



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. MISC. APP. NO. 1 OF 2020

FRANKLINE KAMATHI KAMAU.....APPLICANT

VERSUS

EPHANTUS NDWIGA MUNYI.....1ST RESPONDENT

MARTIN NYAGA NJUE.....2ND RESPONDENT

DOMINIC MUGENDI NJUE.....3RD RESPONDENT

(Being an appeal against the judgement and decree of the Hon. Thomas T. Nzyoki (SPM)

dated 6th June, 2019 in Siakago SPMC No. 47 of 2017)

RULING

1. By a notice of motion dated 15th January 2020 expressed to be brought under **Sections 1, 1A & 3A of the Civil Procedure Act (Cap. 21), Order 50 Rule 5 and Order 51 Rule 1** of the **Civil Procedure Rules**, the Applicant sought the following orders:

- a) *That this honourable court be pleased to extend time to file appeal against the judgement delivered on 6th June, 2019 by honourable Thomas T. Nzyoki (SPM) in SPMCC No. 47/2017.*
- b) *That the Memorandum of Appeal filed herein be deemed as duly filed upon payment of requisite filing fees.*
- c) *That the costs of this application be in the cause.*

2. The said application was based upon the grounds set out on face of the motion and the contents of the supporting affidavit sworn by the Applicant's advocate on 15th January 2020. It was contended that failure to file an appeal within the stipulated time was not intentional and that the omission was occasioned by human error on the part of the Applicant's advocates.

3. The Applicant's advocate contended that she was not aware of the judgement date of 6th June 2019 because the associate advocate who was holding her brief did not communicate the date and that shortly thereafter she left the employment of her law firm. The advocate further contended that she only discovered that judgement had been delivered when she sent her court clerk to peruse the court file in August 2019.

4. Although the Respondents did not file any response to the application, the court shall nevertheless consider and determine the application. The factors to be considered in an application for extension of time to file an appeal out of time were considered in the case of **Mwangi v Kenya Airways [2013] eKLR** as follows:

“Over the years, the court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance in Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi (Civil Application No. Nairobi 255 of 1997 unreported), the court expressed itself thus;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also settled that in general the matters which this court takes into account in deciding whether to grant an extension are; first, the length of the delay. Secondly, the reason for the delay: third (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.”

5. The court has considered the period of delay and the explanation given for it. Although the judgement sought to be appealed against was delivered on 6th June 2019, the instant application was not filed until 21st January 2020 which was more than 6 months after the date of judgement.

6. There were two explanations rendered for the delay. First, it was contended that the associate advocate who was holding brief failed to communicate the judgement date of 6th June 2019 and that soon thereafter she left the law firm acting for the Applicant. The Applicant's advocate further stated that she only discovered delivery of the judgement in August 2019 when she sent her clerk to peruse the court file. It was not explained why the advocate did not inquire from the associate (who had since left the firm) on the judgement date between June and August 2019. Most importantly, it was not explained why the client who had testified at the trial never followed up on the judgement with his advocates for several months.

7. The court has noted that the Applicant avoided exhibiting copies of the proceedings before the trial court which would have revealed what really transpired at the trial. The hearing was conducted in the absence of the Respondents. The proceedings would have revealed whether or not the Applicant was present when the judgement date was given by the court.

8. The second explanation for the delay was that the court clerk who was to obtain copies of the proceedings from the Magistrates' court also left the law firm and he did not communicate that he had collected them. The Applicant's advocate claimed that she only discovered that the proceedings had been collected in December 2019 when she followed up with the court registry. Again, it was not explained why the advocate took 3 more months before following up on the copies of the proceedings.

9. The court has also noted that even though the proceedings were in custody of the Applicants in December 2019, the instant application was not filed until 21st January 2020. No explanation whatsoever was rendered for this additional delay. The court is thus of the opinion that there was undue delay on the part of the Applicant in filing the instant application. The court is further of the opinion that there was no satisfactory explanation for the entire period of delay. All indications are that the Applicant was not a diligent litigant and that the instant application was merely an afterthought.

10. Although it is not mandatory to consider the chances of success of the intended appeal, it would appear from the copy of the impugned judgement annexed to the supporting affidavit that it has very doubtful chances of success. The trial court's finding that the nature of the dispute between the parties was a boundary dispute which should in the first instance be determined by the Land Registrar under **Section 18(2)** of the **Land Registration Act 2012** can hardly be faulted.

11. The trial court's holding that it is only after determination of the boundaries that a court could determine if the Respondents had encroached on the suit property and that an injunction or eviction order could only be granted after such determination can hardly be faulted. The court cannot imagine of any other logical way of proceeding in resolution of a boundary dispute. The court is thus not satisfied that the intended appeal has any reasonable prospects of success.

12. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 15th January 2020 and filed on 21st January 2020. Consequently, the same is hereby dismissed with no order as to costs. It is so decided.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **29TH DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the absence of Beth Ndorongo & Co. Advocates for the Applicant and in the absence of the Respondents.

Y.M. ANGIMA

JUDGE

29.10.2020