



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 11 OF 2020**

**MOHAMED AMIN KAKAO.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**DORIS CAROLINE RATTOS.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**NYAKIGO ODERO.....DEFENDANT/RESPONDENT**

(Being an appeal against the Judgment/Decree of the Chief Magistrates Court at Kisumu (Hon. W.K Onkunya) dated 4<sup>th</sup> December 2019; in ELC Case No. 338 of 2018)

**BETWEEN**

**MOHAMED AMIN KAKAO.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**DORIS CAROLINE RATTOS.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**NYAKIGO ODERO.....DEFENDANT/RESPONDENT**

**RULING**

**BRIEF FACTS**

**Mohamed Amin Kakao and Doris Caroline Rattos (hereinafter** referred to as the applicants) have approached this court through a Notice of Motion Application dated 12<sup>th</sup> February 2020 and filed on 14<sup>th</sup> February 2020 under Order 43 Rule (10 (2), Order 51 Rule 1 of the Civil Procedure Rules, Section 79G, 95, 75(1) of the Civil Procedure Act, Cap 21 Laws of Kenya and all enabling provisions of the Law. The Applicants sought orders that this Honourable Court be pleased to grant the Applicant leave to lodge an Appeal out of time against the whole Judgment of Hon. W.K. Onkunya, Senior Resident Magistrate, delivered on 4<sup>th</sup> December 2019 at Kisumu ELC No. 338 of 2018. That the Memorandum of Appeal annexed on this Application be deemed as duly filed on payment of requisite fees. Costs of this Application be provided for.

Mohammed Amin Kakao on behalf of the 2<sup>nd</sup> applicant filed a Supporting Affidavit and deposed that he is the legal owner/proprietor of the subject property therefore entitled to enjoy quiet possession and use of land and all rights and privileges appurtenant thereto to the exclusion and without interference from anybody else.

He states that the Judgment /Decision he seeks to Appeal against was delivered on 4<sup>th</sup> December 2019 and that the statutory period for filing the intended Appeal has elapsed before he could file a Memorandum of Appeal. That the failure to file a Memorandum of Appeal was occasioned by delay in obtaining the court Judgment and proceedings and therefore the delay was due to circumstances beyond his control or of his Advocates and in any case the delay (a one-month delay) was not inordinate or so great as to be inexcusable. That his Advocates on record wrote to the Deputy Registrar Kisumu Law Courts vide a letter dated 20<sup>th</sup> December 2019 requesting for certified copies of the proceedings and Judgment. That the certified copies of the proceedings and Judgment were availed to his Advocates on 14<sup>th</sup> January 2020 upon resuming work for the new year hence the difficulties experienced in filing the Intended Appeal on time.

He states that he has acted with speed to have this application filed to prevent inordinate delay in filing the intended appeal and that he is

truly aggrieved and dissatisfied with the Judgment of the Chief Magistrate Court (Honourable W.K. Onkunya) and seek to address this by filing an Appeal to further address his grievances. That the Respondent is unlikely to suffer any prejudice should the Application be allowed as the orders sought are not prejudicial to the respondent. That it is in the interest of justice to allow this Application. That the intended Appeal raises solid issues of law and has high chances of success. That this Honourable Court has unfettered discretion in granting leave to file this Appeal out of time and the Honourable court to allow for its filing. That this Application has been brought with reasonable promptitude and it is only fair and just that it be allowed as prayed.

I have perused the court file and established that the Respondent did not file any response to the Application dated 12<sup>th</sup> February 2020. The matter came up for mention on 22<sup>nd</sup> April 2021 and the court directed the applicant to file and serve submissions within 14 days. The Respondents to file and serve within 14 days of service.

### **APPLICANT'S SUBMISSIONS**

The Applicant filed Submissions on 17<sup>th</sup> September 2020 and gave brief facts of the matter and raised the main issue being whether or not the Applicants should be allowed to lodge an Appeal out of time against the whole judgement of the Honourable Court (Hon. W.K. Onkunya, Senior Resident Magistrate, delivered on 4<sup>th</sup> December 2019 at Kisumu, in Kisumu ELC No. 338 of 2018 and who between the parties should bear the costs of this suit.

On the issue of whether or not the Applicants should be allowed to lodge an Appeal out of time against the whole judgment of the Honourable Court, the Applicant submitted that this Honourable Court has the discretion to extend time to file an Appeal out of time as was held in the case of **First American Bank of Kenya Ltd vs Gulab P Shah & 2 Others Nairobi (Milimani) HCC NO.2255 of 2000(2002) 1 EA 65** the court set out the factors to be considered in deciding whether or not to grant such an Application for leave to Appeal out of time and these are:

**i. the explanation if any for the delay;**

**ii. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;**

**iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the applicant.**

The Applicant further relied in the case of **Nicholas Kiptoo Korir arap Salt v IEBC and 7 Others (2014) eKLR** where the supreme court enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that; **“The underlying principles a court should consider in exercise of such discretion include:**

***“(i) 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;***

***(ii) A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;***

***(iii) Whether the court should exercise discretion to extend time is a consideration to be made on a case to case basis;***

***(iv) Where there is a reasonable cause for the delay. The delay should be expressed to the satisfaction of the court;***

***(v) Whether there will be any prejudice suffered by the respondents, if extension is granted;***

***(vi) Whether the application has been brought without undue delay and;***

***(vii) Whether in certain cases, like Election Petitions, public interest should be a consideration for extending time.”***

The Applicant submitted that with regards to reasons for delay, the Applicant wrote to the Deputy Registrar Kisumu Law Courts vide a letter dated 20<sup>th</sup> December 2019 requesting for certified copies of the proceedings and Judgment which were availed to the Applicant on 14<sup>th</sup> January 2020 upon resuming work for the new year hence difficulties experienced in filing the intended Appeal on time.

