



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MISC APPLICATION NO. 32 OF 2019

AMINA OMAR MUNYE.....1ST APPLICANT

MOHAMED NUR MUNYE.....2ND APPLICANT

VERSUS

ALI EYMOY ABDIRESPONDENT

RULING

1. This matter relates to a Notice of Motion dated 12/07/2019 brought pursuant to **Sections 1A, 1B, 3A, 65(1) (c), and 95 of the Civil Procedure Act** and **Order 50 Rule 6 of the Civil Procedure Rules**. The applicant seeks an order for the extension of time within which the he may file and serve the memorandum and record of appeal against the judgment and/or decree of the subordinate court in SRM ELC Case No. 26 of 2015 at Moyale.

2. The grounds upon which the application is premised upon are set out in its body and the supporting affidavit of Amina Omar Munye filed on 23/07/2019. It is contended that the applicants were aggrieved by the decision of the subordinate court, but they lacked money as they were not engaged in any gainful employment and/or running any business which occasioned the delay. They now seek to appeal as they have sufficient funds to do so. They have an arguable appeal with high chances of succeeding.

3. This application was opposed vide the rather lengthy replying affidavit of Ali Eymoy Abdi sworn on 28/08/2019. In summary, the respondent avers that the orders sought have been done so in the wrong forum for extension ought to be sought in the court that passed the judgment as per the provisions of **Section 95 of the Civil Procedure Act**, that the delay is inordinate and has not been sufficiently explained considering time lapsed on or about 21/03/2019. The applicants have neither established an arguable appeal with high chances of success. Besides they have not taken any steps to demonstrate that they would ensure that the appeal if allowed will be filed promptly. Thus, he stands to suffer prejudice if the appeal is allowed.

4. This matter was canvassed by way of submissions. The applicants submitted that the key issue is to ascertain *inter alia* the extent of encroachment of the applicants' Plot No. 442 by the respondent's purported Plot No. 5093 both located in Moyale Sub-County, Biashara Street, Township Location, Marsabit County. They asserted that they have met the principles laid down in **Nicholas kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**.

5. The respondent submitted by reiterating what he had stated. He went further to support his opposition by relying on the following case law: **James Mbatia Thuo & Ephantus Mwangi v Kenya Railways Corporation & Attorney General of Kenya [2018] eKLR**, **Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others [2018] eKLR** and **ELCR No. 1968 of 2014 (Nairobi) Zakayo Mulinge Mutuku v Kenya Electricity Generating Company Limited**.

6. The issue for determination is *whether to grant leave to the applicant to file his appeal out of time*.

7. **Section 79G of the Civil Procedure Rules** stipulates 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 (Emphasize added).”

8. Therefore, an applicant needs satisfy to the court that he/ she had good and sufficient reasons for not filing the appeal on time for the court to exercise its discretion in his favour.

9. The Supreme Court in the case of **Nicholas kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** has laid down principles which the court may consider in exercise of this discretion as follows:

1. *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;*
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 on 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 respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

10. Thus extension of time is not a right. For that reason, a party needs to adequately demonstrate that the court's discretion should be exercised in their favour. In this case the judgment sought to be appealed against was delivered on 20/02/2019. The applicants had a window of thirty (30) days to file their appeal by 21/03/2019 which they failed to do so. On or about three and a half months later they filed the present application seeking leave. In the case of **Abdulrahman Adam Hassan vs National Bank of Kenya Kisumu High Court Civil Case No. 446/2001**, Judge Tanui found that an unexplained delay of 3 months is unreasonable. Also see- **SCOK Damaris Njeri Mwangi & 2 others v City County of Nairobi & another; Fidelity Commercial Bank (Interested Party) [2019] eKLR**. I tend to agree that three and half months is indeed inordinate delay.

11. In addition, the manner in which the applicants have filed their application shows that they are taking this matter lightly. For they have not attached the judgment and or decree they seek to appeal against.

12. Accordingly, I am of the view that the application lacks merits and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 19TH FEBRUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

C.P Mbaabu holding brief for Kamande for respondent

Mokua holding brief for Ndege for applicant

HON. LUCY. N. MBUGUA

ELC JUDGE