



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

MISC APPL. NO. 5 OF 2020

KIHARA KIUNJURIAPPLICANT

VS

HARRISON MACHARIA WAITHAKA1ST RESPONDENT

JAMES MAHINGE MWANGI2ND RESPONDENT

WANGENYE KURIA.....3RD RESPONDENT

RULING

1. Vide an application dated the 4/8/2020 and filed on the 5/8/2020 the Applicant moved this Court under Section 79G and 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules and urged orders for leave to lodge an Appeal against the judgement in SPMCC NO 18 of 2014 delivered on the 16/10/2019 out of time.
2. The application is supported by the affidavit of the Applicant on the grounds that; upon delivery of judgment the Applicant being aggrieved erroneously filed an Appeal on 13/11/2019 vide HCCA No 52 of 2019 in the High Court at Murang'a. The said Appeal was struck out for want of jurisdiction on the 28/7/2020. The Applicant still desirous of proffering an Appeal against the said judgment has approached the Court for orders of extension of time within which to lodge an Appeal in the ELC Court.
3. He avers that the error in filing the Appeal in the wrong forum was an honest mistake/error or oversight that should not be visited upon him to the detriment of his desirous Appeal.
4. He further states that he has operated a business on the suit premises since 1969 and that the Respondents stand to suffer no loss which cannot be compensated by costs should the Honourable Court allow the application.
5. The application has been opposed vide the Replying affidavit of the 3rd Respondent where he briefly contends that the application is incurably defective and is fit for dismissal. That the Applicant is guilty of delay of 10 months and further that the Appeal is not arguable.
6. With the directions of the Court having been given the parties by consent elected to canvass the application by way of written submissions which I have read and considered.
7. Section 79G 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 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.
8. The power to extent time for filing an Appeal is discretionary. Like every discretion relief the Court must exercise its discretion within the confines of the law and not capriciously or whimsically.
9. Whilst exercising such discretionary power the Court is empowered under section 95 of the Civil Procedure Act as follows;

“Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court **may**, in its

discretion, from time to time, **enlarge** such period, even though the period originally fixed or granted may have expired.

10. The Supreme Court laid down the guiding principles on the question of extension of time in the case of Nicholas **Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2015] eKLR**. The Court pronounced itself as:

- a) **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;
- b) a party who seeks...extension of time has the burden of laying a basis to the satisfaction of the Court;
- c) whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
- d) [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;
- e) whether there will be any prejudice suffered by the Respondents if the extension is granted;
- f) whether the application has been brought without undue delay; and,
- g) whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

11. Extension of time cannot be taken lightly by the Court because the Court must balance the competing interests of the Applicant’s right to Appeal against the right to enjoy the fruits of judgment of the Respondent and the greater public policy good that litigation must come to an end. This was well stated in the case of **M/s Portreitz Maternity Vs James Karanga Kabia, CA No. 63 of 1997** where the Court stated:

“That the right of Appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

12. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of its discretionary power. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point as is seen in the case of **Monica Malel & Anor Vs R, CA No 246 of 2008**, where the Court stated:

“When a reason is proposed to show why there was a delay in filing an Appeal it must be specific and not based on guess work as counsel for the Applicants appears to show ... the Applicants are not quite sure of why the delay in filing the notice of Appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

13. It should not be supposed that the Court’s discretion is entirely unfettered as Lord Romilly MR explained in **Haywood V Cope, (1858) 25 beav 140:**

“... the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So, the person who seeks an equitable remedy must be prepared to act equitably, and the Court may oblige him to do so.”

14. Based on the guiding principles enumerated by **SCOK in the Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2015] eKLR** case above I shall now analyze the application.

15. It is to be noted that the judgement being desired to be appealed against was not attached by the Applicant. The same would have enabled the Court to appreciate the arguability of the Appeal. That said it is equally true that the Respondent has not challenged this point and it is common ground that there indeed is a judgement delivered on the 16/10/19 upon which the Applicant is desirous to lodge an Appeal. Equally the ruling of the High Court striking out the Appeal filed vide HCCA No 52 of 2019 on the 28/7/2020. The pleadings in this case leaves a lot to be desired. I say no more.

16. That being the case, I am guided by the overriding objectives of the Court as set out in section 3(1) of the ELC Act read together with Art 159 (2) (d) to look into the substantive justice of the case rather than dwell on technicalities.

17. It is trite that upon the delivery of judgment any party desiring to file an Appeal from a decision of the lower Court must do so within 30 days of the judgement. In this case the judgement in SPMCC No 18 of 2014 was delivered on the 16/10/2019. The Applicant has explained to the Court that he filed an Appeal on the 13/11/19 vide HCCA No 52 of 2019 in the High Court. It therefore follows that the Appeal was filed within the time prescribed by law.

18. However, the problem seems to have emerged following the striking out of the said Appeal by the High Court on the 28/7/2020 on grounds of want of jurisdiction. The Appeal though filed therefore was filed in the wrong forum. By the time the Appeal was struck out the time for filing the Appeal had run out. Hence the need to seek for extension of time. The Applicant’s explanation is that the filing of the Appeal in the High Court is a honest mistake/error which is excusable.

19. I am satisfied that the explanation given by the Applicant in respect to the delay in filing the Appeal is plausible and one that does not disentitle the Applicant from pursuing a relief on Appeal. The Court is fortified by the fact on the record that shows that the earlier Appeal

was filed within the statutory period. Even when he fell into a jurisdictional headwinds, evidence on record demonstrates that that he did not waste time in filing this application, albeit to get back on track.

20. From the analysis above the Court is equally satisfied that the application has been brought without delay. Extension of time being an equitable remedy is negated by delay and where there it is inordinate and unexplained the Court would be hesitant in granting the same.

21. What is the likely prejudice to be suffered by the Respondents? The Respondents have pleaded prejudice on account of being unable to enjoy the fruits of his judgment. This of course is a legitimate expectation once a party triumphs in a case. However, the greater good of substantive justice will be served if the extension is granted so that the Applicant can exhaust his Appeal.

22. In the upshot I allow the application in the following terms;

- a. The time within which the Applicant ought to have filed his Appeal is extended by Thirty (30) days from the date of this ruling.
- b. If the Applicant does not file the said Appeal within the time stipulated in (a) above the window granted to file the Notice of Appeal shall automatically lapse.

23. The Respondents shall have the costs of the application.

24. **It is so ordered.**

DATED, DELIVERED AND SIGNED AT MURANGA THIS 15TH DAY OF OCTOBER 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Applicant: Absent

Kirubi HB for Mbutia for the 1st – 3rd Respondents

Njeri & Kuiyaki, Court Assistants