



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

MISC CASE NO. 31 OF 2019

KIRIMI KELLY MATHIU.....APPLICANT

VERSUS

ISAAC MUCHUI MATHIU & 4 OTHERS.....RESPONDENTS

JUDGMENT

1. The applicant's suit was dismissed in *limine* in the trial court for want of jurisdiction. The applicant thereafter filed this miscellaneous suit vide a notice of motion dated 16th July 2019 premised on **Section 1A, 1B, 3A and 79G of the Civil Procedure Act** seeking an extension of time to appeal against the Decision/Ruling of the Principal Magistrate Tigania dated 28th February 2019, in Tigania CMCC No. 28 of 2011.

2. The application is supported by the sworn affidavit of **Kirimi Kelly Mathiu** who averred that he was not satisfied by the decision of the trial court and was desirous to file an appeal. That his advocate applied for typed copies of the proceedings and Ruling on 1st March 2019, but the same were released when time to appeal had expired. The applicant contends that he has triable grounds of appeal as raised in his memorandum of appeal.

3. The appellant submitted that he has presented plausible reasons for the delay in filing the appeal and has adequately shown he has an arguable appeal. He cited the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another (2018) eKLR**.

4. The application was opposed by the Respondents through their joint Replying affidavit sworn on 9th September 2019. They aver that the Ruling was typed and printed on 28/2/2019 hence the applicant would have obtained the same when they sought it on 1st March 2019. That the appeal herein does not raise any triable issues as the plaintiff had not exhausted the remedies available to him.

5. The Respondents submitted that leave is not a matter of right and that the delay herein is inordinate and remained unexplained. It was also submitted that the applicant has not raised any triable issues and that a consent did not grant the applicant a right to institute a suit where there are already established dispute resolution mechanism. Further, they submitted that they shall be prejudiced by being dragged in a frivolous litigation process and that there was no requirement of a certified copy to file an appeal.

6. The respondents relied on the following cases; **Bagajo vs Christians Children Fund INC [2004] 2 eKLR**, **Nyeri Civil Appeal No. 221 of 2010 Stephen Kungutia & 2 Others vs Severina Nchulubi**, **Meru ELC Petition No. 6 of 2017 Reuben Mwangela M'Itelekwa vs Paul Kigea & 2 Others**, **Meru Elc Misc Appl No. 31 of 2018 Genesio Mutwiri Mwereria vs Augustus Kabira M' Muraga**.

Analysis and Determination

7. I have considered the averments made by the parties and the submissions thereof. **Section 79 (g) of the Civil Procedure Act** provides as follows;

“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 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”.

8. The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** laid down the considerations of granting extension of time as follows;

(1). Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.

(2). A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court. (3). Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis. (4). Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the Court.

(5). Whether there will be any prejudice suffered by the respondents if the discretion is granted.

(6). Whether the application has been brought without undue delay and (7). Whether in certain cases, like Election Petitions, public interest should be a consideration for extending time.

9. The Court of Appeal in Paul Wanjohi Mathenge v Duncan Gichane Mathenge {2013} eKLR also down the criterion as follows;

(a). The length of the delay.

(b). The reasons for the delay.

(c). The chances of the appeal succeeding if the extension of time were to be granted and (d). The prejudice caused to the would be respondent if an extension of time were granted.

10. The decision of the trial Court was made on 28th February 2019. The appellant filed the application four and a half months later on 18th July 2019. The reasons afforded is that they were not able to obtain a copy of the Ruling in good time. The applicant sought to be issued a copy of the Ruling through the letter dated 1st March 2019. However, nowhere in his affidavits has the applicant indicated the date he was supplied with the said ruling or proceedings. He has also not indicated whether he sought a certificate of delay of proceedings from the trial court. Further, all the applicant was required to do in lodging an appeal was to file the memorandum of appeal see **AIG Insurance Company Limited vs. Michael Okoth (2018)eKLR** which I quoted in **Genesio Mutwiri Mwereria vs. Augustus Kabira (supra)**.

11. The court also takes judicial notice that handwritten copies of a Ruling/Judgement may be supplied to a party seeking the same. However, in this case, it appears that the ruling delivered on 28.1.2019 was already typed.

12. I find that the delay of **four and a half months** is inordinate and that the same has not been satisfactorily explained. To this end, I do find that the application herein lacks merits and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF OCTOBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 22.9.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE