



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISC. CASE NO. 56 OF 2019

JAMIN AGUFA OGWAGE.....APPLICANT

VERSUS

NELLY MILOYO.....RESPONDENT

RULING

This application is dated 30th December 2019 and is brought under section 79 G of the Civil Procedure Act seeking the following orders:-

1. That this honourable court be pleased to grant the applicant leave to lodge an appeal out of time.
2. That costs be provided for.

It is based upon the affidavit of the applicant and the following grounds that the applicant sued the respondent vide Hamisi MCL & E Cause No. 56 of 2018 seeking orders for the recovery of L.R. No. North Maragoli/Chavakali/1504. That judgment herein was delivered in favour of the respondent by the trial court on the 31st day of January, 2019 dismissing the claim. That the applicant, being dissatisfied with the judgment therein requested for typed and certified proceedings in order to lodge an appeal. That the typed and certified proceedings were supplied to the applicant on the 18th day of December, 2019. That based on the foregoing the applicant requires leave to be able to file an appeal out of time since the statutory period of 30 days following the delivery of the judgment has lapsed. That the draft memorandum of appeal annexed to the affidavit in support hereto raises arguable grounds. That the orders sought herein will not prejudice the respondent in a manner that cannot be compensated via costs.

The respondent submitted that the said application by the applicant seeking leave to file an appeal out of time, in its entirety is made in bad faith and motivated by ill intentions on the part of the applicant as his allegations are purely fictional and hold no water. That the applicant sued her vide Hamisi ELC Misc. Application No. 56 of 2018 alleging that she fraudulently transferred the parcel of land L.R. No. North Maragoli Chavakali/1504 (disputed land) in her name. That the same was entertained by the said court. That she produced legal documents for the transactions of transfer of the said disputed land viz land sale agreement, copy of application of land control board, letter of consent transfer of land form from Vihiga County Lands Office dully signed, Applicant's Passport size photo, National Identity Card and his Personal Identification Number (KRA PIN). That, both sides were heard and the case was determined on 31/1/2019 when judgment was delivered indicating that although the plaintiff/applicant disputed the signatures, he failed to demonstrate before Senior Resident Magistrate in Hamisi ELC Misc. Appl. No. 56 of 2018 that he reported the loss of his personal documents like ID Card and also he never showed evidence of forgery i.e. handwriting expert or case reported to police hence dismissal of his suit (annexed is copy of judgment marked NM2). That, there are no sufficient reasons why applicant should be granted leave to file appeal out of time. That the applicant's application is clearly an abuse of the court process and should be dismissed with costs.

This court has considered the application and the submissions therein, in the case of **Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi Civil Application No. NAI 255 of 1997** which was a decision of the court on a reference from a decision of a single judge the court held that;

"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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are:

first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted".

The principles to be considered in exercising the discretion whether or not to enlarge time can be found in the case of **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 (2002) 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are:

I. the explanation if any for the delay;

II. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

III. whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

The applicant submitted that the applicant sued the respondent vide Hamisi MCL & E Cause No. 56 of 2018 seeking orders for the recovery of L.R. No. North Maragoli/Chavakali/1504. That judgment herein was delivered in favour of the respondent by the trial court on the 31st day of January, 2019 dismissing the claim. That the applicant, being dissatisfied with the judgment therein requested for typed and certified proceedings in order to lodge an appeal. That the typed and certified proceedings were supplied to the applicant on the 18th day of December, 2019. This is a period of 12 months. I have perused the annexures filed by the applicant specifically “JAD2” which is a letter requesting typed proceedings from the court in order to determine whether or not to file an appeal dated 13th February 2019. The applicant never filed a notice of appeal. I find the reason given for the delay is not acceptable.

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.

Secondly, this court has perused the lower court proceedings and find that the applicant sued the respondent vide Hamisi ELC Misc. Application No. 56 of 2018 alleging that she fraudulently transferred the parcel of land L.R. No. North Maragoli Chavakali/1504 (disputed land) in her name. That the same was heard by the said court. The respondent produced documentary evidence for the transactions of transfer of the said disputed land, that is, land sale agreement, copy of application of land control board, signed letter of consent transfer of land form from Vihiga County Lands Office, Applicant’s Passport size photo, National Identity card and his personal identification Number. Therefore apart from the reasons from the delay not being acceptable I find that the applicant does not have an arguable appeal in this matter. For these reasons I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23RD DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE