



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 43 OF 2019

KITHYO KATA.....1ST APPLICANT

JOHN M. MBIJIWE.....2ND APPLICANT

BEALINE KENYA.....3RD APPLICANT

VERSUS

MARTIN MUKOSI NGAA.....1ST RESPONDENT

GLADYS MULI.....2ND RESPONDENT

RULING

Introduction:

1. This Ruling relates to the Application dated 11th September, 2019. The Application was brought under Order 50 Rule 6 of the Civil Procedure Rules and Sections 3A and 79G of the Civil Procedure Act. The Applicants are seeking for the following orders:

a) That time be enlarged for the Applicants to file their Memorandum of Appeal out of time.

b) That in the event that the time is enlarged as prayed hereinabove, then the Memorandum of Appeal dated 6th September, 2019 be deemed as properly filed and served on the Respondents in compliance with the rules of this Honourable Court.

c) That the costs of this Application abide by the outcome of the intended Appeal.

2. The Application is supported by the Affidavit of the Applicants' advocate who deponed that the trial court delivered Judgment in Machakos CMCC ELC No. 81 of 2018 on the 8th August, 2019 in favour of the Plaintiffs as against the Defendants as prayed in the Pleint.

3. The Applicants' advocate deponed that the Applicants were dissatisfied with the Judgment of the court and requested for copies of the proceedings; that the proceedings were supplied on 3rd September, 2019; that the period between 3rd and 6th September, 2019 was spent pursuing the proceedings and that the delay in filing the Appeal within the thirty (30) days prescribed under Section 79G of the Civil Procedure Act was beyond the control of the advocate for the Applicants.

4. The deponent averred that the advocate representing the Applicants was misadvised considering that Order 50 Rule 3 of the Civil Procedure Rules allows filing of pleadings on the next working day where time expires on a Sunday. The court was urged to allow the Application in view of the imminent execution and the right to be heard on Appeal.

5. In reply, the 2nd Respondent deponed that the Application is frivolous, vexatious, an afterthought and an abuse of the court process; that Judgment was delivered on the 8th August, 2019; that the Applicants' explanation for the delay in filing the Appeal is misleading and that the Applicants' counsel, having been present during the trial in the lower court, did not require typed proceedings in order to come up with the Memorandum of Appeal.

6. It was deponed by the 2nd Respondent that the Applicants have not exhibited any letter addressed to the Executive Officer requesting for typed proceedings; that in any event, the intended Appeal has zero or minimum chances of success and that if the Appeal is allowed to be filed out of time, it will be a waste of valuable judicial time.

7. The deponent averred that the Applicants have not demonstrated any prejudice they would suffer if the Decree of Machakos Law Court

ELC Case No. 81 of 2018 is executed and that the Respondents will be prejudiced if the orders sought are granted.

Submissions:

8. The Application was canvassed vide written submissions. Counsel for the Applicants submitted that the delay in filing the Appeal was occasioned by the time taken to receive the proceedings as well as the misadvice occasioned by the registry officials who refused to accept the Memorandum of Appeal on Monday 9th September, 2019.

9. Learned counsel for the Applicants submitted that the Applicants have an arguable Appeal and that the failure to file the Appeal on time had been explained; that the instant Application was filed promptly hence an indication of good faith on the part of the Applicants and that no prejudice will be occasioned to the Respondents if the Application is allowed.

10. In response, learned counsel for the Respondents reproduced the provisions of Section 79(G) of the Civil Procedure Act which 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.”

11. Counsel submitted that the Applicants ought to meet the following conditions to be allowed to file the Appeal out of time: the delay was not inordinate; the delay is sufficiently explained; the Respondent will not suffer any prejudice and the intended Appeal is arguable. Counsel relied on the case of *Pothiwalla vs. Kidogo Basi Housing Co-operative Society Limited & 31 Others (2005) KLR* where the court rendered itself thus:

“...It is now settled that an Application of this nature (under rule 4 of this courts rules) the court is being asked to exercise its inferred discretion and that for an applicant to succeed, he must satisfy the court that the delay was not inordinate and that the delay has been sufficiently explained. The other issue to be considered is whether the intended appeal is arguable. Lastly the Applicant has to show that no prejudice would be caused to the Respondent ...”

12. It was submitted by counsel that the Judgment the Applicants wish to Appeal against was delivered on 8th August, 2019; that the Memorandum of Appeal ought to have been filed on or before 7th September, 2019 and that the same was filed on 12th September, 2019.

13. It was counsel’s argument that the Applicants have not tendered any explanation for the inordinate delay in filing both the Application and the Memorandum of Appeal.

Analysis and findings:

14. The Applicant is seeking for leave to file the Appeal against the decision of the lower court. 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 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.”

15. The principles that should guide the court in granting an Applicant leave to file an Appeal out of time were considered by the Court of Appeal in the case of *Itute Ingu & Anor vs. Isumael Mwakavi Mwendwa (1994) eKLR*, as follows:

“Whereas advocate’s bona fide error is a special reason for extension of time within which to appeal, the nature and quality of the mistake must be considered. It is therefore clear that whereas inadvertence may be a ground for extension of time, the nature and quality of the inadvertence must be disclosed for consideration by the Court. It therefore does not suffice to simply state that the failure to comply with the prescribed timelines was due to inadvertence, as the Applicant did in this case.”

16. The same principles were considered in the case of *Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi Civil Application No. NAI 255 of 1997 (ur)* where the court held as follows:

“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.”

17. The Applicants' advocate deponed that the Applicants herein were dissatisfied with the Judgment of the lower court and requested for copies of the proceedings; that the proceedings were supplied on him on 3rd September, 2019; that the period between 3rd and 6th September, 2019 was spent pursuing the proceedings and that the delay in filing the Appeal within the thirty (30) days prescribed under Section 79G of the Civil Procedure Act was beyond the control of the Applicants.

18. The reading of Section 79 G of the Civil Procedure Act shows that a party does not need proceedings to be able to file the Memorandum of Appeal. Indeed, the only time that is excluded from computation of time for the purpose of filing an Appeal from the decision of the lower court is the duration that a party takes to extract a Decree or Judgment, which must be certified by the court.

19. However, it would appear that the Applicants' advocate was under a mistaken believe that typed proceedings are required before one can lodge an Appeal.

20. Considering that Judgment was delivered by the lower court on 8th August, 2019, and the Applicants having filed the Memorandum of Appeal on 12th September, 2019, the delay in filing the Appeal for two (2) days was not inordinate.

21. Indeed, the explanation given for the late filing of the Appeal by two days is excusable. The Respondents have also not shown the prejudice they will suffer if the Application is allowed.

22. Having already filed the Memorandum of Appeal, and considering the provisions of Order 50 Rule 6 which grants this court the power to enlarge time which has been fixed by the Rules, and the provision of Section 3A which grants to this court the inherent power to make such orders as may be necessary for the ends of justice, I allow the Application dated 11th September, 2019 as follows:

a) Time be and is hereby enlarged for the Applicants to file the Memorandum of Appeal out of time.

b) The Memorandum of Appeal dated 6th September, 2019 be and is hereby deemed as having been properly filed and served on the Respondents.

c) The costs of the Application to be in the cause.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE