



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 12 OF 2018 (O.S)

JUDITH WALEKHWA..... APPLICANT

VERSUS

RONALD OLUNGA 1ST RESPONDENT

HILLARY EMMANUEL OLUNGA.....2ND RESPONDENT

JAMES OBIERO OLUNGA.....3RD RESPONDENT

RULING

On 12th March 2020, this Court delivered its Judgment dismissing the Applicant's claim to the land parcels **NO BUNGOMA/KAMAKOIWA/1314, 1315 and 1316** (the Suit land) by way of adverse possession. That Judgment was delivered in the presence of counsel for all the parties with **MR MALOBA** appearing for the applicant and **MR WAMALWA** holding brief for **MR OBILO** (now deceased) counsel for the Respondents.

I now have before me the Applicant's Notice of Motion dated 23rd April 2020 and brought under the provisions of **Sections 1A, 3A and 75 of the Civil Procedure Act, Orders 50 rule 6, Order 51 rule 1 of the Civil Procedure Rules, Section 3A of the Appellate Jurisdiction Act and Article 159(2) (d) of the Constitution**. The Applicant seeks the following orders: -

- a: Time for making an application for leave to appeal by the Applicant against the Judgment of the Court delivered on 12th March 2020 be extended.**
- b: Leave be granted to the Applicant to appeal against the Judgment of this Court delivered on 12th March 2020.**
- c: Time for giving Notice of Appeal by the Applicant against the Judgment of this Court delivered on 12th March 2020 be extended.**
- d: Notice of Appeal filed by the Applicant on 22nd April 2020 be deemed as properly filed.**
- e: That costs of this application be provided for.**

The application is premised on the supporting affidavit of the Applicant and also on the grounds set out therein.

The Gravamen of the application is that following this Court's Judgment delivered on 12th March 2020, it was not until 18th March 2020 that the Applicant gave her Counsel instructions to lodge an appeal. That due to the covid-19 pandemic, it was not possible for the Applicant's Counsel to move the Court within the stipulated time owing to the scaling down of Court operations. That these were circumstances beyond the Applicant's control and her appeal has good chances of success. It is therefore in the interest of justice that the orders sought be granted.

The records show that on 5th May 2020, the firm of **ABOK ODHIAMBO AND COMPANY ADVOCATES** for the Respondents were served with the application through Email. This was followed up with a telephone conversation between **MR MALOBA** and **MR ABOK** on 6th May 2020 and a further Email on 7th May 2020.

The record further shows that the application was placed before **OMBWAYO J** on 5th May 2020 who issued orders that the Applicant files submissions within 3 days and the Respondents to file theirs within 3 days of service. The application was thereafter to be mentioned before

me for highlighting on 2nd June 2020.

On 2nd June 2020 when the application was placed before me, none of the parties had filed any submissions. Most significantly, the Respondents, though duly served, had not filed any response to the application, either by way of replying affidavit, a preliminary objection or grounds of opposition. The application is therefore not opposed.

I issued directions that the ruling would be delivered on 4th June 2020.

I have considered the application which, as I have already indicated above is un-opposed.

That notwithstanding, an application such as this one must be determined in accordance with the laid down guidelines.

There is no doubt that this Court has the jurisdiction to enlarge time within which a party may appeal against its Judgment. **Section 7 of the Appellate Jurisdiction Act** provides as follows:

7. "The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence."

The reference to the High Court in **Section 7 of the Appellate Jurisdiction Act** includes this Court following the promulgation of the **2010 Constitution**.

The power to grant a party leave to file an appeal out of time is discretionary and not a matter of right. 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 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 by 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.**

Guided by the above, although this Court delivered Judgment on 12th March 2020 in the presence of Counsel for the Applicant, it took her until 18th March 2020 to instruct her Counsel to appeal. Since the Judgment was delivered in the presence of her Counsel, this Court is entitled to assume that the same was relayed to her. She has however not explained why it took her a whole week to instruct her Counsel. However, her Counsel has, on his part, explained that the delay in filing his application was due to the scaling down of Court operations following the covid-19 Pandemic. That delay is not unreasonable and I will accept the explanation. The scaling down of Court operations due to the covid-19 pandemic is now a matter of public knowledge. Indeed, this ruling is being crafted from my home and not in the Court Chambers.

This dispute involves ownership of land and the Court found as a matter of fact that the Applicant is in occupation of the same although that occupation did not meet the threshold for orders in adverse possession. An extension of time will therefore not prejudice the Respondents who are not in occupation of the suit land. It would therefore be in the interest of justice that the Applicant is given an opportunity to pursue her appeal. It is instructive that no response was filed by the Respondents in opposition to this application.

Taking all that into account, I allow the Applicant's Notice of Motion dated 23rd April 2020 in the following terms: -

- 1. The Notice of Appeal filed herein be deemed as properly filed and served.**
- 2. The Memorandum of Appeal be filed and served within 30 days from the date of this ruling.**
- 3. No orders as to costs.**

Boaz N. Olao.

J U D G E

4th June 2020.

Ruling dated, delivered and signed at Bungoma this 4th day of June 2020 via Email.

Boaz N. Olao.

J U D G E

4th June 2020.