



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 8 OF 2021

LEONARD MUNGAI.....APPLICANT

VERSUS

NANCY MUGURE.....RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated **21st January 2021**, by the Applicant seeking for orders that;

- 1. This Honourable Court be pleased to grant leave to extend time limited for filing of the Memorandum of Appeal and Record of Appeal herein.**
- 2. That corollary to the foregoing, the Memorandum of Appeal and the Record of Appeal filed by the Appellant be deemed as properly and duly filed thus part of the record.**
- 3. That costs be in the cause.**

The Application is premised on the grounds that on **25th April 2019**, the Court entered Judgment in favour of the Respondent and immediately the Applicant instructed its Advocates to file an Appeal. That on **29th April 2019**, the Law Firm of **Waweru Kihara & Co Advocates LLP** sent a letter to **Limuru Law Courts** requesting for typed proceedings and copy of the Judgment in **ELC 24 of 2018**. That the Court did not send a certified copy of the proceedings until **2nd December 2020**, when a clerk from the Advocates Law Firm visited the Court to follow up on the proceedings.

That due to the delay caused by the Court's registry, they did not file a **Memorandum of Appeal** within **thirty days** as required by law. Further that a certified copy of the Judgment was issued to the Applicant's Advocates on **4th July 2019**, three months after requesting for the copy. Further, that upon reading the Judgment, the Advocates found out that the Honourable Magistrate had granted cancellation of the Applicant's title deed on the grounds of **fraud** which facts were not evident from the Judgment and the question as to whether any fraud had been proved remained in limbo and as such there was need to go through the proceedings of the Court to draft a proper and arguable Memorandum of Appeal. That the Court's proceedings were crucial in preparation of the Memorandum and Record of Appeal, given the Advocate came in the matter way after the proceedings had already began in **Civil Case No. 244 of 2017**.

Further that Judgment of the Court had granted **Orders** that required proof of fraud without highlighting the various acts of fraud, that had been committed by the **1st Defendant** and as such there was need to go through the proceedings and a copy of Judgment on its own was not sufficient. That it was unconscionable and inordinate to file a Memorandum of Appeal, based on trivial grounds that would not see the light of day and the same would have amounted to abuse of the Court process. That failure to issue the Applicant with certified copies of the proceedings amounted to the delay and a Certificate of Delay was issued by Limuru Law Courts confirming the same.

That as per the Memorandum and Record of Appeal, the Appel has a high chances of success, and the Judgment of the Court has the effect of rendering the Applicant destitute, as it took away land from him without providing any alternative. Further, that although the proceedings were issued on **2nd December 2020**, the Advocate needed to go through them and prepare the Appeal. Further, that the Limuru Law Courts took time to issue them with a Certificate of Delay and the same was only issued to them on **20th January 2021**. That the **Certificate of Delay** is a mandatory requirement and that as the Applicant's Advocate had requested for the copy of proceedings and judgment on time. That it can only be adjudged that he had intentions to file the Appeal on time, and it is thus only fair and just that the leave to file the Appeal out of time be granted.

In his Supporting Affidavit, **Leonard Mungai** averred that the Respondent instituted a suit claiming that he had been allocated the land. That on **29th April 2019**, Judgment was entered and he is dissatisfied with the same. That were it not for the delay occasioned by the Court, he

had all the intentions of filing his Appeal on time and he is therefore seeking leave of court to file the appeal out of time.

The Application is opposed and the Respondent **Nancy Mugure Njuguna**, swore a Replying Affidavit on **2nd February 2021**, and averred that during the Judgment, neither the Appellant nor his Advocate attended Court. That it appears the idea of an Appeal was an afterthought, as it is in the public domain that Limuru Law Courts is not a busy station and thus if the Appellant was keen on filing the Appeal, he would have made diligent efforts to procure the documents he required processed expeditiously. That the Applicant is the author of his own misfortunes and cannot shift the blame to the lower Court. Further, that the Application is coming soon after the Court dismissed the Application for stay of execution on **17th December 2020**.

The Application was canvassed by way of written submissions, which the Court has carefully read and considered. The Court has also read and considered the instant Notice of Motion Application, the Affidavits and the annexures thereto, together with the written submissions and finds that the issue for determination is ***whether the Applicant is entitled to the orders sought***.

Being equitable reliefs, the principles upon which the Court can exercise its discretion and decide whether or not to allow for the extension of time and allow an Applicant to file an Appeal out of time are well underpinned in the case of **Nick Salat...Vs...Independent Electoral & Boundaries Commission & 7 others [2014] KLR-SCK**, the Court held as follows on extension of time to file an appeal out of time:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;**
- 5. Whether there would be any prejudices suffered by the respondents if the extension was granted;**
- 6. Whether the application had been brought without undue delay; and;**
- 7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.**

In this instant case, it is not in doubt that the Applicant was not present when the Court delivered its Judgment on **25th April 2019**, and therefore it is believable when the Applicant states that his Advocate was not in a position to comprehend the Judgment. It is further not in doubt that well within the **30 days** within which the Applicant was allowed to Appeal, the Applicant did seek for a **Typed Copy of Judgment and proceedings** and paid for the same. Unfortunately, the typed copy of the Judgment was not availed to the Applicant until after the lapse of **69 days**. The Court acknowledges that without a copy of the Judgment, it would have been impossible for the Applicant to file a Memorandum of Appeal and the Judgment having been availed to the Applicant well after the 30 days within which he was able to file an Appeal without the extension of time, the Applicant would still have sought the leave of Court to file the Appeal out of time.

The Applicant has availed the Certificate of delay, which is the lower Court's documents that indeed proves that there were follow ups, that were made by the Applicant through his Advocate to secure the typed proceedings and the same were availed to them on **1st December 2020**. Objectively, looking at the facts of this case, it cannot therefore be said that the Applicant was an indolent litigant. The Court is of the view that even if the Applicant had sought leave to file the Appeal out of time after the Judgment had been availed to them, the parties would still have waited for the typed proceedings to be availed so that the Applicant could prepare a Record of Appeal. It is very clear that the delay was occasioned by the Lower Court and this Court finds no reason not to exercise its discretion in favour of the Applicant and allow him to file his Appeal out of time.

The Respondent has not indicated any prejudice she would suffer if the said orders are granted and the Court is thus inclined to exercise its discretion in favour of the Applicant. This is so as the Applicant has also annexed a **Memorandum** of Appeal and a Record of Appeal duly prepared and then no more delay would occur. The Applicant has sought to have the Memorandum and Record of Appeal to be deemed as duly filed. The Court allows the said Application upon payment of the requisite Court fees.

Consequently, the Court finds and holds that the Notice of Motion Application dated **21st January 2021**, is **merited** and the Applicant herein is entitled to the orders sought. The said Application is thus allowed entirely with costs being in the cause.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy