



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT SIAYA**

**MISCELLANEOUS ENVIRONMENT AND LAND COURT APPLICATION NUMBER 2 OF 2021**

**MONICA OPETE.....APPELLANT**

**VERSUS**

**MICHAEL OWINO AWINDE.....RESPONDENT**

**RULING**

**Introduction**

1. The respondent in **Siaya PM-ELC 74A of 2018** filed suit against the appellant claiming customary trust over NORTH GEM/MALUNGA/219(**the suit property**). The appellant denied the respondent's averments. After hearing the parties, the court on 15/04/2021 entered judgement in favour of the respondent and ordered each party to bear their own costs. Dissatisfied and aggrieved by the decision of the court, the appellant filed the instant motion dated 17/08/2021. The motion is the subject of this ruling.

**Appellant's case**

2. The appellant seeks the following prayers; (i) to be granted leave to appeal out of time against the judgement of the lower court, and, (ii) costs to be provided for. The motion was primarily grounded on; (i) delay is excusable, (ii) the appellant was acting in person and she did not know the time frame for lodging an appeal, (iii) she has an arguable appeal and, (iv) she is not guilty of inordinate delay. The affidavit in support of the motion reiterates the averments in the appellant's motion. The appellant has annexed a draft memorandum of appeal to his motion dated 17/08/2021.

**Respondent's case**

3. The respondent filed a replying affidavit dated 17/09/2021 and contended the appellant had not given a justifiable reason why the appeal was filed out of time and averred that he will be highly prejudiced.

**Appellant's submissions**

4. The appellant filed her written submissions dated 1/10/2021. In her submissions, the appellant has placed reliance on **Sections 79G and 95 of the Civil Procedure Act** as the statutory provisions that clothes this court with jurisdiction to grant the orders sought. She equally placed reliance on the cases of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** and **First American Bank of Kenya Ltd vs Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No.2255 of 2000 (2002) 1 EA 65** which set out the parameters that guide courts in exercising their discretionary powers in motions seeking enlargement or extension of time to file an appeal. She urged the court to allow the motion. The appellant framed two issues for determination; (i) whether the appellant has an arguable appeal and (ii) whether there will be any prejudice suffered by the respondent if the extension is granted.

**Respondent's Submissions**

5. The respondent filed written submissions dated 12/10/2021. He contended that the time frame for filing an appeal is 30 days and it is apparent the appellant slept on her rights. He submitted the instant motion was an afterthought and a waste of court's time. He averred the appellant does not have an arguable appeal. He placed reliance on **Nicholas Kiptoo Arap Korir Salat case (ibid)** and **Major Joseph Mweteri Igweta vs Muhura M'ethare & Attorney General Civil Appl. Nai 8/00 (UR)**.

**Analysis and determination**

6. Having considered the motion, supporting affidavit, replying affidavit, annexure and submissions, the court considers that these are the

issues falling for determination; (i) whether the appellant shall be granted leave to file an appeal out of time and, (ii) whether the draft memorandum of appeal dated 17/08/2021 and annexed to the appellant's motion shall be deemed as duly filed. The issues shall be dealt with in a sequential manner.

I will proceed to analyze the legal and jurisprudential framework on these issues.

7. The appellant has moved this court within the provisions of **Order 21 Rule 22(1)** of the **Civil Procedure Rules** instead of **Order 50 Rule 6** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The overriding objective of this court is to do substantive justice in cases presented before it. Being guided by **Article 159(2)** of the **Constitution**, **Order 2 Rule 12** and **Order 51 Rule 10(1)** of the **Civil Procedure Rules**, this court shall administer justice without undue regard to procedural technicalities.

8. The provisions of law that clothes this court with discretionary jurisdiction to grant leave to file an appeal out of time lies with **Sections 79G** and **95** of the **Civil Procedure Act** and **Section 16A** of the **Environment and Land Court Act** and in order for a party to succeed in such a motion, an appellant must satisfy the court that she has a good and sufficient cause for not filing the appeal in time.

9. The principles that guide courts in allowing or declining a motion seeking leave to file an appeal out of time was settled by the Supreme Court of Kenya in the case **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** where the court set out the principles as follows: -

*“we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:*

- 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 respondents 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”.*

10. Has the appellant met the principles outlined in the **Nicholas Kiptoo Arap Korir Salat case (ibid)**? Though the provisions of law do not set out the maximum or minimum period of delay, an applicant has to demonstrate that she has good and sufficient cause for the delay.

11. The main ground the appellant has proffered for the delay is that she was acting in person in the lower court and by the time she instructed counsel to act for her, time had already run out. Looking at the circumstances of the delay, it is the considered view of this court that the appellant has proffered a reasonable and plausible explanation for the delay.

12. The period of delay from the time the judgement was delivered to the time this motion was filed is approximately 4 months. This motion was filed on 17/08/2021 while the judgement was delivered on 15/04/2021. It is the finding of this court that the period of time is not inordinate to warrant denial of the appellant the right to argue her case on appeal.

13. The court has had a chance to look at the memorandum of appeal annexed to the appellant's motion. It is the considered view of this court that the grounds set out therein establish an arguable case with possibility of success and the appellant should not be denied access to the seat of justice.

14. It is the finding of this court that the appellant has met the criteria for the grant of leave to file an appeal out of time and the motion is merited.

15. Consequently, this court makes the following disposal orders;

- a) The appellant is granted leave to appeal out of time.*
- b) The draft memorandum of appeal dated 17/08/2021 is deemed as duly filed.*
- c) Lower court file to be availed to this court within 30 days from today.*
- d) Case to be mentioned for directions on 19/01/2022.*
- e) Costs shall be in the cause.*

**Ruling delivered in open court.**

**DATED, SIGNED AND DELIVERED THIS 14TH DAY OF DECEMBER 2021**

**IN THE PRESENCE OF:**

**MR. OWUORO FOR THE APPELLANT**

**RESPONDENT PRESENT IN COURT**

**COURT ASSISTANT: SARAH OORO**

**HON. A. Y. KOROSS**

**JUDGE**

**14/12/2021**