



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 70 OF 2019**

**LEONARD KAMENCHU KAIRIAMA.....APPELLANT**

**VERSUS**

**ELIJAH MAITAI ICHICHA.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND ADJUDICATION &**

**SETTLEMENT OFFICER TIGANIA DISTRICT.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant has brought a notice of motion which is undated but filed on **10.9.2021** seeking this court to extend time to give, issue and serve a notice of appeal against this court's judgment delivered on **28.7.2021** on the reasons that the judgment was read in the absence of his counsel and, it took time to get in touch with him so as to get proper instructions. The application is supported by an affidavit of **Leonard Kamenchu** sworn on **30.8.2021**.
2. In the said affidavit there is no indication when the applicant's counsel got to learn of the judgment and when the deponent was notified of its delivery subsequent to which he gave instructions to appeal.
3. In the 2<sup>nd</sup> supporting affidavit of **Caroline Rimita** sworn on **30.8.2021**, she complains there was no notice given for the delivery of the judgment, hence was unable to attend or inform the applicant the outcome. The affidavit is silent on when the delivery came to her knowledge and the exact time she got in touch with the applicant.
4. The motion is opposed by the 1<sup>st</sup> respondent through a replying affidavit sworn on 23.9.202. The 1<sup>st</sup> ground is that notice of delivery of judgment was duly served via email to the parties as well as through the Meru-Bar/Bench WhatsApp page to which the applicant's law firm is an active member. Secondly the 1<sup>st</sup> respondent is of the view the discretion cannot be extended on an application based on falsehood. Thirdly the 1<sup>st</sup> respondent submits the application is an afterthought meant to delay this matter yet litigation must come to an end.
5. Both parties filed written submissions dated **14.10.2021** and **19.10.2021** respectively.
6. The applicant relies on Rule 4 of the Court of Appeal rules, ***Karny Zaharwa & Another –vs- Shalon Levi, Nusura Juma-vs- Afwa Mohammed Ramadhan and Abdul Azizi Ngoma –vs- Mungai Mathayo [1976] KLR 62*** on the principles to be considered on whether to grant extension of time or not namely, lack of prejudice, explanation of the delay and if the appeal has chances of success.
7. On the part of 1<sup>st</sup> respondent, he relies on **Rule 4** of the **Court of Appeal Rules, *Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral & Boundaries Commission & 7 Others [2014] Eklr & Laban Masinjila –vs- County Government of Kakamega [2021] eKLR.***
8. Though the notice of motion is based on no section of the law on its face, it is the duty of this court to deliver substantive justice regardless of procedural technicalities.
9. **Section 7** of the Appellate Jurisdiction **Act Cap 9** provides that the High Court may extend time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the appeal is fit for appeal notwithstanding that the time for giving such notice or making such an appeal may have already expired.
10. The parties herein have submitted and quoted case law based on **Rule 4** of the Court of Appeal Rules. Those rules have no relevance to the High Court in exercising its jurisdiction as to the power to extend time to give a notice of appeal.

11. In *Kenya Airports Authority & Another –vs- Timothy Nduvi Mutungi [2014] eKLR* the High Court had declined jurisdiction referring the applicant to the Court of Appeal in which the court held the High Court by dint of **Section 7** of the Appellant Jurisdiction Act was competent to handle and determine such an application.

12. Having established this court has jurisdiction to entertain the application, what then are the principles to guide the court? In *Stanley Kaboro Mwangi & 2 Others –vs- Kanyamwi Trading Co. Ltd. [2015] eKLR* the court held the principles to consider as the period of delay, chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent, the effect of delay on public administration, the importance of compliance with timelines, the resources of the parties and whether the matter raises issues of public importance.

13. The onus is therefore on the applicant to place adequate, and sufficient material to explain the delay, with valid and clear reasons. In this case, judgment was delivered on 28.7.2021 while the application was filed on 10.9.2021, which was only after 12 days upon expiry of the 30 days in which the notice of appeal ought to have been given. The said delay is not inordinate at all.

