



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC APPEAL NO. E008 OF 2021

THE COUNTY EXECUTIVE MEMBER FOR LANDS, HOUSING, PHYSICAL PLANNING AND

URBAN DEVELOPMENT UASIN GISHU

COUNTY GOVERNMENT.....1<sup>ST</sup> APPELLANT/APPLICANT

UASIN GISHU COUNTY GOVERNMENT .....2<sup>ND</sup> APPELLANT/APPLICANT

VERSUS

BENARD GIKUNDI MWARANIA .....RESPONDENT

RULING

This ruling is in respect of a Notice of Motion dated 15<sup>th</sup> March, 2021 by the Appellant/applicants seeking the following orders:

- a. Spent
- b. That the Honourable Court be pleased to admit the Applicants Appeal which is against the judgment of the Magistrates Court in **ELDORET CMCC NO. 67 of 2020 BENARD GIKUNDI MWARANIA VERSUS COUNTY GOVERNMENT OF UASIN GISHU & ANOTHER**, out of time;
- c. That there be stay of proceedings of **ELDORET CMCC NO. 67 of 2020 BENARD GIKUNDI MWARANIA VERSUS COUNTY GOVERNMENT OF UASIN GISHU & ANOTHER** pending the hearing and determination of this Application *inter partes*;
- d. That there be stay of proceedings of **ELDORET CMCC NO. 67 of 2020 BENARD GIKUNDI MWARANIA VERSUS COUNTY GOVERNMENT OF UASIN GISHU & ANOTHER** pending hearing and determination of the Appeal.
- e. That the costs of the Application be in cause.

This matter was filed under certificate of urgency and counsel agreed to canvass the application vide written submissions which were duly filed

#### **APPLICANTS'SUBMISSIONS**

The application is supported by the affidavit of S.K. LEL dated on 22<sup>nd</sup> April, 2021 and annexed a Certificate of delay dated 15<sup>th</sup> March, 2021 to explain the delay occasioned in filing an Appeal as is outlined in Section 79G of the Civil Procedure Rules.

The Applicants further stated that although its Advocates on record were present when the ruling was delivered on 12<sup>th</sup> November, 2020, a certified copy of the ruling was not supplied on the date of the ruling. It was the applicant's case that the certified copy of the ruling was supplied on 24<sup>th</sup> February, 2021 after writing several letters to the Court Registry.

Ms Chesoo counsel for the applicants listed the following issues for determination:

- a. Whether the court should admit the Applicant's appeal out of time;
- b. Whether the applicant has satisfied conditions for leave to file an appeal out of time; and
- c. Whether the court should grant an order of stay of proceedings in ELDORET CMEL NO. 67 OF 2020- BENARD GIRÜND1 MWARAMA VS COUNTY GOVERNMENT OF UASIN GISHU & ANOTHER pending hearing and determination of the appeal.

On the first issue as to whether the court should admit the applicants' appeal out of time, counsel relied on Section 79G Civil Procedure Act Cap 21 Laws of Kenya which provide that:

**Every appeal from a 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.**

Ms Chesoo further cited the provisions of Section 95 of the Civil Procedure Act which provides that:

**Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.**

Counsel therefore stated that the court has interpreted the power to extend time for filing appeal under the said Section to include the power to admit an appeal already filed out of time and cited the case of **Apa Insurance Limited vs Michael Kinyaiui Muturi (2016)** where the court quoted the case of **Michael Kinyanjui Mbuthia V John Kamau Nganga HCCA 322 of 2008** and dismissed an objection to the appeal filed out of time before seeking leave to validate the same.

Further that in the case of **Apa Insurance Limited vs Michael Kinyajui Muturi (2016)(supra)** the court quoted the case of **Richard Ngetich & Another V Francis Vozena Kidiga HCCA 75/2012** where the respondent had argued that there was no appeal since it was filed out of time before leave was sought and the court rejected that argument.

