



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E010 OF 2021

REGINA NANG'UNDA TUNDWE.....APPLICANT

VERSUS

MARGARET NASIMIYU WASIKE.....RESPONDENT

R U L I N G

This Court is called upon to determine the Notice of Motion dated 20th August 2021 and filed herein on 31st August 2021 by **REGINA NANG'UNDA TUNDWE** (the Applicant) seeking the following orders: -

(a) Spent

(b) Spent

(c) That leave be granted to the Applicant to lodge an appeal out of time against the lower Court Judgment in BUNGOMA CHIEF MAGISTRATE'S LAND CASE No 88 of 2018.

(d) That costs be in the outcome (sic).

The application is premised under the provisions of **Section 79** of the **Civil Procedure Act** and is predicated on the grounds set out therein and is also supported by the Applicant's affidavit also dated 20th August 2021. Annexed to the said affidavit are the following documents: -

1. Memorandum of Appeal.

2. Burial permit for RICHARD TUNDWE dated 5th July 2021.

3. Receipts

4. Medical notes.

The gravamen of the application is that the Applicant is a sister to **MARGARET NASIMIYU WASIKE** (the Respondent). A perusal of the Judgment in **BUNGOMA CHIEF MAGISTRATE'S LAND AND ENVIRONMENT CASE No 88 of 2018** which was annexed to the Respondent's replying affidavit shows that the parties litigated over the land parcel **NO WEST BUKUSU/NORTH MYANGA/1909**. Having heard the parties, **HON. G. P. OMONDI (PRINCIPAL MAGISTRATE)** delivered his Judgment on 10th June 2021 in which he found that the Applicant holds the said parcel of land in trust for the Respondent and directed her to execute all the transfer documents to vest the land in the names of the Respondent within thirty (30) days and in default, the Executive Officer would be at liberty to execute such documents on her behalf.

The Applicant seeks to appeal that Judgment out of time. She has averred that she was not able to file her appeal within time as she only became aware about it after the thirty (30) days due to the regulations put in place following the **COVID – 19** pandemic guidelines. Further, that when the Judgment was delivered on 10th June 2021, she was involved in burial arrangements of her late husband and it was only after the said burial that she became aware of the said Judgment. She therefore promptly engaged the services of her Counsel to file this application which has been brought timeously and without delay. Further, that her appeal has high chances of success.

The application is opposed and the Respondent has filed both Grounds of Opposition and a replying affidavit.

In the Grounds of Opposition, the following have been raised: -

1. That the application is incompetent by dint of the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010.
2. That the Applicant has not met the threshold set under Order 42 Rule 6(1) (2) of the Civil Procedure Rules 2010.
3. That the application is an abuse of the due process of this Court.

Those grounds are rehashed in her replying affidavit where the Respondent has averred, inter alia, that the case in the Subordinate Court had been filed without her knowledge and that she filed a defence and Counter – Claim in which she sought a declaration that the Applicant holds the land parcel **NO WEST BUKUSU/ NORTH MYANGA/1909** in trust for her. That her Counter – Claim was allowed vide a Judgment delivered on 10th June 2021 which was served upon the Applicant’s Counsel. That the Applicant’s husband died on 1st July 2021 some twenty-one (21) days after the delivered of Judgment and so it is not correct for the Applicant to claim that she was bereaved at the time the said Judgment was delivered. That the Applicant has not explained the delay of two (2) months from the time her husband was buried on 5th July 2021. That the application is a delaying tactic and the intended appeal has no chances of success.

