



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISC. No. E010 OF 2021

NASHON OBURENYI.....APPLICANT

VERSUS

IBRAHIM OMULOKOLI ANDO.....RESPONDENT

RULING

1. By Notice of Motion dated 22nd April 2021, the applicant herein seeks the following orders:

1. *[Spent]*

2. *[Spent]*

3. *That the applicant be granted leave by this honourable court for extension of time to file and serve memorandum of appeal together with record of Appeal upon the Respondent.*

4. *That upon grant of prayer (3) above the applicant be given a period within which to file and serve the memorandum of appeal together with Record of Appeal.*

5. *That the costs of this application be in the cause.*

2. The application is supported by an affidavit sworn by Nashon Oburenyi, the applicant. He deposed that the respondent filed Vihiga SPM ELC No. 18 of 2018 against him. That he had earlier filed Kakamega ELC No. 109 of 2016 against the respondent over the same subject matter and that his advocate advised him that the Kakamega matter was to be heard and determined first. That as he waited for updates from his advocate, he fell sick and it was until October 2020 when he visited the Vihiga Court registry only to learn that judgment had been delivered. That he applied for stay of execution before the subordinate court but the application was dismissed.

3. Among the grounds stated on the face of the application are that the judgment was delivered on 29th October 2019 and that as a result of the applicant's sickness as well as Covid 19 pandemic, the applicant could not access court to apply for proceedings and file an appeal within good time. That the applicant has an arguable appeal with overwhelming chances of success.

4. The respondent opposed the application through grounds of opposition in which he took the position that the application does not disclose any ground for stay of execution, that no draft memorandum of appeal had been availed and that the application is an abuse of the court's process.

5. The application was canvassed through written submissions which both sides duly filed. The applicant restated that the delay was caused by sickness and the pandemic. He cited the case of **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR** and urged the court to allow the application.

6. In response, the respondent argued that the applicant had not filed any memorandum of appeal and that the applicant had not satisfied the grounds for granting stay. He urged the court to dismiss the application.

7. I have considered the application and the submissions. I will not preoccupy myself with the aspect of stay pending appeal since a reading of the prayers in the application reveals that stay was only sought pending hearing and determination of the application. There is no prayer for stay pending hearing and determination of the proposed appeal.

8. The only prayers that fall for determination are prayers 3 to 5 which deal with enlargement of time within which to appeal. The principles applicable to an application for enlargement of time were discussed by the Supreme Court in the case of in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] eKLR as follows:

This being the first case in which this Court is called upon to consider the principles for extension of time, 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; ...

9. The judgment that the applicant seeks to appeal against was delivered on 29th October 2019. The judgment and decree were passed by the subordinate court in exercise of its environment and land jurisdiction pursuant to **Section 9 (a)** of the **Magistrates' Courts Act, 2015** as read with **Section 26** of the **Environment and Land Court Act, 2011**. In terms of **Section 16A** of the **Environment and Land Court Act, 2011**, the applicant was required to file any appeal against the decree to this court within 30 days of delivery of the judgment. In other words, the appeal ought to have been filed not later than 29th November 2019. The present application was filed on 22nd April 2021. There was thus a delay of about one and a half years.

10. The applicant has sought to explain the delay by citing sickness and Covid 19 pandemic. To support the claims of sickness, he annexed copies of treatment notes. A perusal of the notes reveals the dates treatment as running from 18th October 2020 to 20th October 2021. In other words, treatment if any, started almost a year after the appeal was due. Further, I have noted some alterations on the year of treatment which creates doubt whether treatment was in the year 2020 or 2021. Either way, I have not found the treatment notes helpful at all.

11. The applicant also laid blame on the Covid 19 pandemic and the resultant disruption. I take judicial notice that it was not until mid-March 2020 when the first case of Covid 19 was confirmed in Kenya after which the disruptions attributable to the pandemic started. By the time the pandemic started disrupting life in Kenya, the applicant's proposed appeal was already three and a half months late.

12. Although the applicant stated that he became aware of the judgment in October 2020 and despite seeking stay of execution in the subordinate court through an application filed on 6th October 2020, he did not file an application for extension of time until over six months later, on 22nd April 2021.

13. I am not persuaded that the applicant has any plausible and satisfactory explanation for the delay. That being the case, Notice of Motion dated 22nd April 2021 is without merit. I dismiss it. Each party to bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF DECEMBER 2021.

D. O. OHUNGO

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

APPLICANT PRESENT

NO APPEARANCE FOR THE RESPONDENT

COURT ASSISTANT: E. JUMA