



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 58 OF 2017

(Formerly Kisii Elcc No. 938 of 2016)

ELIZABETH PRISCA OMOLLO.....PLAINTIFF/APPLICANT

VERSUS

JANE OCHUODHO.....1ST DEFENDANT/RESPONDENT

THOMAS KAWI ONJAGO.....2ND DEFENDANT/RESPONDENT

RULING

1. By a notice of motion dated 25th April 2019 and filed in court on even date pursuant to section 7 of the Appellate Jurisdiction Act as read with Rule 4 of the Court of Appeal Rules as read with Order 9 Rules 9 and 10 of the Civil Procedure Rules, (Hereinafter referred to as the application), Mr. G.S. Okoth learned counsel for the 1st defendant, Jane Ochuodho is seeking orders that;-

a) The Honourable court be pleased to make an order allowing the 1st defendant who is intending to appeal to change advocate and appoint the firm of G.S. Okoth and Company Advocates after Judgment has been delivered.

b) The honourable court be pleased thereafter to extend the time for filing and service of the Notice of Appeal to the Court of Appeal.

c) The costs incidental to this application do abide the result of the intended appeal.

2. The application is premised on grounds (a) to (e) set out on it's face. The grounds include that the intended appeal is arguable and that the delay in originating the instant application is not inordinate.

3. The application further rests upon a nine (9) paragraphed affidavit in support of the application sworn on even date whereby counsel for the applicant deposed inter alia, that the applicant filed a Notice of Appeal on 11th February 2019 annexed to the application and marked as "CSO-1" which was neither signed nor served within the prescribed period of time. That the application was mounted in good faith and that the suit land, **LR NO. KANYAMWA KAYAMBO/KWAMO/1649** has been occupied by the applicant and her families for a period in excess of 12 years and they may suffer loss including their eviction therefrom unless the orders sought in the application are granted.

4. On 8th March 2019, learned counsel for the applicants filed three (3) grounds dated 6th May 2019 in respect of the application. Essentially, the three (3) grounds reiterate to the contents of the affidavit in support of the application.

5. In her ten (10) paragraphed replying affidavit sworn on 19th August 2019, and filed in court on 21st August 2019, Norah Anindo Owino learned counsel for the respondent, Elizabeth Prisca Omolo alias Elizabeth Priska Omolo, opposed the application in it's entirety. Counsel deposed inter alia, that this court delivered Judgment way back on 7th February 2019 as per the annexed copy of the Judgment marked as "NAO-1".

6. Counsel further deposed that the applicant failed to file and serve a notice of appeal within the prescribed period of time. That the applicant did not request for proceedings within the said time. That the delay of seven (7) months to generate the application is not excusable and has demonstrated the applicant's want of interest in prosecuting the intended appeal.

7. On 2nd December, 2019, this court directed that the instant application be argued by way of written submissions. Subsequently, on 4th

February 2020, learned counsel for the applicant and counsel for the respondent filed their respective submissions both dated 3rd February 2020.

8. In his submissions, learned counsel for the applicant urged this court to grant the orders sought in the application. Counsel identified grounds (a) to (e) upon which the application is anchored and relied on authorities including **Wasike –vs- Swala (1984) KLR 59 and George Kagima Kariuki and 2 others –vs- George M. Gichimu and 2 others (2014) eKLR** as well as **Article 159 (2) (d) of the Constitution of Kenya, 2010** to fortify his submissions.

9. On her part, learned counsel for the respondent made reference to the Judgment rendered by this court herein. However, her submissions were in respect of the applicant's notice of motion dated 15th April, 2019 and not the instant application. As such, her submissions are hereby rendered irrelevant.

10. I have duly considered the entire application, the replying affidavit and the applicant's submissions. So, is the application meritorious to prompt this court to grant the orders sought therein?

11. The application is commenced pursuant to legal provisions inter alia, **Order 9 Rules 9 and 10 (supra)** which stipulate in concise and precise terms :-

a) Change of advocate after Judgment has been passed to be effected by order of court or consent of the parties and shall be determined first.

b) An application in (a) hereinabove may be combined with other prayers therein.

12. It is pretty clear that Judgment in this suit was rendered on 7th February 2019 (NAO1). In seeking an order for change of advocate in this application, the respondent has combined the same with orders 2 and 3 sought in the application.

13. In that scenario, is the 1st defendant entitled to change of advocate as sought herein? The answer is to be found under **Article 50 (1) of the Constitution of Kenya, 2010** on the right to fair hearing which include the applicant's right to be heard in the instant application and the intended appeal through counsel of his own choice.

14. More fundamentally, the right to fair trial shall not be limited; see **Article 25 (c) of the said Constitution**.

15. It is well settled that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system; see also **James Kanyiita Nderitu and another –vs- Marios Philotas Ghikas and another (2016) eKLR**.

16. Is the intended appeal arguable? This court is acutely aware of what amounts to an arguable appeal as noted in the case of **David Morton Silvestein–vs- Atsango Chesoni (2002) eKLR**. Furthermore, the court of Appeal held in **George Kagima Kariuki case (supra)** that an arguable appeal does not necessarily mean that which will succeed.

17. The applicant filed a notice of Appeal (GSO-1) and asserted that the intended appeal is arguable. That she will suffer irreparable loss since eviction against her has been ordered by this court.

18. Has the application been brought without unreasonable delay? The applicant contended that the application has been brought without undue delay. Conversely, the respondent contended that the applicant has not given satisfactory reason why she did not file and serve notice of Appeal within the prescribed period of time hence inordinate delay.

19. The applicant's counsel argued that the notice of appeal was filed by the applicant in person and that instructions were given to him belatedly. That therefore he failed to serve the respondent within the prescribed timelines.

20. The instant application was initiated approximately ten and half (10 ½) weeks after this court delivered the Judgment. The applicant has given satisfactory reasons for the delay which I find not inordinate in the circumstances.

21. It is important to remember that it is well settled that it is within the discretion of this court to extend time to file the intended appeal. The discretion is unfettered and must be exercised in a judicious manner bearing in mind the triple requirements as noted in **George Kagima Kariuki, and Wasike cases (supra)**. It is the finding of this court that the applicant has satisfied the said requirements in this application which is full of merits.

22. Accordingly, the application is determined thus,

a) Orders 1, 2 and 3 sought in the application be and are hereby granted.

b) The applicant shall file and serve the notice of appeal as sought in the application as well as complete record of appeal within the next 30 days from this date. In default, orders 1, 2, and 3 sought and granted in this application shall lapse.

23. It is so ordered.

DATED, SIGNED and DELIVERED at MIGORI this 26TH day of February 2020.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Omonde Kisera holding brief for G.S. Okoth learned counsel for the applicant.

Non appearance for the respondent

Court Assistant – Tom Maurice