



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 21 OF 2018**

**RAHAB MUTHONI NJIRU.....1<sup>ST</sup> APPELLANT**

**LYOD NJIRU NYAGA.....2<sup>ND</sup> APPELLANT**

**ALPHA NJIRU ISAAC.....3<sup>RD</sup> APPELLANT**

**JOHN NYAGA ISAAC.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**EVANSON KARIUKI NYAGA.....RESPONDENT/APPLICANT**

**RULING**

1. Before this court is the application dated the 6<sup>th</sup> May 2021 wherein the applicant/respondent seeks that he be granted leave to appeal out of time against the whole judgment of Hon. Justice Mshila delivered on the 18<sup>th</sup> March 2021 and that the Notice of Appeal annexed thereto be deemed as duly filed and served. He has also sought for the costs of the application.

2. The application is founded on the grounds on its face and further supported by the affidavit sworn by Evanson Kariuki Nyaga the applicant herein. The applicant's case is that judgment in this matter was delivered electronically on the 18<sup>th</sup> March, 2021 at Nyeri but he was never notified of the same as the court had earlier indicated that it would be delivered on notice. That he duly learnt of the delivery of the same on the 27<sup>th</sup> April 2021 as no communication was made to him despite having made enquiry about the said delivery vide an email sent to court on the 10<sup>th</sup> February 2021. He avers that the application has been made without undue delay and that no prejudice will be occasioned to any party if the orders sought herein are granted.

3. The respondents have opposed the application by way of a replying affidavit sworn by Rahab Muthoni, one of the respondents, on the 25<sup>th</sup> June 2021. She avers that the application has been brought in bad faith as the applicant had the burden to follow up their case and not the court. That parties were called on phones and informed of the date for judgment. She deposed that when the matter was ongoing, the applicant had failed to attend court on three (3) occasions yet he was fully aware of the hearing dates.

4. It was further deposed that there is no memorandum of appeal attached to the supporting affidavit stating the grounds of appeal. Further that the application is an abuse of the court process as the applicant's father was gifted 5 acres and he now want to claim their portion.

5. That neither the applicant nor his father or brothers has ever lived on the land in issue that is Gaturi/Nembure/2283 and that the applicant just want to get the land for purposes of disposing it and leaving the respondents landless. Further that the respondents have already settled down after a long battle in court and they have developed their entitlements. That litigation must come to an end and they be allowed to enjoy the fruits of their judgment.

6. The applicant filed a supplementary affidavit sworn on the 1<sup>st</sup> September 2021 and deponed that he has given his email address in the pleadings and correspondences that are in the court file and reiterated that he was not informed about the date of the judgment. He annexed a copy of the draft memorandum of appeal to the supplementary affidavit.

7. The court has considered the application and the response thereto and the issues for determination are;

*1) Whether the applicant should be granted leave to appeal out of time.*

2) Who should bear the costs of the application?

8. The powers of this court to extend time for giving notice of intention to appeal from a judgment of the High Court or making an application for leave to appeal or for a certificate that the case is fit for appeal is provided for in Section 7 of the Appellate Jurisdiction Act.

9. Under Rule 59 of the Appellate Jurisdiction Act, any person who desires to appeal to the Court of Appeal shall give notice in writing which shall be lodged in sextuplicate with the registrar of the superior court at the place where the decision against which it is desired to appeal was given, within 14 days of the date of that decision, and the notice of appeal shall institute the appeal.

10. On the institution of appeals to the court of Appeal, Rule 82 provides that an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged;

a) A memorandum of appeal in quadruplicate

b) The record of appeal in quadruplicate

c) The prescribed fee, and

d) Security for costs of the appeal

11. From the foregoing provisions, it is clear that the applicant herein did not lodge his appeal/notice of appeal within the prescribed time, hence this application.

12. The court notes that the application is brought under Section 7 of the Appellate Jurisdiction Act and Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51(1) of the Civil Procedure Rules and Rules 73 of the Probate and Administration Rules and Article 159 of the Constitution. Under Section 7, the only jurisdiction given to the High Court regarding extension of time, is for leave to appeal, giving notice of intention to appeal or for a certificate that the case is fit for appeal.

13. Going by the provision of that section, it is clear that this court does not possess jurisdiction to entertain an application for leave to appeal out of time. What the applicant has sought for is leave to appeal out of time and not for leave to appeal against the judgment.

14. The grounds in support of the application and both the supporting and supplementary affidavits support a prayer for leave to appeal out of time and not leave to appeal.

15. In the circumstances, I find and hold that this court is devoid of jurisdiction. The application is hereby struck-out with costs to the respondents.

16. **It's so ordered.**

**DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent