



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

MISC. APPLICATION NO. 6 OF 2020

ABRAM NJERU NGOROL.....1ST APPLICANT

WILSON IRERI ELIKANA.....2ND APPLICANT

ELIAS KATHURI ELIKANA.....3RD APPLICANT

VERSUS

JOYCE MARIGU ELIKANA.....RESPONDENT

RULING

1. By a notice of motion dated 16th March 2020 brought under **Sections 3, 3A and Section 79G of the Civil Procedure Act (Cap. 21), Section 19 (1) Land Registration Act 2012, Order 51 Rules 1 & 3 Civil Procedure Rules 2010 and all other enabling provisions of the law** the 1st, 2nd and 3rd Applicants (*the Applicants*) sought enlargement of time and leave to file an appeal out of time against the judgement of the Hon. M.N. Gicheru (Chief Magistrate) in *Embu CMCC No. 9 of 2019*.

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicants' advocate, Njeru Ithiga, on 17th March 2020. It was stated that upon delivery of judgement the Applicants requested for a copy of the judgement for purposes of appeal on 17th September 2019 but the same was not supplied until 5th March 2020. The Applicants also requested for a certificate of delay which the court supplied on 10th March 2020.

3. It was the Applicants' case that by the time the proceedings and certificate of delay were supplied the statutory period for lodging an appeal had already expired hence the application for extension of time. The Applicants further contended that the delay in filing the appeal was not inordinate and that they had an arguable appeal.

4. The Respondent filed a replying affidavit sworn on 22nd June 2020 in opposition to the said application. It was stated that the parties herein were siblings and that the administrator of the estate of their late father Ephantus Njagi had been left out of the application. It was contended that the said administrator was a party in the suit before the Chief Magistrates' court and that his exclusion from the instant application rendered it defective. The court was consequently urged to dismiss the application with costs.

5. When the application was listed for *inter partes* hearing on 23rd June 2020 it was directed that the said application be canvassed through written submissions. The Applicants were granted 7 days to file and serve their submissions whereas the Respondent was granted 7 days upon the lapse of the Applicants' period to do likewise. The record, however, shows that none of the parties had filed their submissions by the time of preparation of the ruling.

6. The court has considered the Applicants' notice of motion dated 16th March 2020, the supporting affidavit and annexures thereto, and the Respondent's replying affidavit in opposition thereto. The main question for determination is whether or not the Applicants have made out a case for the grant of leave to file their intended appeal out of time.

7. The court has noted that the Respondent has not disputed or controverted the Applicants' factual averments in their supporting affidavit. It is evident from the material on record that the Applicants applied for a copy of the judgement for purposes of appeal as early as 17th September 2019 when the period for appeal had not expired. There is also a copy of a certificate of delay on record accounting for the period of delay between 17th September 2019 and 10th March 2020.

8. The court is thus satisfied on the basis of the material on record that the delay in filing an appeal within time was not attributable to the Applicants but to the court. The jurisdiction of the court to enlarge time in such circumstances is discretionary. The court is satisfied on the basis of the material on record that the Applicants have adequately demonstrated that such discretion should be exercised in their favour. The court is not satisfied that the failure to join the administrator of the estate of the parties late father if fatal to the instant application. The

administrator can still be joined in the substantive appeal without any party being prejudiced.

9. The upshot of the foregoing is that the court finds merit in the Applicant's notice of motion dated 16th March 2020. Accordingly the said application is allowed in the following terms:

a) Leave is hereby granted to the Applicants to file an appeal out of time against the judgement and decree of the Hon. M.N. Gicheru (Chief Magistrate) dated 9th September 2019 in *Embu CMCC No. 9 of 2019*.

b) The Applicants shall file and serve their memorandum of appeal within 14 days from the date hereof.

c) Costs of the application shall be costs in the appeal.

10. It is so decided.

RULING DATED and SIGNED in Chambers at EMBU this 16TH DAY of JULY 2020 and delivered via Microsoft Teams platform in the presence of Ms. Muriuki holding brief for Mr. Ithiga for the Applicants and in the absence of the Respondent

Y.M. ANGIMA

JUDGE

16.07.2020