



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 78 OF 2017

PATRICK MALONGO LIDOVOLOPLAINTIFF/RESPONDENT

VERSUS

LUICE ASANG'ASA

ACTON MUSII KHALAMBUKHA

SABETI KHALAMBUKHA..... DEFENDANTS/APPLICANTS

RULING

The application is dated 31st August 2020 and is brought under Section 7 of the Appellate Jurisdiction Act, Section, 3A, 95 of the Civil Procedure Act, order 9 rule (9) (3) Civil Procedure Rules, 2010 seeking the following orders:-

1. That this honourable court be pleased to certify this application as urgent warranting hearing on priority basis.
2. That the firm of M/s. Amasakha & Co. Advocates be granted leave to come on record for the defendants/applicants.
3. That the defendants/applicants be granted leave to appeal out of time against the whole judgment of the Hon. N.A. Matheka Judge, delivered on 24th June, 2020 in this case.
4. That such leave as in paragraph 3 do operate as stay of execution pending hearing and determination of the intended appeal.
5. That the Notice of Appeal annexed hereto be deemed as duly filed and served.
6. That the costs of this application be provided for.

It is premised on the grounds that the judgment herein was delivered on the 24th June, 2020. That given the circumstances of Covid – 19 the said judgment was delivered via email without the applicants' knowledge. That it is only on 10th August, 2020 that the applicants became aware of the said judgment after one Khayesa, a village elder, served them with a copy of the judgment and decree herein. That by the time the judgment was served upon the applicants, time for filing an appeal had elapsed. That the applicants risk being highly prejudiced should execution of the orders of the court issued herein would proceed undeterred. That no prejudice will be occasioned upon the respondent as he has his own parcel at Shamakhokho where he resides and has never been in possession of the suit parcel. That the delay occasioned herein is not so inordinate or so great as to be inexcusable. That it is in the interest of justice for this application to be allowed.

The respondent opposed the application in that, it is a non-starter, incurably defective, incompetent, untenable, mischievous and an abuse of the due process. This honourable court is devoid of jurisdiction to entertain the defendants' application or grant the orders sought. This honourable court's jurisdiction has not been invoked properly or at all and there is no justification or basis laid for the grant of the orders sought. The application has been instituted by a stranger and before representation is regularized, no orders or further proceedings can be entertained or granted and there is nothing from their advocate on record to support these allegations which are wild and unfounded. The defendants are guilty of laches and no explanation is given for their inordinate delay. The defendants have not demonstrated existence of an arguable appeal and or any prejudice or loss or damage they stand to suffer in the event of execution of the decree herein as they have their own separate parcels of land.

This court has considered the application and the submissions therein, **Section 7 of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya**, is explicit that:

"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or 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."

Similarly, **Order 50 Rule 6** of the **Civil Procedure Rules, 2010** provides that:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

In the case of *Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi* Civil Application No. NAI 255 of 1997 the court held that;

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are:

first, the length of the delay; secondly, the reason for the delay; thirdly (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".

Accordingly, in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others: SC Application No. 16 of 2014**, the Supreme Court had occasion to consider the applicable principles in an application for extension of time; and had the following to say:

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

- 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 extension 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."**

From the authorities and the law cited above it is clear that the court has jurisdiction to entertain this matter. The applicant submitted that the judgment herein was delivered on the 24th June, 2020. That given the circumstances of Covid – 19 the said judgment was delivered via email without the applicants' knowledge. That it is only on 10th August, 2020 that the applicants became aware of the said judgment after one Khayesa, a village elder, served them with a copy of the judgment and decree herein. The question herein is whether the delay to file the notice of appeal is excusable. It is public knowledge that Covid-19 broke out in Kenya in March 2020 and the Chief Justice in his wisdom decided to suspend open court operations on 16th March 2020. Since then most of the activities have been undertaken online. It is on record that the applicants were represented by Korongo and Company Advocates who were served with all the notices on time. I find and hold that the applicants have not given a plausible explanation for the delay in filing a Notice of Appeal, and are therefore not entitled to the discretion of the Court for extension of time as sought.

On Stay Pending Appeal Order 42 Rule 6 of the Civil Procedure Rules provides that:

"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereof as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside..."

(2) No order for stay of execution shall be made under subrule (1) unless--

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

This court is not convinced by the applicants that they **will suffer substantial loss unless the order is made and that the application has been made without unreasonable delay. In the case of Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63, the court held that;**

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

I find that the reasons for the delay are not acceptable. I grant prayer 2 of the application only. I find the rest of the application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 26TH OCTOBER 2020.

N.A. MATHEKA

JUDGE