



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISC. CASE NO. 8 OF 2020

SOLOMON ONZERE TSISAGA.....APPLICANT

VERSUS

ENOS MAGAMBO ANGWEYA

ALPHONCE MZEE MAGAMBO

PETER ASUDI KHAGALI

KENNETH CHARLES NDEMBEYA....RESPONDENTS

RULING

The application is dated 9th March 2020 and seeks the following orders:-

1. That the applicant be granted leave to file an appeal out of time against the ruling of honourable E.W. Muleka SRM delivered on 5th September, 2019 in Butali MLEC No. 76 of 2018.
2. Costs be provided for.

It is based on the affidavit of Solomon Onzere Tsisaga and the grounds that the ruling herein was delivered on 5th September, 2019 and same was not notified to the applicant or his advocate. The applicant applied for proceedings on 6th January, 2020 immediately after learning of the ruling. The proceedings were supplied to the applicant on 6th February, 2020 which was outside the allowed time within which to lodge an appeal. The delay to file an appeal was not caused by the applicant.

The respondents submitted that the ruling on a preliminary objection was delivered on 5th September, 2019 in the presence of their advocate and advocate Manyoni for the applicant herein and hence the allegations that the applicant's advocate was not notified is a false allegation designed to mislead the court. That the allegation also that the applicant and his advocate came to learn on 6th January, 2020 that ruling had been delivered is also false. That the intended appeal which this application seeks for leave to appeal out of time cannot be sustained since the dispute is a boundary issue which can only be resolved by the Land Registrar and District Surveyor as Law requires. That the applicant's suit vide Butali ELC No. 73 of 2018 (being formerly Kakamega ELC No. 71 of 2016) was simply seeking orders of restoration of the original boundary between land known as Kakamega/Lugari/297, 745, 746, 1321 and 2389 whose jurisdiction purely lies with the Land Registrar and not the court. That the court cannot therefore grant leave to an intended appeal which dispute by law courts have no jurisdiction to entertain. That this application therefore has no merit and is an abuse of the court process and should therefore be dismissed with costs.

This court has considered the application and the submissions therein. Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:

“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.”

In the case of Paul Musili Wambua v Attorney General & 2 others (2015) eKLR, the court held that;

“...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

The applicant submitted that the ruling herein was delivered on 5th September, 2019 and same was not notified to the applicant or his advocate. The applicant applied for proceedings on 6th January, 2020 immediately after learning of the ruling. The proceedings were supplied to the applicant on 6th February, 2020 which was outside the allowed time within which to lodge an appeal. The delay to file an appeal was not caused by the applicant. I find that from the records both the counsels for the plaintiff and the defendant were present during the hearing of the preliminary objection. Even if the applicant were not aware of that the ruling was delivered it is strange that he would sit back for four months until they became aware of the ruling on the 6th January 2020. I find that the reason for the delay is not acceptable and a good and sufficient cause for not filing the appeal in time has not been demonstrated. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH SEPTEMBER 2020.

N.A. MATHEKA

JUDGE