Annexed to the replying documents: -

1. **The pleadings in BUNGOMA CHIEF MAGISTRATE’S CIVIL CASE No 345 of 2011 (I presume this later became BUNGOMA Chief MAGISTRATE’S CIVIL CASE No 88 of 2018).**
2. **Judgment in BUNGOMA CHIEF MAGISTRATE’S CIVIL CASE No 88 of 2018.**
3. **E-mail forwarding the Judgment in BUNGOMA CHIEF MAGISTRATE’S CIVIL CASE No 88 of 2018 to the Counsel.**

The application was placed before me on 21st September 2021 when I directed that it be canvassed by way of written submissions. Those submissions were subsequently filed both by **MR SICHANGI** instructed by the firm of **J. W. SICHANGI & COMPANY ADVOCATES** for the Applicant and by **MR MURUNGA** instructed by the firm of **J. O. MAKALI & CO ADVOCATES** for the Respondent.

I have considered the application, the rival affidavits and annexures thereto, the Grounds of Opposition and the submissions by Counsel.

The starting point is whether the firm of **J. W. SICHANGI & COMPANY ADVOCATES** are properly on record in this matter as Advocates for the Applicant. It is common knowledge that during the trial in the Subordinate Court, the firm of **C. K. AREBA & COMPANY ADVOCATES** represented the Applicant. That trial ended with the Judgment delivered on 10th June 2021 and which is the subject of the intended appeal. There is nothing to suggest that the firm of **J. W. SICHANGI & COMPANY ADVOCATES** sought and obtained leave of this Court before coming on record for the Applicant. Counsel for the Respondent has therefore, citing the provisions of **Order 9 Rule 9(a) and (b) of the Civil Procedure Rules**, submitted that this application is *“incompetent and fatally defective.”* Counsel has also cited the case of **STEPHEN MWANGI .V. MURATA SACCO SOCIETY 2018 eKLR** where **J. G. KEMEI J** struck out an application for failure to comply with **Order 9 Rule 9** of the **Civil Procedure Rules**.

Order 9 Rule 9 (a) and (b) of the Civil Procedure Rules provides as follows: -

9: “Where there is a change of advocate, or where a party decides to act in person having previously engaged an advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court –

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

Order 9 Rule 10 of the **Civil Procedure Rules** on the other hand provides that: -

10: “An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

As already stated above, it is not in doubt that the Applicant was previously represented by the firm of **C. K. AREBA & COMPANY ADVOCATES** upto the time when the Subordinate Court delivered it’s Judgment. The firm of **J. W. SICHANGI & COMPANY ADVOCATES** have now come on record for the Applicant and filed their Notice of Appointment simultaneously with this application without leave of this Court. Does that render this application incompetent and therefore a candidate for striking out as submitted by Counsel for the Respondent?

That issue was considered by the Court of Appeal in the case of **TOBIAS M. WAFUBWA .V. BISHOP BEN BUTALI 2017 eKLR** where the Court took the view that a party seeking to appeal a decision of a Subordinate Court after Judgment need not seek leave to act in person or through another advocate. The Court said: -

“Once a Judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia an appeal to an appellate Court is not a continuation of proceedings in the lower Court, but a commencement of new proceedings in another Court where different rules may be applicable, for instance, the Court of Appeal Rules 2010 or the Supreme Court Rules

2010. Parties should therefore have the right to choose whether to remain with the same Counsel or to engage other Counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous advocate.

As this dispute concerned an appeal from the Principal Magistrate’s Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the Respondent’s Counsel was entitled to commence them without filing a Notice of Change or seeking the leave of the Court to be placed on record.”

The Court of Appeal then goes on to add that: -

“We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then Article 159 of the Constitution and the overriding principles could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings.”

The Court proceeded further and cited its decision in the case of **BONIFACE KIRAGU WAWERU .V. JAMES K. MULINGE 2015 eKLR** where in addressing the issue of non – compliance with **Order 9 Rule 9** of the **Civil Procedure Rules**, it said: -

“All in all, we are not persuaded that non - compliance with Order III Rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed, all times, the set procedures ought to be followed or complied with. However, we find that non – compliance in the present matter did not go to the root of the proceedings. The non – compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all.”

