



**REPUBLIC OF KENYA**

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

**ELC CASE APPEAL NO. 23 OF 2021**

**(FORMERLY MIGORI ELC APPEAL NO. 29 OF 2020)**

**ELISHA JABOYA .....APPELLANT**

**VERSUS**

**KENNEDY ODHIAMBO NYAORO.....RESPONDENT**

**RULING**

1. At the outset, it must be noted that the Deputy Registrar of this court issued a notice to the parties through their respective counsel via email, [gandeda2006@gmail.com](mailto:gandeda2006@gmail.com) and [reyobach@gmail.com](mailto:reyobach@gmail.com) on **30<sup>th</sup> November 2021** at 02.26 PM GMT+3 as regards this ruling. So, the parties are duly notified hereof.
2. The Appellant, Elisha Jaboya (the applicant herein) through the firm of Ndeda and Associates Advocates originated this application by way of a notice of motion dated 6<sup>th</sup> August 2020 on 20<sup>th</sup> August 2020 under section 79 G of the Civil Procedure Act Chapter 21 Laws of Kenya, among other legal provisions. He is seeking the orders infra;
  - a) spent
  - b) **THAT** the applicant be granted leave to file an appeal out of time against the Judgment of this Honourable Subordinate Court delivered on 7<sup>th</sup> November 2019 and all orders consequent thereto.
  - c) **THAT** the costs of this application be in the cause.
3. The application is premised on the applicant's supporting affidavit of sixteen (16) paragraphs sworn on even date and copies of the judgment of the trial court, a bill of costs and a draft memorandum of appeal marked as "EJ1, EJ2 and EJ3" respectively and annexed thereto. The application is further premised on grounds (a) to (j) stated on the face of the same.
4. In brief, the applicant's lamentation is that on 19<sup>th</sup> March 2019, judgment was delivered against him in Homa Bay Chief Magistrate's court Environment and Land case number 24 of 2018. That he was not aware of the delivery of the judgment as his counsel then on record, M/S Robert Ochieng and Company Advocates, failed to inform him of the same. That therefore, mistake of his counsel should not be visited on him. That the delay in filing the appeal which has substantial legal issues as disclosed in the memorandum of appeal attached to the application, was not deliberate and that the respondent is not bound to be prejudiced thereby.
5. By an 11-paragraphed replying affidavit sworn 27<sup>th</sup> October 2020 and duly filed in court on 28<sup>th</sup> October 2020, the respondent, Kennedy Odhiambo Nyaoro through the firm of H.Obach and Partners Advocates, opposed the application. He prayed for dismissal of the same for being a waste of judicial time and resources. That the application is malicious, insufficient and a ploy to delay the ends of justice as the applicant was aware of the delivery of the judgment marked as "KON 1" annexed to the affidavit.
6. The respondent further deposed that the delay in filing the appeal is inexcusable. That if the orders sought in the application are granted, he is likely to be prejudiced and deprived of his right to the estate of his father.
7. Initially, the application was lodged at Migori Environment and Land Court. On 5<sup>th</sup> October, 2021, the court (Kullow J) directed that the present matter be transferred to this court, upon its establishment, for hearing and determination. The court ordered and directed that the application be argued by way of written submissions.
8. Accordingly, the applicant's counsel filed submissions of three (3) pages dated 22<sup>nd</sup> September 2021 on 28<sup>th</sup> September 2021 where brief facts of the matter are set out and framed an issue for determination namely whether the court can admit an appeal out of time. In the analysis

of the issue in favor of the applicant, counsel relied on **sections 79G and 95 of the Civil Procedure Act Chapter 21 Laws of Kenya, Nicholas Kiptoo Arap Korir Salat-vs-Independent Electoral and Boundaries Commission and 7 others (2015) KLR, , Hudson Kidaha Kisigwa-vs-Romaggo Kenya Ltd (2019) eKLR, and Edward Kamau and another-vs-Hannah Mukui Gichuki and another (2015) eKLR** , to buttress the submissions. It was submitted that the applicant has given sufficient reason for the delay in filing the appeal. That the applicant has the constitutional right to lodge the appeal and urged the court to exercise it's discretion and grant the orders sought in the application.

9. The respondent failed to file submissions in this application.

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

11. The applicant asserted that the period of filing an appeal as stipulated under the provision of section 79G (supra), has since lapsed. I take into account the proviso to the said section alongside the provisions of **sections 13 (1) and 16A (2) of the Environment and Land Court, 2015 (2011)** regarding appeals.

12. The applicant further contended that he was not aware of delivery of the judgment in the suit before the trial court. That his advocate on record at the time failed to inform him of the same and he cited the decision in **Hudson Kisigwa case** (supra).

13. In the case of **Butt-vs-Rent Restriction Tribunal (1979) eKLR**, the Court of Appeal observed that the litigants and their professional advisors are the best judges in their affairs. In that regard, it was the duty of the applicant to pursue his counsel to find out the position of the case as held by the Court of Appeal in **Bi-Mach Engineers Ltd-versus-James Kahoro Mwangi (2011) eKLR**.

14. Access to justice is anchored under Article 48 of the Constitution of Kenya, 2010. In addition, the unlimited right to fair hearing is stipulated at Article 50 (1) as read with Article 25 (c) of the said Constitution.

15. The applicant has the constitutional right to ventilate the appeal as noted in **Edward Kamau case (supra)**. Indeed, he has an undoubted right of appeal as held in **Butt case (supra)**.

16. The guiding principles in an application for extension of time are well settled; see **Nicholas Salat case** (supra).

17. Under **section 95 of the Civil Procedure Act** (supra), the court is vested with the discretion to enlarge time. **Order 50 rules 6 and 8 of the Civil Procedure Rules, 2010** provides for the power to enlarge time and computation of days respectively.

18. In the obtaining circumstances, it is the finding of this court that the applicant has shown a good and sufficient cause for not lodging the appeal in time. The application is meritorious.

19. Accordingly, the application commenced by way of a notice of motion dated 6<sup>th</sup> August 2020 and filed herein on 26<sup>th</sup> August 2020, be and is hereby allowed on terms that;

a) The applicant is hereby granted leave to file an appeal out of time within the next thirty (30) days from this date in respect of the Judgment delivered in Homa-Bay Chief Magistrate's Court, Environment and Land Case No. 24 of 2018, failure of which the leave granted herein to lapse automatically.

b) Costs of the application be costs in the intended appeal.

20. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 15TH DAY OF DECEMBER 2021**

**G M A ONGONDO**

**JUDGE**

**PRESENT**

1) The applicant

2) Okello, Court Assistant