The Applicant stated that he has acted with speed to have this Application filed to prevent inordinate delay in filing the intended Appeal. The Applicant being aggrieved by the Judgment of the lower court, he sought redress by filing an Appeal to further address his grievances and relied in the case of **Hassan Nyanje Charo v Khatib Mwashetani and 3 Others eKLR (2014)** where the court stated that:

***“.....Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail..... Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery? We think not. “***

The Applicant further relied in the case of **Edward Kamau & Another v Hannah Mukui Gichuki & Another (2015) e KLR**. He therefore

submitted that the delay in filing a Memorandum of Appeal against the said Judgment was not deliberate but was caused by the failure by the court to supply the Applicant with certified copies of the Judgment and the proceedings and prayed for the court to allow the Application herein.

### **RESPONDENTS' SUBMISSIONS**

I have perused the court file and I have found out that the Respondent did not file submissions as directed by the court.

### **ANALYSIS AND DETERMINATION**

Section 79G of the Civil Procedure Act provides as follows:

**“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.”**

Section 95 provides as:-

**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.**

Section 75(1) of the Civil Procedure Act provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:

**75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-**

- (a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;**
- (b) An order on an award stated in the form of a special case;**
- (c) An order modifying or correcting an award;**
- (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;**
- (e) An order filing or refusing to file an award in an arbitration without the intervention of the court;**
- (f) An order under section 64;**
- (g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;**
- (h) Any order made under rules from which an appeal is expressly allowed by rules.**

The procedure for obtaining leave is provided under Order 43(3) of the Civil Procedure Rules which states as follows: -

**(3) An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.**

In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] 2 EA 231* (referred to by the Court of Appeal in *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR*) set out the guiding principles to be applied in considering an application for extension of time as;

**“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 in general the matters which this Court takes into account in deciding whether to grant an extension of time are:**

- i. first the length of the delay;**

ii. secondly, the reason for the delay;

iii. thirdly (possibly) the chances of the appeal succeeding if the application is granted; and,

iv. fourthly, the degree of prejudice to the respondent if the application is granted.”

### **1. Length of the delay and reasons thereof;**

It is clear that the Judgment in the lower court was delivered on 4<sup>th</sup> December 2019. The 1<sup>st</sup> Applicant herein in his Supporting Affidavit stated that the statutory period for filing the Intended Appeal elapsed before he could file a Memorandum of Appeal for reasons that there was delay in obtaining the court Judgment and the proceedings. The Proceedings and Judgment were obtained on 14<sup>th</sup> January 2020 when the Applicant's Advocates resumed work for the new year. I do find that the delay is not inordinate since the Applicant had written to Deputy Registrar on 20<sup>th</sup> December 2019 requesting for the certified copies Proceedings and Judgment which was 40 days after the Judgment was delivered.

### **2. Chances of the appeal succeeding if the application is granted**

In the case of *Kenya Power & Lighting Company Ltd v Rose Anyango & another* the Court stated that;

**‘On whether the intended appeal has chances of success is not for this court to decide at this stage save that from the draft intended memorandum of appeal annexed, I am satisfied that the intended appeal is not frivolous on the face of it. The applicant will have an opportunity to satisfy the court on the merits of its appeal and the Respondents will have a chance to respond to the merits or demerits of the appeal once filed.’**

In *Divya J. Patel v Guardian Bank Limited [2020] eKLR, Mohammed JA*. held that an arguable appeal is not one that must succeed but one which is not frivolous and merits consideration by the court.

At this stage am not able to ascertain whether the Applicant has an arguable Appeal. However, having looked at the Memorandum of Appeal, the same raises triable issues that need to be determined by this court.

### **3. The degree of prejudice to the respondent if the application is granted**

It is my finding that the Respondent will not be prejudiced if the Applicant is granted leave to file this Appeal out of time. It is proper to balance the competing interests of the parties which include, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant is aggrieved by the judgment of the lower court and is desirous of appealing against the said judgment out of time. I am of the view that the Applicant should be given an opportunity to file his Appeal out time since he is aggrieved by the decision of the lower court and during Appeal, the court will determine whether the Appeal has merits or not.

### **CONCLUSION**

I therefore order that leave be and is hereby granted to the applicant to file and serve a record of appeal out of time against the judgment and decree of Hon. W.K. Onkunya, Senior Resident Magistrate, delivered on 4<sup>th</sup> December 2019 at Kisumu ELC No. 338 of 2018. That the record of appeal be filed and served within fourteen (14) days from the date hereof. Costs of this application to abide by the outcome of the intended appeal.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF OCTOBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**