



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC MISCELLANEOUS APPLICATION NO.44 OF 2018**

**MICHEAL MWEU MUTUKU.....INTENDED APPELLANT/APPLICANT**

**VERSUS**

**BERNARD NGUGI GATONGA.....RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion** Application dated **18<sup>th</sup> December 2018**, by the Applicant seeking for orders that;

- a) That the Honourable court be pleased to grant leave to the Applicant to file an appeal out of time.*
- b) That the costs of this Application be provided for.*

The Application is based on the grounds that on the **26<sup>th</sup> of September 2018**, Judgment was delivered. However the Applicant was dissatisfied with the said Judgment but the Appeal could not be filed without the typed proceedings which were supplied on the **26<sup>th</sup> of November 2018**, when the time for filing the Appeal had long expired. That the Applicant has an arguable Appeal with high chances of success and the same ought to be heard on merit.

In his **Supporting Affidavit**, the Plaintiff reiterated he grounds on the face of the application and averred that the time for filing the Appeal had expired with a delay of **60 days**. He further averred that the Respondent does not stand to suffer any prejudice if the orders are granted.

The Application is opposed and the Respondent through his Advocates **Kamiro Richard Nganga** averred that the Application is unmerited as the Advocate for the Applicant knew of the Judgment date and when the Judgment was delivered, it was already typed and printed and ready for collection and that the Respondent has not exhibited any letter applying for the proceedings and no annexure for **Certificate of Delay**. He further averred that the Defence in the lower court was a mere denial and that it is not true to allege that there was a Defence and a Counter-claim.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered. The Court has also read and considered the pleadings and the annextures thereto and renders itself as follows.

The issue for determination herein is **whether or not the Applicant has achieved the threshold for grant of Leave to file Appeal out of time**.

This Court has jurisdiction to allow an Applicant to file an Appeal out of time, but in doing so, the Court is to use its discretion and has to be satisfied that the Applicant has given sufficient reasons to warrant the grant of the said leave. See Section **79G** of the **Civil Procedure Act**, which provides that:-

***“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 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”***

Further, in the case of **Nicholas Kiptoo Arap Korir Salat...Vs....The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR**, the Court held that:-

*“..... It is clear that the discretion to extend time is indeed unfettered.*

*It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

In line with the foregoing cases, it is this Court’s considered view that the question that must then be answered is whether the Applicant has explained the reason for the delay to the satisfaction of this Court.

It is the Applicant’s contention that the reason for failing to file the Appeal on time is because the typed proceedings were not ready for collection and therefore he was unable to file the appeal in the absence of the typed proceedings. It is however the Respondent’s contention that the Applicant has not exhibited the delay as he has failed to annex a certificate of delay and or a letter showing that they requested for the typed proceedings and further that the Judgment was already typed and ready for collection at the time the Judgment was delivered.

This Court has gone through the annexures and concurs with the Respondent that the Applicant has failed to annex a letter that evidences that he indeed sought for the typed proceedings and that the same were delayed. It is however important to recognize that the issue as to whether or not to grant Leave to Appeal out of time lies with the discretion of Court and the said discretion means that the Court ought to be satisfied with the explanation of the Applicant.

Further, the Court is alive to the fact that on more occasions proceedings will usually take time before they are typed and the fact that the Applicant is stating that the reason for failing to file the Appeal out of time is because the delay was in getting the typed proceedings is a satisfactory explanation to this Court. But then again this is not the only reason, as the Court has weighed various other factors including the fact that there was no inordinate delay in instituting this Application. This is coupled with the fact that there has been no allegations of other factors that had pushed the Applicant to file the application including but not limited to the threat of enforcing of the Decree. Further the Respondent has not shown any prejudice that he will suffer if the Application is allowed.

**The Judgment having been delivered on 26<sup>th</sup> September 2018, therefore the time of filing the Appeal fell due on the 26<sup>th</sup> October 2018. The Court notes that this Application was brought one and half months later after time had lapsed. However with the explanation given, then the Court finds that there was no inordinate delay. Therefore, the Court is satisfied with the explanation advanced for the said delay and consequently the Court is inclined to exercise its discretion and grants the Applicant Leave to file the Appeal out of time. Consequently, the Court finds that the Application has merit and the same is allowed. See the case of Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015)eKLR, where the court held that:-**

*“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.*

The upshot of the foregoing is that the Applicant’s **Notice of Motion** application dated **18<sup>th</sup> December 2018**, is merited and the same is hereby allowed with costs being in the cause.

The Applicant to file the Record of Appeal within a period of **14 days** from the date hereof.

It is so ordered.

**Dated, Signed and Delivered at Thika this 30<sup>th</sup> day of January 2020.**

**L. GACHERU**

**JUDGE**

**30/01/2020**

In the presence of

Mr. Mboha holding brief for Mr. Muturi Njoroge for Applicant

No appearance for Respondent

Lucy - Court Assistant.

**L. GACHERU**

**JUDGE**

**30/01/2020**