



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC MISC. APPL. CASE NO. 5 OF 2021

DR. JAMES OUKO OKUMBE.....APPELLANT

VERSUS

DR. JOSHUA ABONGO OKUMBE.....1ST RESPONDENT

DISTRICT LAND REGISTRAR BONDO.....2ND RESPONDENT

RULING

Application seeking leave of court to file an appeal out of time and an extension of time to file an appeal: application disallowed.

Introduction

1. The appellant filed a motion dated 5/03/2021 under the auspices of sections **1A, 3A, 79G** and **95** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The motion seeks the following verbatim reliefs:

“1. THAT this Honourable Court be pleased to grant an extension of time to file an appeal.

2. THAT this Honourable Court be pleased to grant leave to file an appeal out of time.

3. THAT the Honourable Court be pleased to grant the Appellant leave to lodge and serve the memorandum of appeal and record of appeal.

4. THAT the cost of and incidental to this application abide the result of the said appeal.

Appellant’s case

5. The appellant’s motion is mainly anchored on the following grounds; (i) instructions to legal counsel to file an appeal was hindered by COVID- 19 pandemic, (ii) previous legal counsel failed to notify the appellant that his suit had been dismissed, (iii) there was delay in obtaining the court file in time, (iv) the motion has been brought with promptitude upon the discovery of the ruling, (v) there are strong grounds for appeal and, (vi) it is in the interests of justice that the motion be allowed as prayed.

6. The motion is supported by the affidavit of the appellant’s counsel on record dated 5/03/2021 together with several annexures including pleadings of **Bondo PMCC ELC No. 28 of 2019**, a ruling of **Bondo PMCC Land Case (sic) No. 2 of 2019**, judgement of **Siaya HCCC Civil Appeal No. 26 of 2018**, correspondence between the parties’ advocates referring to **Succession Cause No. 430 “A” of 2018** and **Bondo PMCC ELC No. 28 of 2019**. Except for **Siaya HCCC Civil Appeal No.26 of 2018**, the several suits mentioned by the appellant in one way or the other relate to the appellant and the 1st respondent. The supporting affidavit reiterates the grounds in support of the motion.

1st and 2nd respondents’ case

7. The 1st respondent filed grounds of opposition dated 3/03/2021. The grounds contended among several others; (i) the application was fatally defective, incompetent and a nullity, (ii) the period of delay was inordinate and inexcusable and, (iii) the decision to appeal is an afterthought. The 2nd respondent did not participate in the proceedings

8. As directed by the court, the parties disposed of the motion by way of written submissions.

Appellant's submissions

9. The appellant's written submissions dated 15/07/2021 contended that the error to file the appeal within time was occasioned by several reasons; (i) the appellant's previous advocates on record did not notify the appellant that the suit had been dismissed, (ii) limitations occasioned by COVID 19 pandemic, (iii) failure by the appellant's previous advocates to release the appellant's files on time to the advocates currently on record and, (iv) the court file which is the subject of the appeal was missing in the court registry. The appellant contended that he had proffered sufficient cause why this court should exercise its discretionary jurisdiction in granting the motion. He urged the court not to visit the mistakes of an advocate upon the client. He contended that the court erred in dismissing the suit for recovery of property belonging to a deceased's estate and argued that a succession court cannot delve into the issues of ownership of land because its jurisdiction is only restricted to distribution of assets. Among several cases, he placed reliance on; **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet (2018) Eklr, Itute Ngui & Anor vs Isumail Mwakavi Mwendwa, Civil Application No. Nai.166 of 1997, Belinda Muras & 6 others v Amos Wainaina (1978) KLR, Philip Chemwolo & Another v Augustine Kubede (1982-88) KLR 103.**

1st respondent's submissions

10. In his written submissions dated 1/07/2021, the 1st respondent contended that the appellant has neither filed a notice of appeal, sought leave to file a notice of appeal out of time nor sought leave to lodge and serve a memorandum of appeal and record of appeal out of time. He contended the orders being sought by the appellant were ambiguous because they did not disclose the cause of action the appellant was appealing against. He contended that the period of delay was inordinate and inexcusable and the appellant had not proffered sufficient cause. He contended the decision to appeal was an afterthought and apart from the present suit, the parties were involved in several other litigations.

