



**REPUBLIC OF KENYA**

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

**E.L.C. MISCELLANEOUS APPLICATION NO. E012 OF 2021**

**CHARLES KIMAITA MWITHIMBU.....PLAINTIFF**

**VERSUS**

**EDWARD MUTUA M'MWITHIGA.....DEFENDANT**

**RULING**

1. **Charles Kimaita Mwithimbu** hereinafter the applicant applies for leave to file an appeal against **CMCC ELC No. 16 of 2019** out of time on the grounds are that he has been sickly and secondly the intended appeal raises arguable points. The application is supported by an affidavit sworn on **12<sup>th</sup> March 2021** in which he states after the suit was dismissed on **12<sup>th</sup> July 2019**, he applied for review through an application dated **15<sup>th</sup> October 2019** which was also dismissed on **24<sup>th</sup> September 2020**.

2. Though leave to appeal was granted, unfortunately the applicant fell sick as per attached medical report **marked CKM "11"**. The situation was made worse after the applicant lost a daughter on **18<sup>th</sup> February 2021**. He has attached a draft intended memorandum of appeal.

3. The application is opposed through an affidavit sworn on **18<sup>th</sup> May 2021** and brief oral submissions made on **12.10.21** by **Mr. Wambua advocate**, for the respondent.

4. **Section 95 of the Civil Procedure Act** grants the court powers to enlarge time even where such time has expired. Under **Section 79 G of the Civil Procedure Act**, an appeal from a subordinate court is to be filed within **30 days** after the ruling or judgment thereof, provided an appeal may be admitted out of time if the applicant satisfies the court he had good and sufficient reason for not filing the appeal within time.

5. In **Gregory Kiema Kyuma –vs- Marietta Syokau Kiema (1988) eKLR** it was held that sympathy cannot substitute the law since an appeal is a creature of a statute and any person desirous of exercising that right must bring himself squarely within the four corners of both substantive and procedural legislation

6. In **Nicholas Kiptoo Korir Arap Salat –vs- KBC & 7 Others (2014) eKLR** the court stated thus:-

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

- 1) Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party and the discretion of court;***
- 2) A party who seeks for extension of time ha the burden of laying a basis to the satisfaction of the court;***
- 3) Whether the court should exercise the discretion to extend time is a consideration to be made a case to case basis;***
- 4) Whether there will be reasonable reason for delay. The delay should be explained to the satisfaction of the court;***
- 5) Whether there will be any prejudice suffered by the respondent if the extension is granted.***
- 6) Whether the application has been brought without undue delay.”***

7. In light of the above parameters the applicant claims to have been both sick and bereaved. There is no medical report to indicate he was admitted in any known medical facility. Secondly the applicant has not attached a death certificate. Much as I do not believe one can merely allege death without its existence, the same only happened six or so months after expiry of the mandatory time to file the appeal. The inordinate delay is not explained sufficiently. Nevertheless, the court gives the applicant a benefit of doubt under this limp on account of

sickness and bereavement.

8. Coming to the issue of prejudice, it is not in dispute that the matter relates to land. The lower court suit was terminated on account of a technicality. The matter was therefore not heard on merits. The replying affidavit has not demonstrated any prejudice to be occasioned to the respondent should an extension of time to file an appeal be allowed. This court takes the course of justice with lower risk of injustice. The prejudice would be more if the applicant is shut out of the seat of justice on account of technicalities.

9. It is my considered view **Article 159 (2) (d) of Kenya Constitution** expects courts to do dispense substantive justice to the parties such as to the applicant herein.

10. Given the circumstances of this case, I am inclined to give the applicant a benefit of doubt. I allow the application with costs to the respondent.

11. The appeal shall be filed and served within 7 days from the date hereof.

This file is marked closed.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 27<sup>TH</sup> DAY OF OCTOBER, 2021**

**IN PRESENCE OF:**

**CHARLES KIMAITA PRESENT IN PERSON**

**WAMBUA FOR RESPONDENT**

**COURT ASSISTANT - KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**