Counsel also relied on the case of **Asma Ali Mohamed V Fatime Mwinyi Juma CA 75/2014** where the court observed as follows:

"when a party wishes to obtain leave to file an appeal out of time such a party must file the appeal and as provided in the proviso of Section 79G, then must seek leave to admit that appeal out of time. Appellant here has done that." it was procedurally in order to file an appeal then seek for leave to have the appeal deemed as properly filed"

Ms Chesoo further relied on the case of **Nanasi Housing Co-operative Co. Ltd & another v John Muoho Njore 120201 eKLR** quoted with approval in the case of **Thuita Mwangi vs Kenya Airways(2003) eKLR** and stated as follows:

"...the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari material with section 79G of the Civil Procedure Act, reiterated its decision in Mutiso vs Mwangi (1997) KLR 630 as follows:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that the general 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 the delay; thirdly(possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted."

Counsel therefore submitted that the appeal and application for leave as filed are competent before this court and that the application was not brought under **Order 50 Rule 6 of the Civil Procedure Rules** On the second issue as to whether the applicant has satisfied the conditions for leave to file an appeal out of time, counsel submitted that Section 79G of the Civil Procedure Act permits such filing of an application for leave out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time and relied on the case of **Mwangi V Kenya Airways Ltd (supra)** which laid down four (4) conditions to be fulfilled with regard to delay which are:

- a. The length of the delay
- b. The reason for the delay.
- c. The degree of prejudice to the respondent if the application is granted.
- d. the chances of the appeal succeeding if the application is granted.

On the issue of length of delay, counsel submitted that the application had been filed without inordinate delay and that the delay had been satisfactorily explained that the ruling was delivered on 12<sup>th</sup> November, 2020, on 26<sup>th</sup> November 2020 the appellants/ applicants instructed the advocate on record to file the appeal however the court had not supplied the same in good time.

Ms Chesoo relied on the case of **Hellen Wanza Maeker, Bernard Njoroge Gathua & Another I-ICC Miscellaneous Application 286/2009** where the court held that delay is excusable where it is contributed to by delay by the court registry to provide typed proceedings, and that in that case the application for leave was made several days after the proceedings were available for collection.

Further in the case of **Gladys Wamuyu Ngira v Mary Wamaita Ruiru [20161 eKLR]** the court in interpreting Section 79G stated as follows:

"To my understanding, if the certificate of delay and proceedings were supplied on 17th March 2015, then the applicant had 30 days from the said date to file the appeal."

On the issue as to whether the appellant has an arguable appeal with probability of success, counsel cited the case of **Charles Nyamwega v Asha Njeri Kimata & another [2017] eKLR** where the court quoted with authority the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** where the Court held that:

"We cannot over emphasize that at this stage we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest *we embarrass the trial judge. We therefore find that the applicant has discharged this requirement on the balance of probabilities...*"

Ms Chesoo submitted that the Applicants have an arguable and meritorious Appeal with a good likelihood of success and listed the following grounds:

- a. The Respondent is not a genuine allottee and/or legal owner of the suit parcel.
- b. The land parcel number ELDORET MUNICIPALITY/BLOCK 15/632 is a public market and was set aside for the market for public use
- c. The title number ELDORET MUNICIPALITY/BLOCK 15/632 is a completely different parcel from the land claimed by the respondent and the applicant has never issued any allotment letter for land known as ELDORET MUNICIPALITY/BLOCK 15/632 to the respondent.

On the issue as to whether the court should grant an order of stay of proceedings in the lower court pending counsel cited the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR** whereby the principles to determine whether or not to grant orders for stay of proceedings was enunciated as follows:

"To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a. Whether the applicant has established that he/she has a prima facie arguable case.
- b. Whether the application was filed expeditiously and
- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought."

Counsel submitted that the applicants have met the set principles as the application was filed without inordinate delay and that the applicants have a prima facie case as the appeal raises critical issues regarding ownership of the suit parcel which issues were not fully determined by the decision in the trial court and require determination on merit by this honourable court. Further that the Applicants are government institutions in service of the public and that the suit land had been earmarked for public use.

