavit to the application which was sworn by the 2nd Appellant. He deposed that the Honourable Court lacks jurisdiction to grant the principal orders sought and therefore the consequential orders sought thereon. He stated that the none of the provisions of the law cited in the application or any provision of law bestows upon this Honourable Court the necessary jurisdiction to grant the orders sought. The application is an afterthought and is meant to vex. He further deposed that the Applicant deliberately withheld crucial documents from court, documents that can enable the Honourable court make a determination on crucial facts that emanate from the application. No evidence has been placed before court to show that the applicant made an effort to contact his former advocate on record. He stated that in matters of extension of time, a person seeking extension must give an account of every period of inaction which the Applicant has not done. He stated that the applicant is destitute of merit and should be dismissed with costs.

4. On 18th March 2021, the court directed the Applicant to address it via case law on whether the court has jurisdiction to extend time. The Applicant filed their submissions on 10th June 2021 which the court has looked at and considered. He submitted that the court has jurisdiction to hear and determine that application herein and issue the orders forthwith. He stated that the Applicant was unable to file the Notice of Appeal or Appeal within time as he has been unwell having been diagnosed with dementia. It is his contention that this court has jurisdiction to handle the matter especially since it is the very court that previously handled the matter. He cited the case of **Edward Njane Nganga & another v Damaris Wanjiku Kamau & another (2016) eKLR** which quoted Section 7 of the Appellate Jurisdiction Act CAP 9 which gives the High Court powers to extend time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal. He further submitted that this section of the law does not need any more than a literal interpretation that jurisdiction is clearly conferred to the High Court to extend time for filing of an application seeking leave for time to appeal. He further cited the decisions in **Michael Joseph & another v Kenya Aviation Workers Union (2019) eKLR**

5. The Appellants/Respondents did not file submissions by the time the matter was coming up for ruling. Jurisdiction is everything to a court and when a court finds that it lacks jurisdiction it must down its tools. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held that a court should put its pen down on discovery of lack of jurisdiction.

6. The Applicant has placed reliance on Section 7 of the Appellate Jurisdiction Act which states **that the High Court may extend the time for giving notice of intention to 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.** The court in **Loise Chemutai Ngurule & another v Winfred Leshwari Kimung'en & 2 others (2015) eKLR** ruled that the High Court does have jurisdiction to extend time to lodge Notice of Appeal out of time.

7. Initially, this court took the position that it lacks powers to extend time for lodging an appeal. However, I have re-looked the provisions of section 7 of CAP 9 in light of the decision of Githinji JA in the case of **Michael Joseph & another supra** where the learned judge stated that the High Court indeed has jurisdiction to extend time under section 7 of the Appellate Jurisdiction Act. Like the wise man, I am now persuaded that this court does have jurisdiction to hear the application before it.

8. Even though the court does have the power to extend time to file an appeal out of time, the same is discretionary. I have looked at the ruling that was delivered on 25th July 2019, most of the parties were not present when the ruling was delivered but the Respondent/Applicant's counsel was present. The applicant has stated in his supporting affidavit that during the course of the suit he had been out of the country up until 5th October 2019 and he tried to contact his advocate for updates on the suit progression but he was not forthcoming. He was later on diagnosed with dementia as per the letter dated 24th November 2019 which has been annexed as 'GAC 2'. He only became aware of the ruling on 5th December 2020 upon completion of the sedation drugs and having recuperated. He has also further outlined the reasons why the extension of time to appeal should be granted in paragraph 15 of the supporting affidavit.

9. I am satisfied that the Applicant's reason for delay in filing a Notice of Appeal are reasonable. The consequence of the finding is that the application in the following term;

i. That the Honourable Court be does grant the applicant leave to appeal out of time against the ruling of the Honourable Judge A.K. Kaniaru delivered on the 25th of July 2019 within a period of Seven (7) days.

ii. That this Court does issue an order for maintenance of the statusquo existing when the impugned ruling was delivered on 25th July 2019 pending the hearing and determination of the intended appeal.

iii. That the Memorandum of Appeal and Notice of Appeal annexed are deemed as duly filed upon filing of the requisite Court fees.

iv. That the costs to and incidental to this application awarded to the Respondent. (in the application).

DATED, SIGNED & DELIVERED AT BUSIA THIS 29TH DAY OF JULY, 2021

A. OMOLLO

J U D G E