



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E009 OF 2021

RICHARD CHESOMEPLAINTIFF

VERSUS

MIX WAFULA SIMITI.....1ST DEFENDANT

IBRAHIM WAFULA BARASA 2ND DEFENDANT

R U L I N G

RICHARD CHESOME (the Applicant herein) has approached this Court citing the provisions of **Rules 4, 41, 42 and 43** of the **Court of Appeal Rules**. I must confess that I was flattered to be asked to interrogate those provisions. Nonetheless, I wish to remind the Applicant and his Counsel that I don't sit in the **COURT OF APPEAL**. My attempts to join the Court went up in smoke in 2019 and I ended up being a page boy. Perhaps I will strike better luck next time.

The above cited rules do not apply in a situation such as this where I am considering an application for extension of time to appeal against a decision of a Subordinate Court. However, that wrong citation is not fatal to the application. I will save it by invoking **Article 159 2 (d)** of the **Constitution** and **Order 51 Rule 10(2)** of the **Civil Procedure Rules**.

By the Notice of Motion dated 6th August 2021 and filed herein on 17th August 2021, the Applicant seeks the following orders: -

- 1. That this Honourable Court be pleased to grant leave to the Applicant to file the Notice of Appeal out of time pursuant to Rule 4 of the Appellate Jurisdiction Act CAP 9.**
- 2. That this Honourable Court be pleased to extend time within which to file an appeal to this Court out of time pursuant to Rule 4 of the Appellate Jurisdiction Act CAP 9.**
- 3. That, as an alternative to prayer (2) above, this Court be pleased to grant the Applicant leave to filed the intended appeal against the Judgment dated 24.6.2021.**

The application is premised on the grounds set out therein and is supported by the Applicant's affidavit also dated 6th August 2021.

The gravamen of the application is that the Applicant who was the plaintiff in **BUNGOMA CHIEF MAGISTRATE'S LAND CASE No 56 of 2019** was dissatisfied with the Judgment of **HON. E. N. MWENDA PRINCIPAL MAGISTRATE** delivered on 24th June 2021 and seeks to appeal against the same. However, efforts to file a Notice of Appeal was not successful since the E- filing system had issues and the Court did not assess the necessary fees. That via a letter dated 12th November 2020 (this must be a typo), Counsel for the Respondent wrote to the Court requesting for the Judgment date. That the delay in filing the Notice of Appeal in time was not deliberate but was due to the inconvenience caused by the E – filing system. That this application has been filed without undue delay and it is in the interest of justice that it be allowed.

The application is opposed and **IBRAHIM WAFULA BARASA** (the 2nd Respondent herein) has filed a replying affidavit in which he has deponed, inter alia, that the Judgment sought to be appealed was delivered by **E. N. MWENDA** and the Applicant's suit was dismissed. The Applicant then filed an application dated 1st July 2021 seeking a stay of the Judgment. That application was dismissed through a ruling dated 26th August 2021. That the Applicant has not shown that he made calls to the Registry or sent e – mail, to the Court over the matter. That there has been an inordinate delay in filing the appeal and the Applicant has not even shown any evidence that the Notice of Appeal has been filed. This application should therefore be dismissed with costs.

When the application was placed before me on 21st September 2021, I directed that it be canvassed by way of written submissions. Both parties complied.

I have considered the application, the rival affidavits and the submissions as filed both by **MS NASIKE** instructed by the firm of **NASIKE WAFULA AND ASSOCIATES ADVOCATES** for the Applicant and by **MR KUNDU** instructed by the firm of **SITUMA AND COMPANY ADVOCATES** for the Respondent.

Section 79G of the **Civil Procedure Act** provides as follows: -

“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.

It is clear from the case of **NICHOLAS KIPTOO arap KORIR SALAT .V. I.E.B.C & OTHERS 2014 eKLR** that the following principles guide a Court considering an application of this nature: -

- (a) 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.**
- (b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.**
- (c) Whether the Court should exercise its discretion to extend time is a consideration to be made on a case to case basis.**
- (d) Where there is a reason for delay, it should be explained to the satisfaction of the Court.**
- (e) Whether there will be any prejudice suffered by the Respondent if the extension is granted.**
- (f) Whether the application has been brought without delay.**
- (g) 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 24th June 2021 by way of electronic mail to the addresses provided by Counsel. I have not heard the Applicant say that the e – mail addresses contained in the Certificate of delivery of Judgment issued on 24th June 2021 is not the address of his Counsel. It is not clear therefore why the Applicant has deponed in paragraph 5 of his supporting affidavit that: -

5: “That via the later dated 12th November 2020, Advocates for the respondents herein wrote to the Court requesting for the Judgment date, which letter was copied to our advocates on record. Annexed hereto and marked AOI’2, is a copy of the said letter.”

No such letter dated 12th November 2020 was annexed to the said affidavit as alleged.

The Applicant has also alleged that he had challenges with the E – filing system. However, as the 2nd Respondent has deponed in paragraph 6 of his replying affidavit, no evidence has been produced by the Applicant to demonstrate that he made calls or sent any e – mails to the Court over the challenges, if any, that he was experiencing with the E – filing system. And even assuming that the Applicant was not aware about the Judgment delivered on 24th June 2021 and that Counsel for the Respondents is the one who had to write to the Court on 12th November 2020 enquiring about it, he has not said when he subsequently became aware of the Judgment.

It is trite that whereas the Court has the discretion to extend time, such discretion can only be exercised in favour of a party who has demonstrated good and sufficient cause. No doubt the Applicant has a right to pursue an appeal if he is aggrieved by the Judgment. The corollary is also true that a party who has a Judgment in his favour and from which no appeal has been preferred has a right to enjoy the benefits of his Judgment. That right can only be taken away from the party for good and sufficient cause. In **QURESHI .V. PATEL 1964 EAL R 633, MILES J** took the view that there is no difference between the words “**sufficient cause**” and “**good cause.**” I would similarly subscribe to that view. In **BLACK’S LAW DICTIONARY 10TH EDITION**, the term good cause is defined as: -

“A legally sufficient reason. Good cause is often the burden placed on a litigant (usv by Court rule or order) to show why a request should be granted or an action excused.”

It cannot be good and sufficient cause when a party seeking the Court’s indulgence in his favour does not satisfactorily demonstrate that he is deserving of the exercise of that discretionary but equitable jurisdiction with the respect to the matters placed before the Court for its determination. In the circumstances of this Court, there is clear evidence of in – action and malafides on the part of the Applicant in failing to act within the prescribed time – lines in the law. The delay has not been explained to my satisfaction.

The up – shot of the above is that the Notice of Motion dated 6th August 2021 is devoid of merit. It is dismissed with costs to the 2nd Respondent.

BOAZ N. OLAO.

J U D G E

16TH DECEMBER 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 16TH DAY OF DECEMBER 2021 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO.

J U D G E

16TH DECEMBER 2021.