Counsel therefore urged the court to allow the application as prayed

### **RESPONDENT'S SUBMISSIONS**

The respondent opposed the application and raised issues that the Applicants ought to have filed a Miscellaneous Application to seek leave to file an Appeal out of time and that the Applicants filed a Memorandum of Appeal without the leave of Court as such this Application is an attempt to seek leave after the event.

Counsel also submitted that the Applicants have not sought an order to have the Memorandum of Appeal on record to be deemed as being properly on record hence the same should be struck out for being filed without leave of Court.

Mr Misoi stated that the ruling in **ELDORET CMCC NO. 67 of 2020 BENARD GIKUNDI MWARANIA VERSUS COUNTY GOVERNMENT OF UASIN GISHU & ANOTHER** was delivered on 12<sup>th</sup> November, 2020 in the presence of both the Advocates for the parties to the suit and that the Applicants have not furnished the Court with good reasons why they filed a Memorandum of Appeal on 2<sup>nd</sup> March, 2021.

Counsel relied on **CIVIL APPLICATION NO. 3 OF 2016 COUNTY EXECUTIVE OF KISUMU ...VERSUS COUNTY GOVERNMENT OF KISUMU AND 8 OTHERS** where the Court held that:

‘.....from the application before us, the applicant stated that it had already filed a petition of appeal and went ahead to urge us, if we were inclined to extend time, to deem that petition of appeal as properly filed. It then appeared to change tune in its written submissions when it stated that the 'said appeal' be taken as a draft for purposes of showing urgency of the matter. This mystery may not be unraveled in this ruling, but we call upon the Court Registrar to check against such scenarios. Whatever it is that happened in this matter should be investigated and not allowed to recur. However, as we are unable to trace the said, petition in the Court's records at the registry it is our position that there is no petition of appeal already filed in this matter, hence the issue rests there “

Counsel therefore urged the court to dismiss the application for in its entirety as there is no appeal with costs to the respondent.

### **ANALYSIS AND DETERMINATION**

I have considered the rival submissions from counsel and the issues for determination are as to whether the court should admit the applicant's appeal out of time, whether the applicant has met the threshold for leave to file an appeal out of time and whether the court should grant an order of stay of proceedings in **ELDORET CMCC NO. 67 of 2020 BENARD GIKUNDI MWARANIA VERSUS COUNTY GOVERNMENT OF UASIN GISHU & ANOTHER** pending the hearing and determination of the appeal.

The applicants have stated the reason for delay in filing the appeal within the stipulated time. Section 79G of the Civil Procedure Act is the guiding section on an application for leave to file an appeal out of time. It also takes into account the period which the lower court may take in the preparation and delivery of a copy of the decree and order to the appellant which can be cured by a certificate of delay.

Where an applicant explains the reason for delay in filing an appeal satisfactorily to the court together with a certificate of delay from the court, the court will evaluate the reasons and exercise the discretion in favour of the applicant. It should be noted that an inordinate delay in filing an appeal may cause prejudice to the respondent.

The Applicants filed a Memorandum of Appeal on 2<sup>nd</sup> March, 2021 and the current application on 4<sup>th</sup> March, 2021 wherein they seek for the appeal to be admitted out of time.

In the case of **ASMA ALI MOHAMED V FATIME MWINYI JUMA [2014] eKLR** the Court held that when a party wishes to obtain leave to file an appeal out of time such a party must file the appeal and as provided in the proviso of Section 79G, then must seek leave to admit that appeal out of time.

Further in the case of **GERALD M'LIMBINE V. JOSEPH KANGANGI [2009] eKLR** where the court held that :

“My understanding of the proviso to Section 79G is that an Applicant seeking “an appeal to be admitted out to time” must in effect file such an appeal and at the same time seek the Court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the Court's process ...”