Analysis and determination

11. Having considered the motion, supporting affidavit, annexures, grounds of opposition and rival written submissions, this court is of the considered view that the only issue falling for determination is whether the appellant's motion is merited.

I will proceed to analyze the legal and jurisprudential framework on the issue.

12. At the outset, I wish to set out that contrary to the 1st respondent's assertion that the appellant failed to file and serve a notice of appeal, appeals to a superior court from the lower court do not require a notice of appeal. **Sections 78 and 79 of the Civil Procedure Act, Section 16 A of the Environment and Land Court Act and Order 42 of the Civil Procedure Rules** have an elaborate legal framework on how such appeals are to be dealt with and a notice of appeal is not one of the requirements. A notice of appeal is a preserve of the Court of Appeal and the Supreme Court.

13. Though this court has discretionary jurisdiction under **Sections 79G and 95 of the Civil Procedure Act** to grant a party leave to file an appeal out of time on condition that the intended appellant shall demonstrate good and sufficient cause and enlarge time to file an appeal, the court is called upon to exercise such discretionary power with abundant caution.

14. Is the motion merited? the face of the appellant's motion and supporting affidavit are bereft of material facts on which court's decision the appellant was dissatisfied and aggrieved against. The court that made the decision and when the decision was made are not disclosed. In his supporting affidavit, the court gets a slight glimpse of the decision he is aggrieved against when he discloses that he had difficulties locating the court file from the court registry and he was desirous of lodging an appeal however, the details of the court file are not disclosed. In essence, the appellant is urging this court to carry out a fishing expedition in discerning the decision that he intends to appeal against. It is unfortunate that the appellant did not avail a draft memorandum of appeal to assist this court. From the appellant's supporting affidavit and the 1st respondent's submissions, it is common ground that the parties have either amongst themselves or together with other parties four other suits namely; **Siaya HCCC Succession Cause No. 3 of 2019, Siaya HCCC Miscellaneous Application No. 31 of 2020, Bondo PMCC ELC case No.2 of 2019 and Bondo PMCC ELC case No.28 of 2019** and it is an arduous task for this court to determine which decision the appellant is referring to in his motion. Worse still, the appellant's letter dated 19/08/2020 which would have shed light on the suit the appellant intends to appeal against, is addressed to the 1st respondent's advocates and not to the appellant's previous advocates. It is the finding of this court that the motion is devoid of material facts on the decision the appellant is dissatisfied and aggrieved against.

15. In his motion, appellant failed to proffer to this court a draft copy of his memorandum of appeal which is a mandatory requirement. The Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** held as follows;

“Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time”

It is the finding of this court that the appellant has failed to meet a mandatory ingredient in a motion seeking leave to appeal out of time and an extension of time to appeal.

16. Had the appellant disclosed the substance of the suit against which he is dissatisfied and aggrieved against and filed a draft memorandum of appeal which he has not, this court would have exercised its discretion in deciding whether or not to grant the motion based on the well-established principles in the Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat (ibid)**.

17. Consequently, it is the ultimate finding of this court that the motion is not merited.

18. Ultimately, I make the following disposal orders: -

- a) *The Notice of Motion dated 5/03/2021 is struck out.*
- b) *Costs shall be borne by the appellant.*
- c) *The file is closed.*

Ruling delivered by virtual court.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF OCTOBER 2021

A. Y. KOROSS

JUDGE

In the Presence of:

R. O. ODHIAMBO H/B FOR QUE OGOLA FOR APPELLANT

CHRISTINE NYABUNDI H/B FOR ONYATA FOR 1ST RESPONDENT

COURT ASSISTANT: SARAH OORO