That was the path that I followed in the case of **MOSSY KHAEMBA MUCHANGA & DAVIS WABWILE MUCHANGA .V. PAUL LUTOTI KHAWANGA 2020 eKLR** where I declined to strike an application for failure to comply with **Order 9 Rule 9 of the Civil Procedure Rules**. I therefore decline a similar invitation by Counsel for the Respondent to strike out this application for being **“incompetent and fatally defective.”** Further, the firm of **J. W. SICHANGI & COMPANY ADVOCATES** are properly on record for the Applicant.

With regard to the prayer for extension of time within which to appeal, Counsel for the Respondent has rightly cited the case of **NICHOLAS KIPTO ARAP KORIR SALAT .V. IEBC & OTHERS 2014 eKLR** where the Supreme Court of Kenya laid down the following principles that should guide a Court considering such an application. These are: -

- 1. 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.**
- 2. A party who seeks for extension of time has 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 on a case to case basis.**
- 4. Whether there is a reasonable reason for the 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; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

It is not in dispute that the Judgment sought to be appealed was delivered on 10th June 2021. Any appeal therefore should have been filed within thirty (30) days from that date. **Section 79G** of the **Civil Procedure Rules** provides as follows: -

79G: “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.” Emphasis added.

No doubt the Applicant is out of time in her desire to appeal the decision of the Subordinate Court. Among her explanations for not appealing in time, as per paragraph 9 of her supporting affidavit, is that when the Judgment of the Subordinate Court was delivered on 10th June 2021, she had lost her husband and was engaged in burial arrangements. She has however annexed a copy of the burial permit showing that her late husband one **RICHARD TONDWE** infact died on 1st July 2021 some three (3) weeks after the delivery of the Judgment sought to be appealed. There is however evidence by way of hospital notes showing that the deceased was being attended at **BUMULA SUB – COUNTY HOSPITAL** prior to his death – annexures **RNT – 2**. That is sufficient cause in my view to exercise my discretion in the Applicant’s favour. The burial permit discloses that the Applicant’s deceased husband passed away aged 80 years. She has also stated in paragraph five (5) of her application that she **“has been sickly.”** Given those undisputed facts, it cannot be argued that the delay in

approaching this Court was intentional.

The Respondent has annexed to her replying affidavit a copy of e-mail showing that the Judgment sought to be appealed was dispatched to Counsel on 10th June 2021 at 5:20 p.m. The Applicant has however stated in paragraph two (2) of her application that due to the **COVID** rules and regulations, it was not until 10th August 2021 that she became aware of the Judgment and immediately instructed her new Counsel. This Court is also entitled to take judicial notice under **Section 60(0)** of the **Evidence Act** as a matter of general and local notoriety the fact that **MR AREBA** from the firm of **C. K. AREBA & COMPANY ADVOCATES** then appearing for the Applicant is deceased and the e-mail notifying the parties of the delivery of Judgment appears not to have been addressed to that firm. Taking into account the fact that the Judgment sought to be appealed was not delivered in Open Court, the Applicant has in my view laid a basis to the satisfaction of the Court to warrant the exercise of its discretion in her favour. The delay is not inordinate and has been explained. Other than waiting a little longer to realise the fruits of her Judgment, I did not hear the Respondent point at any prejudice that she will suffer if this application is allowed.

Having considered all the matters herein, I am persuaded that the Notice of Motion dated 20th August 2021 is merited and deserves my favourable consideration.

Ultimately therefore, the Notice of Motion dated 20th August 2021 is allowed in the following terms: -

- 1. The Applicant shall within seven (7) days hereof file and serve a Memorandum of Appeal.**
- 2. The Applicant shall also file and serve the record of appeal within sixty (60) days hereof.**
- 3. The appeal shall thereafter be placed before the Court for appropriate directions.**
- 4. Costs shall be in the appeal.**

Boaz N. Olao.

J U D G E

30th November 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF NOVEMBER 2021 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

Boaz N. Olao.

J U D G E

30th November 2021.