



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 163 OF 2015

DAVID MWANIKI KASIMU.....APPELLANT

VERSUS

COLLINS MUSYANI MUTHANGYA (*Sued as the legal representative of*

JOHN MUTHANGYA KASIMU.....1ST RESPONDENT

TOWN COUNCIL OF MWINGI.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Senior Resident Magistrate's Court

at Mwingi in Civil Case No. 56 of 2002 delivered on 21st November, 2012

by Hon. H.M. Nyaberi –Ag. Senior Principal Magistrate)

RULING

1. In the Application dated 3rd April, 2019, the Applicant is seeking for the following orders of the court.

a) The Appellant be and is hereby granted leave to seek leave of Court to Appeal against the Ruling and order of this Court dated and delivered by Hon. Justice Mr. O. A. Angote on 31st July, 2018 out of time.

b) The Appellant be and is hereby granted leave to Appeal to the Court of Appeal against the Ruling and order of this Court dated and delivered by Hon. Justice Mr. O. A. Angote on 31st July, 2018 within fourteen (14) days.

c) The costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Applicant who has deponed that he filed an Application dated 24th January, 2018 seeking admission of additional evidence in the Appeal; that the court reserved its Ruling for 31st July, 2018; that the advocate on record confused the Ruling date and diarized it as 3rd July, 2018 instead of 31st July, 2018 and that his advocate, while doing his routine research stumbled on the Ruling which he had been waiting for all along.

3. According to the Applicant, he is dissatisfied with the Ruling of the Court and would wish to Appeal to the Court of Appeal and that an Appeal against an order such as the one dated 31st July, 2018 does not lie as of a right and the leave of the court ought to have been sought immediately upon delivery of the Ruling within fourteen (14) days.

4. The Applicant finally deponed that he is desirous of pursuing his right of Appeal and that the court should exercise its discretion and enlarge time for seeking leave to Appeal out of time.

5. In response, the 1st Respondent deponed that the Applicant is enjoying orders of stay of execution; that this court does not have jurisdiction to hear and determine the Application and that it is not prudent for a party to wait for seven (7) months without making a follow-up on the Ruling.

6. In his submissions, the Applicant's advocate submitted that the court that should grant leave to Appeal where an Appeal does not lie as of

a right is the court whose Ruling is sought to be appealed from; that it is the discretion of this court to determine whether to enlarge time or not and that the orders sought are discretionary in nature.

7. On his part, the Respondents' advocate submitted that Section 75 of the Civil Procedure Act does not provide for leave to Appeal out of time; that the Application has been filed out of time and that there is no prayer for leave to file the Application out of time.

8. The Respondents' counsel submitted that there is no provision in law for the High Court to grant orders to file Appeal to the Court of Appeal out of time and that the jurisdiction to Appeal out of time is the preserve of the Court of Appeal under Rule 4 of the Court of Appeal Rules.

9. On 25th January, 2018, the Applicant filed an Application dated 24th January, 2018 seeking for an order to be allowed to produce additional evidence limited to the production and admission in evidence of the Report of the Document Examiner. The said Application was dismissed by this court vide a Ruling dated 31st July, 2018.

10. The Application by the Applicant is for *“leave to seek leave of court to Appeal against the Ruling and order of this court out of time”* and for *“leave to Appeal to the Court of Appeal against the Ruling.”*

11. The Application has been filed pursuant to the provisions of Section 75 of the Civil Procedure Act, Orders 50 Rule 6 and Order 43 Rule 1 of the Civil Procedure Rules.

12. Section 75 of the Civil Procedure Rules and Order 43 provides for the circumstances under which an Appeal shall lie as of right from the orders of this court to the Court of Appeal. It is not in dispute that in an Application seeking for leave to file additional evidence, leave to Appeal is required before a party can lodge an Appeal in the Court of Appeal.

13. Order 43 Rule 3 of the Civil Procedure Rules provides as follows:

“3. Nothing in this Order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.”

14. From the above provision of the law, the Applicant was required to file an Application seeking for leave to Appeal against the order of 31st July, 2018 within fourteen (14) days. However, according to the Applicant, his advocate only knew of the Ruling of 31st July, 2018 on 11th March, 2019 *“while doing their routine research.”*

15. Although the Applicant's advocate has admitted that he was in court when the court reserved the Ruling for 31st July, 2018, it is his contention that he diarized the Ruling date as 3rd July, 2018 and not 31st July, 2018; that the said error was his mistake and that his mistake should not be visited on his client.

16. The advocate's plea of not diarizing the date of 31st July, 2018 is not supported by an extract of his diary. Indeed, the assertion of diarizing the Ruling date as *“3rd July, 2018”* and not *“31st July, 2018”* is not supported by any evidence at all, except for the letters dated 29th May, 2018 and 7th February, 2019.

17. In any event, even if it is true that the Applicant's advocate could not have filed an Application for leave to Appeal within fourteen (14) days because he was not aware of the delivery of the impugned Ruling, this court cannot exercise its discretion in favour of the Applicant because the delay of filing this Application even after the discovery of the existence of the Ruling has not been explained. Indeed, one would have expected that upon *“stumbling upon the Ruling of the court on 11th March, 2019”*, the current Application should have been filed immediately. However, the Applicant had to wait until 12th April, 2019 to file the Application.

18. The grounds upon which a court can extent time to file an Application was set down by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR* as follows:

“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. ...

3. ...

4. Where there is a reasonable cause of the delay, the same should be expressed to the satisfaction of the court.

5. Whether there will be any prejudice suffered by the Respondents, if extension is granted;

6. Whether the Application has been brought without undue delay;

7. ...”

19. This is a 2015 Appeal. Litigation in this matter started in the year 2002. The continued delay in prosecuting the Appeal is prejudicial to the Respondents herein, and moreso in a situation where the Appellant is enjoying the *status quo* orders. It is therefore only in order that the rights of the parties are determined expeditiously by fixing the Appeal for hearing.

20. For those reasons, I dismiss the Notice of Motion dated 3rd April, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020.

O.A. ANGOTE

JUDGE