



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY

ELC MISC APPEAL NO. 8 OF 2021

(FORMERLY MIGORI ELC MISC APPEAL NO. 22 OF 2019)

MASLIANA AKUMU OLOO.....APPLICANT

VERSUS

PETER ANYANGO OYORE.....RESPONDENT

RULING

1. In an application by a Notice of Motion dated 4th November 2019, duly filed in court on 19th November 2019, pursuant to, inter alia, Section 79 G of the Civil Procedure Act Chapter 21 Laws of Kenya as read with Section 1A of the same Act and sections 3 and 19 of the Environment and Land Court Act, 2015 (2011), one, **MASLIANA AKUMU OLOO** (The applicant) through the firm of G S Okoth and Company Advocates, is seeking the following orders;

- a) The Honourable court be pleased to extend time stipulated for filing and serving the Memorandum of Appeal and allow the applicant to file an appeal out of time.
- b) THEREAFTER the draft memorandum of Appeal be filed in Court upon payment of the requisite fee and be deemed to be filed timeously.
- c) The costs of this application do abide the result of the intended appeal.

2. The application is premised on grounds 1 to 3 stated on it's face and the applicant's fourteen (14) paragraphed supporting affidavit sworn on even date together with copies of documents which include; a Notice of Appeal and a draft memorandum of Appeal marked as "MAO-01" and "MAO5" respectively annexed thereto. In summary, the applicant complains that upon delivery of judgment in Homa Bay Senior Principal Magistrate's Court civil case number 96 of 2011, he filed the notice of appeal in time and he has been under the impression that his appeal was duly lodged since he was unrepresented and not conversant with the procedure thereof. That he also applied for copies of the proceedings and judgment of the trial court which were supplied to her late. That the dispute involves LR No. Kanyamwa/K/K/Kakaeta/1276 which is emotive. That she be granted the orders sought in the application since the appeal is arguable as revealed in the memorandum of appeal.

3. By a fifteen (15) paragraphed replying affidavit sworn on 13th March 2019, the respondent namely PETER ANYANGO OYORE through the firm of P R Ojala and company Advocates, opposed the application. He deposed in part that he never had any dispute with the applicant and that the intended appeal has no chances of success. That the application is an afterthought and that the delay in filing the appeal was intentional and should not be allowed.

4. The application was canvassed by way of written submissions further to the orders and directions of the court given on 23rd February 2021 pursuant to **Order 51 Rule 16 of the Civil Procedure Rules, 2010**(The Rules); see also practice direction number 33 of the Environment and Land Court Practice Directions, 2014.

5. Consequently, learned for the applicant filed a two (2) paged submission dated 31st May 2021 on 23rd June 2021 and urged this court to allow the orders sought in the application. Counsel submitted that the dispute involves land and that the applicant had demonstrated sufficient reason and a good explanation for the delay, among others. Counsel further relied on **section 3 and 19 (1) of the Environment and Land Court, 2015 (2011), section 79G of the Civil Procedure Act Chapter 21 Laws of Kenya and the case of Dilpack Kenya Limited-vs-William Muthama Ketony 2018 eKLR**, to fortify the submissions.

6. On the other hand, learned counsel for the respondent filed a four (4) paged submission dated 11th March 2021 and filed in court on 12th March 2021 where counsel urged this court to dismiss the application with costs to the respondent. Counsel made reference to the judgment of the trial court and submitted, that the applicant was ably represented at the trial and that he was indolent in lodging the intended appeal and

has not shown the reasons for the delay. That the appeal is not arguable and that she is likely to suffer any prejudice. To buttress, the submissions, counsel relied on **Order 42 Rule 1** of the Rules.

7. I have duly considered the application, the replying affidavit and the rival submissions in their entirety. On that account, has the applicant satisfied this court that he has good and sufficient cause for not filing the intended appeal in time?

8. The provisions of the law under which the application is commenced and Order 42 Rule 1 (Supra), are all borne in mind. Further, Order 50 Rules 6, 7 and 8 of the Rules, 2010 provide for power to enlarge time, enlargement of time and computation of days respectively. Indeed, this court has special and inherent jurisdiction to make orders to meet the ends of justice.

9. The applicant contended that she intends to appeal from the decision in a suit involving land reference number Kanyamwa/K/K/Kakaeta/1276 which is emotive. That she should be allowed to exhaust the available avenues. She is entitled to access to justice as enshrined under 48 of the Constitution of Kenya 2010 which reads in part;

“The state shall ensure access to justice for all persons.....”

10. The applicant has also unlimited right to fair hearing of his intended appeal; see **Articles 25 (c) and 50 (1) of the Constitution of Kenya 2010**, the meaning of the term “Trial” in the **Concise English Dictionary 12th Edition** at **page 1539** and the Court of Appeal decision in **James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another 2016 eKLR**.

11. It is trite law that the court ought to exercise the best discretion in this application and that the applicant has an undoubted right of the intended appeal; see the Court of Appeal decision in the case of **Butt-vs-Rent Restriction Tribunal (1979) eKLR**.

12. Clearly, judgment of the trial court in Homa Bay Senior Principal Magistrate’s Court civil case number 96 of 2011 was rendered on 31st January 2019. The applicant was unrepresented. That she filed a notice of appeal in time which is deemed to be an appeal by dint of **Order 42 rule 6 (4) of the Rules**. That she applied for proceedings and judgment which took time to be supplied to her.

13. On that score, the explanation given by the applicant herein is good and sufficient. Thus, the application is merited and the respondent’s opposition to the same, fails.

14. In the result, I hereby allow the application dated 4th November 2019 in terms of order numbers 1 and 2 sought therein. The applicant shall file and serve the intended appeal within 30 days from this date, failing which the leave granted shall lapse without a further order of this court. Costs of the application be costs in the intended appeal.

RULING DELIVERED, SIGNED AND DATED AT HOMA-BAY THIS 23RD DAY OF NOVEMBER 2021.

G.M.A ONG’ONDO

JUDGE

In the Presence of;

Mr. Mulisa holding brief for G.S Okoth learned counsel for the applicant.

Court Assistant: A. Okello.

G.M.A ONG’ONDO

JUDGE

23/11/2021