



**REPUBLIC OF KENYA**

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

**ELC MISC APPLICATION E002 OF 2021**

**AVIANO KIUNGA.....PLAINTIFF**

**VERSUS**

**GODFREY MWITI KIUNGA.....DEFENDANT**

**RULING**

1. Aviano Kiunga hereinafter the applicant through an originating summons brought under Sections 27 and 28 of Limitation of Actions Act dated 14<sup>th</sup> January 2021 seeks leave to file an appeal out of time.
2. The applicant in the supporting affidavit states a judgment in Githongo ELC case no. 8 of 2019 in which he was the plaintiff was passed on 28<sup>th</sup> February 2020 but because of Covid 19 he only obtained certified copies and judgment on 30.11.2020. He blames Covid 2019 and subsequent closure of court for the delay.
3. The application is premised on section 27 and 28 of the Limitation of Actions Act Cap 22 Laws of Kenya. This Act principally deals with limitation for actions. The suit on which the intended appeal is based on was heard and determined by the trial court.
4. In my view the applicant herein does not intend to institute a suit whose cause of action has been caught by time limitation so as to seek leave of the court to institute it out of time. The application on that scope fails for the want of procedure. Leave to appeal out of time and leave to file a suit out of time are completely different and each requires an applicant to approach the court for leave through totally different processes.
5. Further the suit herein is neither founded on tort, nuisance, negligence nor breach of duty as per Sections 27 and 28 thereof.
6. The law regarding leave to appeal out of time is to be found in section 79 a of the Civil Procedure Act. The applicant ordinarily would file a notice of motion and not an originating summons.
7. The applicant herein has come through the wrong procedure but nevertheless in the interest of substantive justice this court will exercise its discretion and consider the merits of the application.
8. Under the section 79 a of the Civil Procedure Act the applicant has to:-
  - (i) Show the intended appeal raised arguable points
  - (ii) The application was brought without undue delay.
  - (iii) There will be no prejudice to the respondent.
  - (iv) There is good and sufficient cause for not filing the appeal within time.
9. In **Nicholas Kiptoo Korir Arap Salat vs IEBC & 7 others (2014) eKLR** the Supreme Court of Kenya laid the principles as thus:

***“The underlying principles a court should consider in exercise of such discretion include:-***

***(a) Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.***

*(b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.*

*(c) Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis.*

*(d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.*

*(e) Whether there will be any prejudice suffered by the respondent if the extension is granted.*

*(f) Whether the application has been brought without undue delay”.*

10. In the instant suit the judgment was read on 28.2.2020, in the absence of the applicant and his counsel though they were aware of the delivery date. The absence has not been explained and or denied. Second the applicant relies on Covid 19 pandemic.

11. It is common knowledge that practice directives on Covid pandemic were gazetted by the Chief Justice vide gazette notice 3137 dated 20.3.2020. This was long after 28.2.2020. Further the pandemic was declared so by the World Health Organization on 15<sup>th</sup> March 2020.

12. Time to file an appeal would have expired on 28.3.2020. There is no explanation why the applicant was unable to act between 28.2.2020 and 19.3.2020 a period of over 21 days.

13. Third the applicant only applied for the judgment and proceedings on 15.6.2020 yet courts were operating both physically and virtually. At the very least one would have expected an attempt to be made to reach the court virtually.

14. Fourth the attached judgment is certified on 30.8.2020. There is no attachment for certificate of delay to show if indeed there was delay on the part of the court registry and if so for how long.

15. The application herein was filed on 20.1.2021. By any stretch of imagination the delay is not for two months as alleged but of over nine months which has not been explained to the satisfaction of this court.

16. Even assuming the proceedings and judgment were collected on October 30<sup>th</sup>, 2020, the applicant has not explained why it took him another month to mount the instant application. There is no draft intended memorandum of appeal attached to enable the court gauge the veracity of the intended appeal.

17. In the circumstances the court has reached the inevitable conclusion that the originating summons dated 10<sup>th</sup> January 2021 fails in both form and substance. The same is hereby dismissed with no orders as to costs. The file is marked as closed.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2021 IN PRESENCE OF:**

C/A: Kananu

No appearance

**HON. C.K. NZILI**

**ELC JUDGE**