



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLANEOUS CIVIL CASE NO. 66 OF 2019

JOSEPH CHIENI MUMO.....APPLICANT

VERSUS

JOSEPH KARANJA JASON.....RESPONDENT

R U L I N G

1. Before me is the motion filed on 24TH February 2019 seeking to enlarge time to allow the Applicant herein file an appeal in respect of the ruling of the lower court in **Thika Succession Cause No. 446 of 2004**. The ruling, which dismissed the Applicant's preliminary objection to an application by the Respondents seeking his eviction from land parcel **LR No. NDARUGO/KAMUNYAKA/1079**, was delivered on 3rd March 2017. The explanation for the delay in filing appeal and/or application to extend time is contained at paragraph 6 of the supporting affidavit of the Applicant to the effect that:

“... I was not able to appeal against either the findings (read ruling)of the court on (my)objection of the eviction order because I had ran out of resources from the long litigation process and I did not for sure know that time was limited. I was also pursuing the matter on a reconciliatory note with the Respondent” sic

2. The Respondent swore an affidavit opposing the application, denying in particular any reconciliation engagement with the Applicant, and emphasizing the delay herein. Submissions of the parties by and large took cue from the affidavits on record.

3. The court has considered the application and respective affidavits. 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 been 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.”

4. The successful applicant must demonstrate **“good and sufficient cause for not filing the appeal in time.”** In **Thuita Mwangi v Kenya Airways [2003]e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

5. The delay in this matter is almost 2 years since the ruling intended to be appealed from. By any definition, that is a very long time, especially for a cause that was first filed in 2004 in the lower court. The reasons given by the Applicant are unsatisfactory and verge on flippancy. The Respondent has already obtained title to the suit property pursuant to the distribution of the estate in the succession cause. Any further delay in this matter is prejudicial to them. The court also notes that the intended appeal relates to the order of eviction, which was only giving effect to the earlier decision which dismissed the Applicant's protest, itself filed on 20th July 2010. One wonders how efficacious the appeal on the eviction ruling would be, when the initial order dismissing the protest remains in place: courts do not act in vain.

6. While the discretion of the court to extend time is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor.

7. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR.**

8. The application before the court fails on all the above fronts and the court is not satisfied that it should exercise its discretion in the Applicant’s favor. The application has no merit and is dismissed with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF FEBRUARY 2020

C. MEOLI

JUDGE

In the presence of:

Mr Njehu holding brief for Mr Njoroge Kugwa for the Applicant

Respondent- No appearance

C/A Kevin/Nancy