



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT ELDORET**  
**ELC CASE NUMBER 108 OF 2019 (O.S)**

**CHRISTOPHER CHEPKITENG.....APPLICANT**

**VERSUS**

**RAPHAEL AYABEI SEREM.....1<sup>ST</sup> RESPONDENT**

**VINCENT LELEI.....2<sup>ND</sup> RESPONDENT**

**NELSON CHEPKIYENG.....3<sup>RD</sup> RESPONDENT**

**JOSEPH KIBET.....4<sup>TH</sup> RESPONDENT**

**RULING**

This ruling is in respect of an application dated 5<sup>th</sup> June 2020 by the plaintiff/applicant seeking for the following orders:

- a) Spent
- b) That this Honourable court be pleased to enlarge time and grant leave to the applicant to file an appeal out of time against the ruling of the Hon. Court delivered on 23<sup>rd</sup> April 2020 by Hon. Justice M.A Odeny(Judge)
- c) That herewith annexed notice of appeal and memorandum of appeal dated and filed on the....be deemed by this Honorable court as properly filed and properly before the court’s record save for the payment of filing fees thereto
- d) The cost of this application be provided for:

Counsel agreed to canvass the application vide written submission but at the time of writing this ruling no submissions had been filed by the applicant. The applicant filed supporting affidavit and a further affidavit explaining the reason for delay of filing a notice of appeal against the ruling dismissing an application for injunction.

The applicant averred that the ruling in this case was delivered on 23<sup>rd</sup> April 2020 and that the statutory time within which to file an appeal had run out by the time he gave instructions to his lawyer.

The applicant therefore seeks for extension of time within which to file an appeal at the Court of Appeal and that he has an arguable appeal with high chances of success. In the applicant’s further affidavit, he averred that the application has been made without undue delay and the reason is that he had travelled home following the government directive owing to the Covid-19 pandemic and could not be reached on phone.

The applicant further stated that the respondent’s averments were untrue in regard to the claim that he had filed a claim on adverse possession and that he had not sought any review or appeal from the judgment in Eldoret HCC No. 87 of 1990. He further stated that the court should disregard the procedural technicalities and focus on administering justice. He averred that he is willing to abide by any conditions to be set by the court and urged the court to allow the application as prayed.

**RESPONDENT’S SUBMISSIONS**

Counsel for the respondent filed submissions and stated that the ruling was delivered on the 23<sup>rd</sup> April 2020 and the applicant had 14 days within which to lodge an appeal. The applicant did not comply with Rule 75 of the Court of Appeal Rules. The applicant failed to file a

notice of appeal and serve the same upon the respondents within 7 days as provided by the law.

Counsel also submitted on the provisions of Rule 82(1) of the Court of Appeal Rules, 2010 which require the applicant to lodge his memorandum of appeal, record of appeal, prescribed fee and security for the costs of the appeal within a period of 60 days from the date when the notice of Appeal was lodged.

It was counsel's further submission that the applicant made an application for a copy of the proceedings within 30 days from the date of the ruling he intends to appeal and that the proviso, to sub rule (1) entitles the applicant herein to obtain a certificate of delay from the Registrar of the court excluding such time within the applicant was required for preparation and delivery of the copy of proceedings to the applicant.

Ms Cheso submitted that the applicant cannot rely on proviso to sub rule (1) as Rule 82 (2) is only available to appellants whose application for a copy of the proceedings was made in writing and the same served upon the respondent to the appeal.

On the issue as to whether there was inordinate and inexcusable delay in filing the application, counsel submitted that this instant application was filed two months after delivery of the ruling. Counsel disputed the applicant's argument that he could not visit the advocate's offices due to the government directive on Covid – 19 yet the applicant resided in Iten about 20 Kms from Eldoret town.

Counsel relied on the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** where the court held that:

*“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but to apply it in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”*

Counsel submitted that there was inordinate delay as the applicant's application is an afterthought and should be dismissed with costs.

Ms Cheso further submitted on the issue of extension of time of time and cited the Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 ors(2014)eklr**, where it was stated that extension of time is not a right of a part but an equitable remedy that is only available to a deserving party at the discretion of the court. The Supreme Court enumerated the principles that a court should consider in exercise of such and stated thus

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.

Counsel also relied on the case of **Raphael Musila Mutiso & 3 ors v. Joseph Ndava Nthuka &anor(2019) eklr**, the Court of Appeal held that in an application for extension of time the most critical consideration is the explanation for the delay. It was urged that the applicant had not given any tangible reason for the delay to lodge the appeal on time. The court relied on the case of **Leo Sila Mutiso V Rose Hellen Wangari Mwnagi Civil Application No. Nai.225 of 1997** where it was noted that:

*“On the strength of a long line of authorities it is settled that whether or not to extend time for filing a notice of appeal or lodging the appeal itself is discretionary and will depend on the length of the delay, the reason for the delay, the degree of prejudice to the respondents if the application is granted and possibly the chances of the appeal succeeding if the application is granted.”*

Ms Cheso also cited the case of **Naomi Wanjuki Irei (Legal Representative of the Estate of Ireri Muigai) Vs Pauline Mutuku Kivuti (Legal Representative of the Estate of Nelson Ngari Wachira) eKLR 2020** where the court the court held that the applicant had not given sufficient reason for the delay in filing the appeal.

Counsel therefore urged the court to dismiss the application with costs to the respondent.

## **ANALYSIS AND DETERMINATION**

The issue for determination is as to whether the applicant meets the threshold for grant of orders of extension of time to file an appeal out of time. Counsel agreed to canvas the application by way of written submissions of which the respondent complied but the applicant failed to do so. The court will therefore determine the application from the affidavits filed by the applicant.

It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. The court should also be guided by the settled principles as set out in the Nicholas Salt Case ( Supra) which the respondent has relied on.

The applicant filed an application dated 17<sup>th</sup> September 2019 seeking for and order of injunction to issue against the defendants. The court heard the application and rendered a ruling to the effect that the applicant argued the application as if it was seeking for final orders which were not tenable in an interlocutory application. The ruling was delivered on 23<sup>rd</sup> April 2020 and this current application was filed on 5<sup>th</sup> June 2020 which is more than 2 months from the date of the ruling.

In an application for extension of time the most important element is the explanation of the delay in filing the notice of appeal within the stipulated period. What are the reasons for delay by the applicant in this case? The applicant stated that he was unable to instruct his lawyer to file an appeal due to COVID 19 pandemic. It is on record that the new normal for the communication and hearing of cases was through virtual hearings. Processes were served electronically and communication via mobile communications.

It is also on record that the applicant comes from Iten which has mobile network coverage and the reason alluded to does not absolve him in the delay in instructing his lawyer to file a notice of appeal. This is a matter whereby the main suit has not been heard.

In the case of **Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co. [1957] EA 438**, it was held that:

*“In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”*

The reason given by the applicant for the delay is not satisfactory and there are no special circumstances to warrant the extension of time. I have considered the application the submissions by counsel and find that the application lacks merit and is dismissed with costs to the respondents.

**DATED and DELIVERED at ELDORET this 17<sup>TH</sup> DAY OF NOVEMBER, 2020**

**M. A. ODENY**

**JUDGE**