



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY**

**ELC MISC APPLICATION E001 OF 2021**

**OBADIA AUKO ONGOCHE.....APPLICANT**

**VERSUS**

**JARED OGINGO OTIENO.....1<sup>ST</sup> RESPONDENT**

**GEORGE OPIYO DIANGA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 22<sup>nd</sup> September 2021, one Obadia Auko Ongoche (The applicant herein) lodged the instant application by way of a Notice of Motion dated 21<sup>st</sup> September 2021 under Sections 3A, 79G and 95 of the Civil Procedure Act Chapter 21 Laws of Kenya and Article 159 of the Constitution of Kenya 2010 (The Constitution herein). He is seeking the following orders:

- a) Spent
- b) That the Honourable Court be pleased to grant leave to the applicant herein to appeal against the Ruling delivered on the 15<sup>th</sup> day of September 2020.
- c) That costs of the application be costs in the cause in any event.

2. The application is premised on grounds (a) to (d) set out on its face, the applicant's nine (9) paragraphed supporting affidavit sworn on even date and a copy of the judgment rendered in Homa Bay Principal Magistrate's Court Environment and Land case number 48 of 2020 as well as copies of the applicant's medical documents from Medicins Frontieres and Homa Bay County Teaching and Referral Hospital. In a nutshell, the applicant stated that he is old in age and was diagnosed with Corona Virus disease and suffers from arthritis and stroke. That thus, he was unable to lodge the intended appeal within the prescribed timelines.

3. On 28<sup>th</sup> September 2021, this court certified the application as urgent, ordered and directed that the respondents be served within three (3) days from that date. That the respondents to file and serve reply thereto, if any, within three (3) days from the date of service of the application. The said orders were extended on 6<sup>th</sup> October 2021 and 19<sup>th</sup> October 2021.

4. On 9<sup>th</sup> November 2021, the court fixed the application for hearing on the 16<sup>th</sup> day of November 2021 (today) in the spirit of **Article 159 (2) and (e) of the Constitution**; see also the Overriding Objective in **section 3 of the Environment and Land Court Act, 2015 (2011)**.

5. The respondents were duly served by way of G4S courier service as shown on the consignment document and receipts dated 9<sup>th</sup> November 2021. They have neither responded to the application nor appeared herein.

6. The applicant argued the application by way of written submissions further to this court's orders and directions given on 6<sup>th</sup> October 2021 pursuant to **Order 51 Rule 16 of the Civil Procedure Rules, 2010**; see also **Article 159 (2) (b) of the Constitution** which provides;

“Justice shall not be delayed.”

7. In his submissions, the applicant gave the background of the case which he had filed by way of a plaint dated 18<sup>th</sup> August 2020 against the respondents at the trial court in respect of LR No. Kanyada/Kalanya/Kanyango/329. That by the trial court's ruling delivered on 15<sup>th</sup> September 2020, the plaint was struck out and the suit dismissed with costs to the respondents.

8. I have duly considered the application and the applicant's submissions in their entirety. In that regard, has the applicant established a sufficient case for the grant of orders sought in the application?

9. Notably, the application was originated pursuant to the Constitutional and statutory provisions cited on the face of it. No doubt, this court is guided thereby.

10. In the case of **Ogada-vs-Mollin (2009) KLR 620**, it was held that it is the duty of the appellant to make the respondent aware of the appeal by way of service of the necessary papers. That the latter may appear or decline to appear in the matter.

11. In the present application, the respondents were given notification including the notice dated 9<sup>th</sup> November 2021. They had the liberty to respond to the application or decline to respond to the same. Quite clearly, they chose the latter option.

12. It is the lamentation of the applicant that he was prevented from lodging the intended appeal within the prescribed timelines by his health conditions. This is revealed at ground (d) of the application and paragraph 5 of his affidavit in support of the application.

13. This court is aware of the applicant's right to access justice as stipulated under **Article 48 of the Constitution of Kenya 2010**. Indeed, the intended appeal is envisaged thereunder.

14. Moreover, it is established law that the applicant has an undoubted right to file, serve and prosecute his intended appeal; see the Court of Appeal decision in the case of **Butt-vs-Rent Restriction Tribunal (1979) eKLR**.

15. Plainly, the instant application is unopposed and cogent. I find the same solid and meritorious.

16. Wherefore, the application dated 21<sup>st</sup> September 2021 and filed herein on 22<sup>nd</sup> September 2021 be and is hereby allowed in terms of orders 2 and 3 sought therein and as stated in paragraph 1 (b) and (c) hereinabove.

17. In any event, the applicant shall mount the intended appeal within the next thirty (30) days from this date failure of which the leave granted herein to lapse automatically.

18. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT HOMABAY THIS 16TH DAY OF SEPTEMBER 2021.**

**G M A ONGONDO**

**JUDGE**

**In the presence of;**

The applicant in person

Okello A, court assistant

G M A ONGONDO

JUDGE