



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

MISC APPLICATION NO.46 OF 2018

PAULINE MUGURE KARIUKI.....APPLICANT

VERSUS

NYAKINYUA INVESTMENT LTD.....1ST RESPONDENT

WANJIKU KIHURA.....2ND RESPONDENT

RULING

The matter for determination is the **Notice of Motion** Application dated **13th December 2018**, by the Applicant seeking for orders that;

1. That the Applicant be granted leave to appeal out of time against the orders issued on 26th October 2018, dismissing the Applicant's Application in Miscellaneous Application No. 155 of 2018.

2. That the costs of this Application be provided for.

The Application is premised on the grounds that the Applicant is the Administrator of the Estate of one **Regina Nyambura Kariuki**, who was the Plaintiff in **CMCC No.175 of 2012** at the **Chief Magistrates Court** in **Thika**. That the suit was dismissed despite the Applicant's efforts to trace the file and that prior to its dismissal, no notice to show cause was ever served upon the Applicant or her Advocate on record. That on that basis the Applicant filed a **Miscellaneous Application** on the **26th of October 2018**, seeking to set aside the order of dismissal of suit **No.175 of 2012**. However, on the **30th of October 2018**, the Applicant's Advocate discovered that the suit had been dismissed but the Applicant's Advocates were not able to access the file to extract the orders of the Court as the file could not be traced. That the file has never been traced and time to appeal has since lapsed and that failure to lodge an Appeal on time was as a consequence of factors beyond the control of the Applicant and her Advocates.

In her **Supporting Affidavit**, the Applicant reiterated the grounds on the face of the application and further averred that the orders sought will not prejudice the Respondent in any way and that the Applicant will forever be driven away from the seat of justice. It was her contention that the Application was presented without undue delay and therefore it is in the best interest of justice that the Application is allowed.

The Application is opposed and the 2nd Respondent filed **Grounds of Opposition** dated **22nd February 2019**, and averred that the Application is dead on arrival, is an abuse of the Court process and replica of two other Applications whose fate is unknown as the Court files cannot be traced. Further that litigation must come to an end and a vexatious litigant should not be allowed to waste judicial time.

The 2nd Respondent through its **Advocate Njugi B. Gachogu** swore a **Replying Affidavit** on the **22nd of February 2019**, and averred that the Applicant's allegations that she tried to trace the file in **CMCC No.175 of 2012** are unfounded as no evidence has been tendered to that effect. Further that the Applicant's Advocate has not explained how she learnt that the case had been dismissed yet the Court file was missing. It was his contention that no evidence had been availed to show that the Court files were missing and that the Applicant has filed a plethora of Miscellaneous Applications and continuing to entertain the Applications denies the 2nd Respondent justice. He further averred that the Applicant has inordinately delayed to file and prosecute the intended Appeal and she is guilty of laches. He therefore urged the Court to find that the Application lacks merit.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered. The issue for determination before this Court 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 be satisfied

that the Applicant has given sufficient reason to warrant the grant of the said leave. Section 79G of the Civil Procedure Act, 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”

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.”

Further in the case of Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015)eKLR, 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 gist of the above cited authorities and provisions of law is that in deciding whether or not to grant leave to a party to appeal out of time, the Court is to use its discretion and come to a conclusion when it is satisfied of the explanation that it has been given to decide if the Application is merited. In this instant, the Applicant is seeking to file an Appeal out of time, and the reasons for the delay advanced by the Applicant is that the lower Court’s file has been missing and therefore they have been unable to find the Application that was filed in the lower court besides the fact that the same was dismissed.

The question then begs, how then will the Applicant prosecute the appeal if the subordinate’s court’s file is missing? How will the court be able to know if the matter was dismissed or not without the proper documentations? Further more the Applicant’s allegation that the file is missing and their attempts to locate the file have not been backed by any evidence. Sections 107 and 108 of the Evidence Act are very clear that ‘he who alleges must prove’. It is this Court’s holding that the Applicant has not in any way given a satisfactory explanation of her failure to file an Appeal out of time. It cannot be said with certainty when the Ruling to dismiss the Application was delivered and therefore it cannot even be said whether or not there is inordinate delay. If the Court is to allow an Appeal on a file that is missing, it is this Court’s considered view that it will be giving orders in futility and engaging on an academic exercise. Consequently, this Court has not been persuaded to exercise its discretion. Until and unless the missing file is reconstructed, only then would there be a chance of this Court establishing the principles that guide it in granting Leave to Appeal out of time. Without an explanation of why the Court should exercise its discretion and thereby grant the Leave to Appeal out of time, this Court finds that the Application is not merited.

The Upshot of the foregoing is that the Applicant’s **Notice of Motion** application dated **13th December 2018**, has no merit and the same is hereby dismissed entirely with costs to the 2nd Respondent.

It is so ordered.

Dated, Signed and Delivered at Thika this 30th day of January 2020.

L. GACHERU

JUDGE

30/01/2020

In the presence of

M/S Musyoka holding brief for Mr. Joshua Kiarie for Applicant

No appearance for 1st Respondent

No appearance for 2nd Respondent

Lucy - Court Assistant.

L. GACHERU

JUDGE

30/01/2010