The applicants had already filed a Memorandum of Appeal which they seek to be admitted. I do not agree with counsel for the respondent that this was unprocedural to file a Memorandum of Appeal then seek to regularize it. This is the right procedure which is put in place to avoid a situation where the court is being asked to admit a non-existent appeal.

In the case of **Apa Insurance Limited vs Michael Kinyajui Muturi (2016)** Aburili J held that:

“I am not in agreement with the respondent that the application and therefore the appeal herein are incompetent simply because the appeal was filed out of time and leave sought subsequent thereto to have the appeal admitted as duly filed out of time. This court as correctly submitted has had on many occasions to decide on the same issue and has plainly, overtly and authoritatively pronounced itself that an appeal which is filed out of time can be validated by an application for leave to validate the appeal and that is what the proviso to Section 79G of the Civil Procedure Act stipulates. The decisions by **Honourable H.M. Okwengu J ( as she then was) in I-ICC 322/2008 Michael Kinyanjui Mbuthia V John Kamau Nganga; Honourable R. V.P. Wendoh J in Richard Ngetich & another V Francis Vozena Kidiga HCCA 75/2012 ; and Honourable Mary Kasango J in Asma Ati Mohamed V Fatime Mwinyi Juma HCCA 75/2014 (Mombasa) among others all positive attestations to that pronouncement and so far there is no contrary decision from the Court of Appeal on that line of interpretation of**

Section 79G of the Civil Procedure Act Proviso.”

I find that the applicants have explained the reason for the delay, further that the application is proper before the court.

On the issue whether the applicants have met the threshold to be granted leave to file an appeal out of time, the court wishes to rely on the case of **MURINGA COMPANY LIMITED V ARCHDIOCESE OF NAIROBI REGISTERED TRUSTEES [2020] eKLR** where the Court made the following observation:

Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity...”

The applicants have exhaustively given the background and the chronology of events in this case, when the ruling was delivered, when the Memorandum of Appeal was filed and the several letters that they wrote to court for the proceedings and a copy of the decree and a certificate of delay to boot. I have perused the court record together with the annexures and I am satisfied that the delay was not inordinate.

In the case of **SAMUEL CHEGE GITHUA & ANOTHER V SOPHIA NYOKABI WAMBUI [2021] eKLR** cited with approval the case of **Hellen Wanza Maeker, Bernard Njoroge Gathua & Another HCC Miscellaneous Application 286/2009** the court held that delay is excusable where it is contributed to by delay by the court registry to provide typed proceedings.

On the issue as to whether the applicants have met the threshold for stay of proceedings, in the case of **KENYA WILDLIFE SERVICE V JAMES MUTEMBEI (2019) eKLR** the court held that:

“stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent.”

This is a draconian measure which affects further hearing of a case, in fact it stalls the case Halsbury’s Laws of England [4<sup>th</sup> Edition pages 330-332) provides as follows:

“The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue.”

The court should grant such an order in very clear cut circumstances where it is in furtherance of justice and not to prejudice a party who wants to conclude a matter without delay.

Similarly in the case of **KENYA POSTEL DIRECTORIES LIMITED V YELLOW PAGES PUBLISHING & MARKETING LTD [2018] eKLR** the Court cited with approval the decision of the Court in **Global Tours & Travels Limited - Winding-Up Cause No. 43 of 2000**, where the Ringera J (as he then was) expressed himself thus, on the principles governing applications for stay of proceedings;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice to order a stay of proceedings and, if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

Further in the case of **Christopher Ndolo Mutuku & another v Cfc Stanbic Bank Limited [2015] eKLR** the court stated as follows:

“That explains why the law on stay of proceedings pending appeal will be concerned with the sole question of whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order, It will also consider such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...’

Having considered the application, the submissions by counsel and the relevant judicial authorities, I find that the application has merit and is therefore allowed as prayed.

**DATED AND DELIVERED ELECTRONICALLY AT MALINDI THIS 21<sup>ST</sup> DAY OF SEPTEMBER , 2021**

**M. A. ODENY**

**JUDGE**