



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLICATION NO. 40 OF 2019

HENRY MUSAU MWANIA.....APPLICANT

VERSUS

PETER MUSYOKA WAEMA.....1ST RESPONDENT

TITUS MUANGE KAVOI.....2ND RESPONDENT

DANIEL KASINGA.....3RD RESPONDENT

RULING

1. In the Notice of Motion dated 3rd September, 2019, the Applicant has sought for the leave of the court to file an Appeal against the Judgment of Machakos Chief Magistrate dated 26th June, 2019 in Civil Case Number 764 of 2013 out of time.
2. The Application is premised on the grounds that the Applicant is aggrieved by the decision of the subordinate court; that the Applicant's advocates failed to inform the Applicant of the outcome of the case in the lower court in good time to enable the Applicant to instruct him to file an Appeal and that the decision of the lower court was delivered without his knowledge.
3. In response, the 2nd Respondent deponed that the Application has been filed by a busy body because the Applicant was represented by the firm of F.M. Mulwa Advocate in the lower court; that the said firm of advocates has never ceased acting for the Applicant and that the present advocate has not sought the leave of the court to act for the Applicant.
4. The 2nd Respondent deponed that the delay in filing the Appeal has not been sufficiently explained; that the trial court arrived at the correct findings after evaluating the evidence before it and that the Application has been filed with the sole intention of denying him the fruits of the Judgment.
5. The 3rd Respondent filed a Replying Affidavit which is similar in all respects to the 2nd Respondent's Affidavit. According to the 3rd Respondent, if the Application is allowed, he will be greatly prejudiced by incurring extra costs and yet he has no interest in the suit property.
6. In the Further Affidavit, the Applicant deponed that his case raised weighty issues of forgery which the learned Magistrate ignored; that he acted swiftly by filing the current Application and that he has a strong and arguable appeal. Both the Applicant's and the Respondents' advocates appeared before me and made oral submissions. I have considered the said submissions and the authorities submitted by counsel.
7. The Respondents' counsel argued that the current Application was filed by a busy body because no leave was obtained by the Applicant, contrary to the provisions of the law. Order 9 Rule 9 of the Civil Procedure Rules, which requires the leave of the court to be obtained where a party seeks to change advocates, or to act in person, after Judgment has been delivered, is only applicable where the said changes occur in the same suit, and not on appeal.
8. Where a matter has been concluded, a party may appoint a different advocate of his choice, without the leave of the trial court, to file and prosecute the Appeal on his behalf. Alternatively, such a party may file the Appeal in person, without the leave of the court or consent of his former advocate. Consequently, the Applicant did not require the leave of the court to file the current Application.
9. The impugned Judgment of the lower court was delivered on 26th June, 2019. 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, provided that an Appeal may be admitted out of time if the Appellant satisfies the court that he had a good and sufficient cause for not filing the Appeal in time.
10. Although the Applicant's advocate was aware of the Judgment of the lower court, it is the deposition of the Applicant that he was not

informed by the said advocate about the decision of the court in good time to enable him file an Appeal within 30 days.

11. Some of the considerations that the court ought to bear in mind while considering an Application for extension of time include the length of the delay involved; the reasons for the delay; the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of the party who has a decision in his favour against the interests of a party who has a constitutionally underpinned right of Appeal; and the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes. (*See Imperial Bank Limited (in receivership) & another vs. Alnashir Popat & 14 others, (2018) eKLR*).

12. Indeed, the current Application and the draft Memorandum of Appeal were filed by the Applicant in person on 4th September, 2019, which was two months after the decision of the lower. That being the case, the Applicant's contention that his advocate did not inform him of the outcome of the case in good time to enable him give him instructions to lodge an Appeal is not far-fetched.

13. Although the Appeal against the decision of the lower court was to be filed on or before 26th July, 2019, the current Application was filed on 4th September, 2019, which is a delay of slightly less than two months. That being the case, the delay was not inordinately long.

14. Considering the constitutional right of the Applicant to lodge an Appeal against the decision of the lower court, and the reason for the late filing of the Appeal, which in my view is sufficient, and in view of the promptness of the Applicant to file the current Application in person, I shall allow the current Application.

15. For those reasons, the Notice of Motion dated 3rd September, 2019 is allowed as follows:

a) Leave be and is hereby granted to the Applicant to file an Appeal against the Judgment of the Machakos Chief Magistrate dated 26th June, 2019 in Civil Case Number 764 of 2013 out of time.

b) The Memorandum of Appeal to be filed and served within 30 days of this Ruling.

c) Each party to cater for his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE