



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
ELC MISC APPLICATION NO. 27 OF 2015

BENSON MURIUKI NJERU.....APPELLANT/APPLICANT

VERSUS

PATRICK FUNDI MAINA.....RESPONDENT

RULING

Before me is the Applicant's Notice of Motion dated 18th March 2015 seeking the following orders:

- 1. Spent.***
- 2. That the applicant/appellant be granted leave to file an appeal out of time.***
- 3. That costs of this application be provided for.***

The application is based on the grounds set out therein and is supported by the applicant's affidavit. The gist of the application is that the applicant had filed at **EMBU CHIEF MAGISTRATE'S COURT, CIVIL SUIT No. 315 of 2013** seeking the cancellation of transfer of land parcel No. NGANDORI/KIRIGIRI/9363 to the respondent for being illegal, null and void. However, after trial, the applicant's case was dismissed with costs in a judgment delivered by **S.K. MUTAI** (Acting Principal Magistrate) on 9th December 2014. That the applicant, being dissatisfied with that judgment, intended to appeal but was involved in an accident during which he lost his advocate's contact hence the delay in filing the appeal. He had however requested his advocate to apply for proceedings which he did on 23rd December 2014. Annexed to the application are a copy of the judgment sought to be appealed from, the medical records and a copy of the letter from the applicant's advocate dated 23rd December 2014 requesting for the proceedings – annexure **BMN 1** to **BMN 3**.

The application is opposed and in his replying affidavit, the respondent has deponed, inter alia, that the applicant was only admitted in hospital for three (3) days from 23rd to 26th December 2014 and it is not true that the applicant was so incapacitated as to be un-able to see his advocate because on 6th February 2015, the applicant walked to the Chief's office over a land dispute involving the two parties. That on 25th February 2015, the respondent's advocate wrote to the applicant to vacate from the land subject of this suit and that is what prompted the applicant to file this application. Annexed to the replying affidavit are copies of letters written by the advocate for both parties – annexure **PFM 1** to **PFM 3**.

Submissions have been filed both by the firm of **MBUTHIA KINYANJUI & CO. Advocates** for the applicant and **JOE KATHUNGU & CO. Advocates** for the respondent.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsel.

This application is premised under the provisions of **Sections 3, 3A, 75 and 79 of the Civil Procedure Act, Orders 44, 43 and 51 of the Civil Procedure Rules and Section 3 of the Judicature Act.**

Section 79G of the Civil Procedure Act provides as follows:-

‘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”. Emphasis added

The power to grant a party leave to file an appeal out of time is discretionary and not a matter of right. Therefore, the party seeking such an order must satisfy the Court that, as provided under **Section 79G of the Civil Procedure Act**, there is “***good and sufficient cause for not filing the appeal in time***”. In the case of **NICHOLAS KIPTOO arap KORIR SALAT VS I.E.B.C & OTHERS, S.C APPLICATION No. 16 of 2014**, the Supreme Court laid down the following principles that should guide a Court in exercising its discretion to extend time:

- 1. Extension of time is not a right but an equitable remedy available only to a deserving party at the Court’s discretion.***
- 2. A party seeking such extension must satisfy the Court by laying the basis for the exercise of such discretion.***
- 3. Such discretion is to be exercised on a case to case basis.***
- 4. Where there is a delay, it should be explained to the satisfaction of the Court.***
- 5. The Court should consider the prejudice that may be caused to the other party.***
- 6. The application should be brought without undue delay.***
- 7. In certain cases such as Election Petitions, public interest should be a consideration for extending time.***

The above principles will therefore guide this Court in determining the issue as to whether the applicant has shown “***good and sufficient cause***” to warrant the order sought.

The term “***sufficient cause***” has been defined by the Supreme Court of India in the case of **PARIMAL VS VEENA (2011) 3 SCC 545** as follows:-

“Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word ‘sufficient’ is ‘adequate’ or ‘enough’ in as much as may be necessary to answer the purpose intended. Therefore the word ‘sufficient’ embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, ‘sufficient cause’ means that a party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently’ or ‘remaining inactive’. However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the

Court exercises discretion, it has to be exercised judiciously”.

And as was held by **MUSINGA J.A** in **THE HON. ATTORNEY GENERAL VS LAW SOCIETY OF KENYA & ANOTHER C.A CIVIL APPLICATION No. 133 of 2011**, sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a Judge’s mind. The explanation should not leave un-explained gaps in the sequence of events.

