**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**MISCELLANEOUS CIVIL APPLICATION NO. 18 OF 2019**

**MOSES LUMBASI SIMIYU....................................1ST APPLICANT**

**JOHN WANJALA BUSURU (Suing as founder member and official**

**of Holy Spirit and Truth Gospel Ministry) ...........2ND APPLICANT**

**VERSUS**

**JOHN KAPTOO NGEYWO ...............................1ST RESPONDENT**

**BEFILE KISACHI .............................................2ND RESPONDENT**

**R U L I N G**

The Applicants have moved this Court by their Notice of Motion dated 25th November 2019 and premised on the provisions of **Sections 1A, 1B, 3, 3A and 79G of the Civil Procedure Act** and **Orders 50 Rule 6 and 51 Rule 1 of the Civil Procedure Rules** seeking the following prayers: -

> **(a) That this Honourable Court be pleased to grant the Applicants leave to lodge an appeal against the Judgment of the learned Senior Resident Magistrate in BUNGOMA CHIEF MAGISTRATE CIVIL CASE NO 272 OF 2011 out of time.**
>
> **(b) Costs of this application be provided for.**

The application is predicated on the grounds set out therein and is also supported by the affidavit of **OCHARO KEBIRA ADVOCATE**.

The gravamen of the application is that the Applicants, being dissatisfied by the Judgment delivered on 4th October 2019 by the Subordinate Court in **BUNGOMA CMCC NO 272 OF 2011**, desired to appeal but were unable to immediately instruct their counsel **MR KEBIRA** who was busy trying to hand over his law firm following his nomination by the Judicial Service Commission for appointment as a Judge of the Employment and Labour Relations Court. When they eventually reached him on 18th October 2019, he perused the case file and Judgment and instructed his clerk one **BRIAN** to file the Memorandum of Appeal which he had prepared. However, the said clerk by over – sight, did not do so. Counsel therefore avers that his mistake should not be visited on the Applicants who have expressed their desire to exercise their right of appeal. Further, that the appeal is not frivolous and the Respondents have also appealed. Among the documents annexed to the supporting affidavit are the pleadings and Judgment in the subordinate Court as well as a copy of their Memorandum of Appeal and also a copy of the Memorandum of Appeal filed by the Respondents against the same Judgment being **CIVIL APPEAL NO 99 OF 2019**.

The application is opposed and **JOHN KAPTOO NGEYO** the 1st Respondent in his replying affidavit dated 30th December 2019 has deponed, inter alia, that the application must fail because it is based on falsehoods and is filed by persons who were not parties in **BUNGOMA CMCC NO 272 OF 2011**. That counsel for the Applicants prepared a bill of costs dated 16th October 2019 and the clerk who failed to act on the instructions of counsel has not been disclosed by names. That the delay in filing this application has not been explained and the Respondents will be prejudiced because they have already paid their counsel Kshs. 100,000/= as fees for this application and if the orders sought are granted, they will have to pay more fees. That the intended appeal has no merit but if the application is allowed, then the Applicants should pay them thrown – away costs of Kshs. 100,000/=.

The application has been canvassed by way of written submissions which have been filed both by **MR OCHARO** instructed the firm of **OCHARO KEBIRA & CO ADVOATES** for the Applicants and **MR BW'ONCHIRI** instructed by the firm of **OMUNDI BW'ONCHIRI & CO ADVOCATES** for the Respondent.

I have considered the application, the rival affidavits and the submissions by counsel including the cases cited.

It is commons ground that the Judgment in the subordinate Court and which is sought to be appealed was delivered on 4th October 2019 in the presence of **MR ANGIMA** who was holding brief for **MR OCHARO** for the Applicants. The record does not indicate whether or not the Applicants were present but it is clear from the supporting affidavit by **MR OCHARO** that the Applicants were indeed present and started looking for him and that was when he took their instructions, perused the case file and prepared the Memorandum of Appeal dated 18th October 2019.

The appeal ought to have been filed within 30 days from 4th October 2019 when the Judgment sought to be appealed was delivered. Counsel for the Applicants has submitted that taking into account the holidays in October 2019 the appeal ought to have been filed by 11 th November 2019. What I can say is that **Section 79G of the Civil Procedure Act** has a window where good and sufficient cause is shown for failure to file the appeal within the 30 days. It reads: -

> ***79 G "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 satisfied the Court that he had good and sufficient cause for not filing the appeal in time."*** Emphasis added.

In **BAGAJO.V. CHRISTIAN CHILDREN FUND INC 2004 2 KLR 273**, **RINGERA J.A** (as he then was) while considering an application under Rule 4 of the Court of Appeal Rules laid down the following principles which would equally apply in an application such as this one. These are: -

Ø **The length of the delay.**

Ø **The explanation for the delay.**

Ø **Is the intended appeal arguable?**

Ø **Any prejudice that may be caused to the other party if the application is allowed.**

Ø **The public importance of the matter.**

Ø **The requirements of the interest of justice of the case.**

The Supreme Court in the case of **NICHOLAS KIPTOO ARAP KORIR SALAT .V. IEBC & OTHERS 2014 eKLR** laid down the following principles to guide a Court while considering such an application.