14. Secondly is whether sufficient reasons have been given for the no-compliance. The applicant's lawyers wrote a letter dated 12.8.2021 to the Deputy Registrar seeking for a copy of the judgment. Obviously it is therefore apparent from the said letter that they knew of the delivery almost 14 days after delivery and 14 days before the deadline to give, file and serve the notice of appeal.

15. The deponents to the two supporting affidavits to the notice of motion are being economical with the truth by not disclosing when the appellant became aware of the delivery of the judgment from his lawyers on record. In my considered view, therefore, the delay has not been sufficiently explained to the satisfaction of the court.

16. As regards the chances of the intended appeal succeeding, ground number C of the notice of motion alludes to the issue that the case raises technical issues of law and facts which it is just and fair and in the interest of justice that the appellant is allowed to ventilate in the Court of Appeal. The supporting affidavits do not attach a draft memorandum of appeal which may demonstrate the legal technical issues requiring revisiting by the Court of Appeal.

17. The issue before the lower court and the High Court was whether the court had jurisdiction to entertain a claim or cause of action arising from the decision of the Arbitration Board case relating to a land falling under an adjudication section without exhausting the dispute resolution mechanisms as provided by **Section 29 (1)** of the **Land Adjudication Act Cap 284** as read together with **Section 26 (3)** of the **Land Consolidation Act Cap 283 Laws of Kenya**.

18. The High Court held and found the consent by a DLASO could not confer jurisdiction as jurisdiction can only be conferred by the Constitution or statute or both.

19. On the issue of public interest **Article 159 2 (c)** of the **Constitution** advocates for the courts to respect and encourage use of alternative dispute resolution mechanisms such as those under the **Land Adjudication Act** and the **Land Consolidation Act**. This is for good measure for courts to exercise judicial restraint and judicial deference.

20. Secondly, under **Section 1A** of the **Civil Procedure Act** the overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Lawyers for such parties are also required to assist courts to further the overriding objective and to comply with directions and orders of the court.

21. Under **Section 1B** of the **Civil Procedure Act**, courts are expected in all matters presented to them to attain the just determination, in an efficient manner while using the available judicial time and administrative resources efficiently and in a timely manner. Public policy therefore militates against saddling courts with matters which should otherwise be handled by the available alternative disputes resolution mechanisms, unless it has been demonstrated there are exceptional circumstances of the matter to which the alternative dispute resolution lacks capacity to determine.

22. In the instant intended appeal, there are no exceptional technical legal issues of law and fact demonstrated. In any event the issue before both the lower court and the High Court was a preliminary objection based on matters of law and not facts.

23. On the issue of prejudice, the 1<sup>st</sup> respondent submits the application is an afterthought only meant to procrastinate litigation against the principles that litigation must come to an end. As noted from the pleadings, the dispute arose from an arbitration board case which is a statutory body established under the **Land Adjudication Act** to hear and determine complaints arising out of the ascertainment and registration of rights to land. Land being an emotive issue must be settled in a timely and orderly manner.

24. The body established to ascertain and register rights as to land is the Department of Land Adjudication and Settlement. It is only after the ascertainment of interest and the adjudication register and record are declared final that a title deed can be issued. The anxiety as to who is the rightful owner of land cannot be removed unless the land adjudication officers are given room and space to undertake their duties without superintendence from other quarters. This is the reason why the right to move to court under the aforesaid Acts are restricted. After all if and where there are irregularities, illegalities, fraud and collusion, the parties still have another chance after exhausting the internal mechanism to challenge the title under **Section 26** of the **Land Registration Act 2012**.

25. The long and short of this is the delay in filing the notice of appeal and the eventual appeal shall definitely impact on the public administration of adjudication process to the detriment of the parties. Lastly the issue does not in any way invoke any public importance.

26. For the above reasons, the application lacks merit. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2021**

**In presence of:**

**Gachuki for 1<sup>st</sup> respondent**

**Mr. Kimathi for 2<sup>nd</sup> and 3<sup>rd</sup> respondent**

**Orimba for appellant**

**HON. C.K. NZILI**

**ELC JUDGE**