Bearing those principles in mind and applying them to the circumstances of this case, I am not persuaded that the applicant has demonstrated ‘**good and sufficient cause**’ to warrant the order sought. The judgment sought to be appealed was delivered on 9th December 2014 and the applicant had thirty days from that day to file any appeal against it. This Court is of course alive to the fact that under **Order 50 Rule 4 of the Civil Procedure Rules**, the period between 21st December in any year and 13th January in the next year both days inclusive, shall be omitted in computing time. No explanation has been offered by the applicant as to what action, if any, he took between 9th December 2014 and 21st December 2014 when time stopped running. It is conceded that the applicant was admitted for three (3) days from 23rd to 26th December 2014 following a road accident. The applicant depones in paragraph five (5) of his supporting affidavit that he lost contact with his advocate following the loss of his phone as a result of the accident and was only able to see the advocate after he got well “**two weeks ago**”. That affidavit was signed on 18th March 2015 which implies that he only got well around 4th March 2015. However, there is evidence that on 6th February 2015, the applicant attended a meeting at the office of the Assistant Chief Gatituri Sub-location where the respondent had filed a complaint that the applicant had up-rooted his beans. The minutes of that meeting are marked as the respondent’s annexure **PFM 2** and contents thereof were not rebutted. The applicant was infact directed to pay the respondent Ksh. 3,000 as compensation by 15th March 2015. It cannot therefore be true, as alleged by the applicant, that he only got well two weeks before 18th March 2015 when there is evidence that on 6th February 2015, he was at the Assistant Chief’s office attending to a dispute. That explanation is not therefore rational, plausible, logical, convincing, reasonable and, most importantly, truthful as was held in the case of **THE HON. ATTORNEY GENERAL VS LAW SOCIETY OF KENYA** (supra).

In addition to that, it has been deponed, in paragraph 4 of the respondent’s replying affidavit that on 20th February 2014, the applicant was able to contact his advocate to write a letter to the Land Registrar Embu over this case. A copy of the letter is annexed (**PFM 1**) and although it is dated 20th February 2014, that date must be a typographical error and it must have been written on 20th February 2015 because in paragraph 3 thereof, it says:

“Our instructions are to inform you that the subject matter of the dispute is still pending before Court my clients having opted to file an appeal against the judgment delivered in CMCC No. 315 of 2013 Benson Muriuki Njeru Vs Patrick Fundi Maina”

It is common knowledge that judgment in CMCC No. 315 of 2013 Benson Muriuki Njeru Vs Patrick Fundi Maina was delivered on 9th December 2014 so the letter marked as annexure **PFM1** could only have been written on 20th February 2015 and certainly not on 20th February 2014 because by that date, the judgment in CMCC No. 315 had not been delivered. That also demonstrates that by 20th February 2015, the Applicant was in contact with his advocate because the said letter (annexture **PFM 1**) commences as follows:

“RE: BOUNDARY DISPUTE

The above matter refers where we act for our client Mr. Benson Njeru who has instructed us to address you as hereunder”

It cannot therefore be truthful when the applicant depones in paragraph 5 of his supporting affidavit dated 18th March 2015;

“That during the aforesaid accident, I lost both my phone and the contacts to my advocate and

was only able to see him after I got well two weeks ago”

yet there is un-rebutted evidence that on 6th February 2015, he was at the Chief’s office at Gatituri over this dispute and on 20th February he instructed his advocate to write to the Land Registrar Embu over the same issue. It is clear to me that the applicant only moved to this Court upon receiving the letter dated 25th February 2015 from the respondent’s advocate (annexture **PFM3**) asking him to vacate the land parcel No. NGANDORI/KIRIGIRI/9363 or face legal proceedings. As was held in the ***NICHOLAS SALAT*** case (supra), extension of time is not a right. It is an equitable remedy that is only available to a deserving party and at the Court’s discretion. He who comes to equity must do so with clean hands and a dishonest litigant who attempts to mislead the Court is certainly not one that is deserving of the discretionary power of the Court to aid him. Counsel for the applicant has, in his submissions, sought shelter in the overriding objectives of the ***Civil Procedure Act*** under ***Sections 1A, 1B and 3A***. However, as was held in ***MRADURA SURESH KANTARIA VS SURESH NANALAL KANTARIA C.A CIVIL APPEAL No. 277 of 2005:***

“The overriding principle will not doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially considered”.

A party cannot, through deceit, seek refuge under the overriding objectives principles or indeed under ***Article 159 of the Constitution*** and expect a Court of equity to exercise its discretion in his favour. That is not what those objectives were meant to achieve. It is therefore clear from the above that the applicant has not shown any good and sufficient cause for not filing the appeal in time. If anything, he has only succeeded in demonstrating that his hands are soiled and he is therefore not deserving of this Court’s favour.

Ultimately therefore, the applicant’s Notice of Motion dated 18th March 2015 is lacking in merit. It is accordingly dismissed with costs. It is so ordered.

B.N. OLAO

JUDGE

1ST FEBRUARY, 2017

Ruling dated, delivered and signed in open Court this 1st day of February 2017

Mr. Kagio for Mr. Kathungu for Respondent present

Mr. Mbuthia for Applicant absent.

B.N. OLAO

JUDGE

1ST FEBRUARY, 2017