· **Extension of time is not a right of a party. It is an equitable remedy which 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 it's discretion to extend time is a consideration to be made on a case by case basis.**

· **Whether there is a reasonable reason for delay, it should be explained to the satisfaction of the Court.**

· **Whether there will be any prejudice suffered by the Respondent if the extension is allowed.**

· **Whether the application has been brought without undue delay.**

· **Whether in certain case, like election Petitions, public interest should be a consideration for extending time.**

Those are the principles that guided this Court in its decision in **MARTIN WANJALA WAFULA .V. MARGARET WAIRIMU MBIRUA KERUGOYA ELC APPLICATION NO 32 OF 2016 [2017 eKLR]** which counsel for the Respondent has cited in support of his submissions that this application has no merit and must be dismissed with costs but if I allow it, then I should impose a condition for the payment of thrown away costs of Kshs. 100,000/=. On the other hand, counsel for the Applicant has submitted, citing among other cases, **PHILIP CHEMWOLO & ANOTHER .V. AUGUSTINE KUBENDE C.A CIVIL APPEAL NO 103 OF 1984 [1986 eKLR]** that the Applicants should not be punished for their counsel's mistake, that this application has been filed timeously, that the intended appeal is arguable and that the Respondents will not suffer any prejudice if this application is allowed.

I can only re – emphasize what I said in the case of **MARTIN WANJALA WAFULA.V. MARGARET WAIRIMU MBIRUA (supra)** that: -

> ***"It is clear therefore that whether or not to grant an extension of time to appeal is discretionary, such discretion is to be exercised judicially with a view to doing justice to the parties involved with each case being considered on its own peculiar circumstances. The Applicant must give a plausible explanation for the delay before such discretion is exercised in his favour."***

The case of **MARTIN WANJALA WAFULA .V. MARGARET WAIRIMU MBIRUA** (supra) which counsel for the Respondents has cited does not aid the Respondents because in that case, the Judgment sought to be appealed was delivered on 30th September 2015 and the application for leave was filed on 19th September 2016 just about one year later which I found not only to be inordinate delay but which had not been explained. That case is therefore distinguishable from the circumstances obtaining in the case which I shall demonstrate shortly.

It is clear from the provisal in **Section 79G of the Civil Procedure Act** that a party seeking leave to appeal out of time must demonstrate ***"good and sufficient cause for not filing the appeal in time."*** This Court must also be guided by the principles laid down by the Court of Appeal and the Supreme Court in the cases of **BAGAJO** and also **NICHOLAS KIPTOO ARAP KORIR SALAT** cited above.

With regard to delay, the Judgment sought to be appealed was delivered on 4th October 2019. The earliest date on which an appeal ought to have been filed excluding any holidays, would therefore be 5th November 2019. Counsel for the Applicant has calculated the days and puts it at 11th November 2019. That may or may not be a correct computation but to my mind, even if the Court adopts the earliest date as 5th November 2019 excluding any holidays, this application was filed on 5th December 2019 exactly a month later and I would not consider that period to amount to in – ordinate delay. In any event, that delay has been explained to the satisfaction of this Court. It is common knowledge that **MR OCHARO** had been nominated by the Judicial Service Commission for appointment as a Judge of the Employment and Labour Relations Court. I know for a fact that the said nomination was made public by the Chief Justice on 13th August 2019 after which the names of the nominees including that of **MR OCHARO** were forwarded to His Excellency the President. That is a matter which this Court can take Judicial notice of under **Section 60(1) of the Evidence Act** which reads: -

***60 (i)(o) "The Courts shall take Judicial notice of the following facts***

***(a)***

***(b)***

***(c)***

***(d)***

***(e)***

***(f)***

***(g)***

***(h)***

***(i)***

***(j)***

***(k)***

***(l)***

***(m)***

***(n)***

***(o) All matter of general or local notoriety."***

It is a matter of local notoriety, at least in **BUNGOMA COUNTY** where both **MR OCHARO** and **MS MUMALASI** practice as Advocates, that the two have been nominated by the Judicial Service Commission for appointment as Judges of the superior Court since August 2019 but are yet to be appointed. Hopefully, this will not persist for a long time. There is therefore no harm in referring to the two as Judges designate. I have seen Magistrates who have similarly been nominated being referred to as Judges designate in the recent invitations to the Magistrate's Colloquium. There is therefore merit in the averments in paragraphs 9, 10, 12, 17, 18, 19, 20 and 21 of **MR OCHARO**'s supporting affidavit wherein he has deponed as follows: -

***9: "That this came at a time when I was working on the possibility of handing over my law farm to my said senior following my nomination by the Judicial Service Commission for appointment as a Judge for the Employment and Labour Relations Court."***

