



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC MISC. APPLICATION NO. 13 OF 2020**

**ANTHONY KARIMI KAMICHA.....APPLICANT**

**VERSUS**

**FRANCIS KARIMI KAMICHA.....RESPONDENT**

**RULING**

What is coming before me is the Notice of Motion dated 22<sup>nd</sup> July 2020 brought under *Order 51 rule 1 Civil Procedure Act and Sections 1A, 1B 3A 65(E), 79 G and 95 of the Civil Procedure Act*. The Applicant is seeking the following orders:-

(1) Spent.

(2) That this Honourable Court be pleased to grant the applicant leave to file an appeal against the entire judgment and subsequent decree of Honourable A.K. Ithuku, Chief Magistrate, delivered on 20<sup>th</sup> February 2020 vide Kerugoya CM's ELC Case No. 4 of 2019 out of time.

(3) That the costs of this application be provided for.

The application is based on the following grounds:-

- (a) That the applicant was aggrieved and dissatisfied with the judgment of the lower Court and he intends to appeal against the same.
- (b) That he has good grounds of appeal.
- (c) That the applicant instructed his previous counsel on record M/S Ann Thungu & Co. Advocates to file the appeal.
- (d) That the applicant later went to his previous advocate's office sometime towards the end of March only to realize that no appeal was filed.
- (e) That the applicant later instructed Wanjiru Waweru & Co. Advocates to file an appeal on 30<sup>th</sup> March 2020.
- (f) That the said firm of advocates could not file an appeal immediately since Courts were not in operation due to Covid-19 pandemic.
- (g) That the delay by the applicant to file his appeal was not deliberate since all along he knew that his previous counsel had filed the appeal.
- (h) That an advocate's mistake should not be visited on an innocent litigant.
- (i) That the respondent shall not suffer any prejudice should this application be allowed.
- (j) That it is mete and just to allow this application.

**Factual Statement by Parties**

The applicant reiterated the same contents of the grounds shown on the face of the application in his supporting affidavit. The only additional matter are annexures of the impugned judgment and the draft Memorandum of Appeal.

The respondent filed a replying affidavit in opposition to the said application in which she deposed as follows:-

- (i) That under the provisions of Order 9 rule 5 the counsel for the applicant in this matter is not properly on record since she did not represent the applicant in the lower Court.
- (ii) That the applicant's former advocate Ann Thungu has not sworn an affidavit to confirm that she was duly instructed but failed to file an appeal.
- (iii) That no evidence has been tendered to show that the current counsel on record was instructed on 30<sup>th</sup> March 2020 and no proper explanation has been given for the delay since the Court operation were up-scaled from June 2020.
- (iv) That the delay to file the appeal is inordinate, un-reasonable and inexcusable.
- (v) That the applicant's proposed appeal has no chance of success.
- (vi) The applicant is a vexatious litigant as can be shown from the plaint in the lower Court that he was seeking the determination of trust on behalf of one Edith Wangithi Kamicha, Penina Kirunda Kamicha and Eunice Muthoni Kamicha.
- (vii) That upon determination of CMCC ELC Case No. 4 of 2019, the parties whom the applicant was seeking determination for trust on their behalf namely PENINA KIRUNDA KAMICHA and EDITH WANGITHI KAMICHA filed another suit being ELC Case No. 17 of 2020 which raises the same issues.
- (viii) That the application sought in ELC Case No. 17 of 2020 against him was dismissed on 26<sup>th</sup> February 2020.
- (ix) That ELC Case No. 17 of 2020 is still pending and the issues to be determined are the same issues in the intended appeal.
- (x) That this is an abuse of the Court process.

#### Legal Analysis

I have considered the Notice of Motion dated 22<sup>nd</sup> July 2020, the supporting affidavit of the applicant and the annexures thereto. I have also considered the replying affidavit and the applicable law. The applicant has invoked the provisions of *Section 79 G, 95, 1A, 1B, 3A, and 65 (E) Civil Procedure Act* as read with *Order 51 Rule 1 Civil Procedure Rules*. **Section 79 G Civil Procedure Rules** 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”.*

The impugned decision was delivered by the Chief Magistrate Hon. A.K. Ithuku in CMCC No. 4 of 2019 on 20<sup>th</sup> February 2020 and this application was made on 22/7/2020. There is a delay of about five (5) months. The reasons given for failing to file appeal within the given period is that he had instructed his previous advocate M/S Ann Thungu & Co. Advocates to

lodge appeal and when he visited her offices towards the end of March 2020, he realized that no appeal was filed. The applicant has not attached a letter to his former advocate instructing her to prefer an appeal or a payment receipt showing that she engaged her to conduct the appeal. This Honourable Court takes judicial notice that the Chief Justice of the Republic of Kenya only scaled down the Court operations during the Covid-19 pandemic but the Courts were operational as usual. The reasons given by the applicant that his newly instructed advocate M/S Wanjiru Waweru & Co. Advocates could not file an appeal immediately since Courts were not in operation due to Covid-19 pandemic cannot be further from the truth. The applicant has not attached a Notice from the Hon. Chief Justice or any other authorized person from Judiciary indicating that the Courts were not in operation due to Covid-19 pandemic.

The statute gave an aggrieved party a right to appeal within a period of 30 days. A Court exercising discretionary power cannot give more than what the statute has provided unless sufficient reasons are given. The reasons given by the applicant that he had given instructions to his hitherto advocates to file appeal cannot take away his responsibility to check and ensure that the appeal is indeed filed. Cases belong to litigants and should not be heard shifting blame to advocates who are not parties in the suit. In the case of **Republic Vs Laikipia District Land Disputes Tribunal & 3 others (2006) e K.L.R Justice Kimaru** (as he then was) observed as follows:-

*“This Court and various Courts of record have stated that a suit once filed is owned by a litigant and not his counsel. It behoves a litigant to diligently pursue his case and ensure that it has been prosecuted to conclusion. A litigant cannot blame his counsel for failing to inform him of the progress of his case. It is such a litigant's duty to keep in contact with his advocate so that he is aware of the progress that would have been made in his suit. In my view, that is an excuse that is raised by such a litigant to mislead this Court into granting him the orders sought. Furthermore, it is trite law that when an advocate diligently fails to give effect to the instructions of his client, he may be liable to be sued for professional negligence. It cannot in all circumstances be a ground for setting aside an adverse order made against such a litigant”.*

I agree with the observation by the learned Judge. Indeed a culture is emerging among litigants who after failing to comply with statutory procedural requirements, they engage new advocates while using previous counsels as scapegoats for their failure.

The Notice of Motion dated 22<sup>nd</sup> July 2020 lack merit and the same is hereby dismissed with costs.

**READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 13<sup>th</sup> day of November, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms Wanjiru for the Applicant
2. M/S Githaiga for the Respondent
3. Mbogo – Court clerk.