



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI LAW COURTS**

**ELC CIVIL MISC APP.NO 76 OF 2019**

**BEATRICE MALESI.....APPLICANT**

**VERSUS**

**PETER NDIRITU & ANOTHER.....RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 7<sup>th</sup> May 2019, the Applicant sought leave to file an appeal against the Judgement of M/s I Gichohi SRM delivered on 24<sup>th</sup> December 2018. The Applicant argues that the case was heard at Milimani Commercial Court within Nairobi but as at the time the Judgement was delivered, the trial magistrate had been transferred to Kangema Law Court. The Judgement was delivered in Nairobi on her behalf by Mr D O Mbeja S RM.

2. The Applicant contends that there was no Notice of delivery of Judgement issued and as such the Applicant only came to know about it when the 1<sup>st</sup> Respondent went to the ground to sub divide the suit property. It is then that the Applicant informed her Advocate who went to court and found out that Judgement was delivered in the absence of the Advocates for the parties.

3. The 1<sup>st</sup> Respondent has opposed the Applicant's application through a replying affidavit sworn on 16<sup>th</sup> September 2019. The 1<sup>st</sup> Respondent contends that there was a notice of delivery of Judgement which was pinned outside the door of the court where the Judgement was delivered; that the Applicant is out to delay the realization of the fruits of his judgement and that the intended appeal has no arguable ground as the 1<sup>st</sup> Respondents property is separate from that of the Applicant and that the issue of subdivision does not arise.

4. I have considered the Applicant's application and the opposition thereto by the Respondent. I have also considered the submissions by the parties. The only issue for determination is whether the Applicant has demonstrated that she has grounds upon which this court can exercise its discretion to extend time. In **Paul Musili Wambua-Vs- Attorney General & 2 Others (2015) eKLR Justice Koome J A** stated as follows:-

***“It is now well settled by a long line of authorities by this court that the decision of whether or not to extend time for filing an appeal the Judge exercises unfettered discretion However, in the exercise of such discretion, the court must act upon reasons not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted”.***

5. In the instant case, Judgement was delivered on 24<sup>th</sup> December 2018. This application was filed on 8<sup>th</sup> May 2019. This was a delay of over four months. What was the reason for the delay?. The Applicant states that there was no notice of delivery of Judgement given. The Applicant came to know about the Judgement when the 1<sup>st</sup> Respondent went to the ground to sub divide the suit property. I have looked at the Judgement which was delivered. There were no advocates present. Though the Respondent claims that there was a notice pinned outside the court rooms, that does not amount to a notice to the parties. Order 21 Rule 1 of the Civil Procedure Rules provides that if judgement is not delivered at once or within 60 days from conclusion of the trial notice shall be given to parties or their advocates.

6. There is no evidence that notice was given as required because judgement was not delivered within the 60 days given under Order 21 Rule 1. Even if there was notice pinned outside the court room, there is no way the parties would have known about the matter. The Respondent or his lawyers were not in court either. I therefore find that the delay has been explained.

7. The Applicant contends that the 2<sup>nd</sup> Respondent had allocated it to the suit property but that the same Respondent later illegally subdivided it and sold it to someone else who in turn sold it to the 1<sup>st</sup> Respondent. It is therefore clear that the appeal raises an arguable ground. It has been said that an arguable appeal is not one which will necessarily succeed.

9. The 1<sup>st</sup> Respondent's contention is that his plot is separate from that of the Applicant. If that be the case, I do not see what prejudice he will suffer if the Applicant is allowed to appeal. If the 1<sup>st</sup> Respondent has constructed permanent structures which are on his land, there is no prejudice which he will suffer. I therefore find that this is a proper case where to exercise discretion in favour of the Applicant. I therefore allow the Applicant's application and extend the period for filing the appeal by 14 days. Costs of this application shall be costs in the appeal. It is so ordered.

Dated, Signed and delivered at Nairobi on this 30<sup>th</sup> day of January 2020.

**E.O.OBAGA**

**JUDGE**

In the presence of:

Mr. Mwangi for 1<sup>st</sup> defendant /respondent

Mr. Owange for 2<sup>nd</sup> defendant.

Court Assistant : Waweru

**E.O. OBAGA**

**JUDGE**