***10: "That therefore I was not substantially in office."***

***12: That when the Applicant eventually got me in the office and expressed their feeling, I got constrained to make a perusal of the Court record on 18th day of October 2019. Hereunto annexed and marked OK – 4 is a copy of the payment receipts."***

*17: "That I did prepare a Memorandum of Appeal copy of which is hereunto annexed and marked OK – 7 with instructions that the same be filed for and on behalf of the Applicants as Appellants."*

*18: "That imperative to state that in view of the nomination by the Judicial Service Commission nomination that I have alluded to hereinabove, I took leave from office for some time to enable my senior learned colleague MR ANGIMA get acquainted to the office and or clients."*

*19: "That I got surprised to realize that the appeal was not filed by my clerk Brian. The default to file came to the fore when we received a Memorandum of Appeal from the Respondent's counsel (see annexture OK – 8)."*

*20: "That my said clerk informed me that by over – sight the file was filed away before the Memorandum of Appeal would be filed and he did not ask for facilitation in terms of Court fees from the office to carry out my instructions in sum by over – sight he did not carry out my instructions. I verily believe this information to be true."*

*21: "That the default to file the appeal in time was as a result of the over – sight on the part of my office."*

From the foregoing, it is clear that there was a mistake on the part of counsel for the Applicant in failing to file the appeal in time. That mistake has also been sufficiently explained as having been as a result of counsel's nomination for appointment as a Judge which meant that he was in the process of handing over his office to another counsel and also having taken leave which meant that his clients could not reach him in good time and even when they did, counsel's clerk failed to act on instructions. It is a generally accepted principle that a party should not suffer because of the mistake of his legal adviser – **CHEMWOLO .V. KUBENDE** (supra). Contrary to the averments in paragraph 3 (vii) of the 1st Respondent's replying affidavit that the clerk who failed to act on counsel's instructions has not been named, it is clear that the said clerk has been named in paragraph 19 of **MR OCHARO**'s supporting affidavit as **BRIAN**. There is also no doubt that what **MR OCHARO** has deponed in his affidavit are matters within his knowledge as he is the one who issued those instructions. Counsel having taken full responsibility for the mistake that resulted in the appeal not being filed in good time, it would be harsh to punish the Applicants by shutting them away from their right of having their appeal determined by this Court under those circumstances. The delay herein is not inordinate and has been satisfactorily explained. A good basis has therefore been laid by the Applicants to justify the exercise of this Court's discretion in their favour.

On the issue of whether the Respondents will be prejudiced if the orders sought herein are granted, the case of the Respondents as per paragraph 5(a) and (b0 of the 1st Respondent's replying affidavit is that they have already paid their counsel Kshs. 100,000/= towards this application and if the orders sought are granted, they will have to pay additional fees. Whereas no evidence was availed by the Respondents that they have already paid Kshs. 100,000/= to their counsel, the issue of costs will eventually be determined by the Deputy Registrar during taxation. But that alone cannot out – weigh the right of the Applicants to pursue their right to appeal against the Judgment of the Subordinate Court. It is instructive to note that the Respondents are equally aggrieved by the said Judgment and have already filed **BUNGOMA CIVIL APPEAL NO 99 OF 2019** seeking to have the said Judgement set aside. It is not clear to me therefore what prejudice the Respondents are referring to that ought to stand in the way of the Applicant's intended appeal when they themselves are also appealing against the same Judgement.

Finally, as to whether the intended appeal is arguable, I don't think the Applicants are under any duty to show that the intended appeal has high chances of success. It is enough to demonstrate the arguability of their intended appeal and having looked at the impugned Judgment and the pleadings that gave rise to it, one of the issues that will no doubt be canvassed is whether the award of Kshs. 200,000/= for loss of land and breach of trust was merited when the same had not been sought.

The up – shot of the above is that the Applicants' Notice of Motion dated 25th November 2019 and filed herein on 5th December 2019 is well merited and must be allowed.

On the issue of costs, counsel for the Applicant has readily admitted that his office was to blame for the situation in which the Applicants now find themselves. It would be harsh to punish the Applicant further with an order for costs. The most prudent thing to do in the circumstances is to direct Counsel to personally meet the costs occasioned, by this application.

The up – shot of the above is that I make the following orders with regard to the said application: -

1. **The application dated 25th November 2019 is allowed.**

2. **The appeal be filed within 7 days of this ruling.**

3. **The Respondents are awarded throw away costs which I assess at Kshs. 10,000/= payable by Applicants' counsel.**

**J U D G E**

**12th March 2020.**

Ruling dated, delivered and signed in Open Court this 12th day of March 2020 at Bungoma.

Mr R Wamalwa for Mr Bw'onchiri for Respondent present

Mr Ocharo for Applicant – absent

Joy – Court Assistant

**J U D G E**

**12th March 2020.**