



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 1 OF 2016

RABECAH MWIKALI JACOB.....PLAINTIFF/APPLICANT

VERSUS

PETER NICHOLAS MUTUKU.....1ST DEFENDANT/RESPONDENT

STELLAMARIS NZILANI MUTUKU.....2ND DEFENDANT/RESPONDENT

LAND REGISTRAR,

MACHAKOS COUNTY.....3RD DEFENDANT/RESPONDENT

RULING

1. In the Application dated 17th June, 2020, the Applicant is seeking for the following orders:

- a) That this court pleased to grant leave to lodge an Appeal out of time against the decision delivered on 24th April, 2020.***
- b) That upon grant of leave to Appeal, the Appeal lodged herein be deemed as properly filed.***
- c) That the costs abide the Application.***

2. The Application is supported by the Affidavit of the Plaintiff who deponed that she is aggrieved by the decision made on 24th April, 2020 and wishes to prefer an Appeal out of time; that she was not able to file an Appeal within the stipulated time because she was not present during the delivery of the decision and that she learnt about the decision of the court on 15th June, 2020 after the courts scaled up their operations.

3. The Plaintiff deponed that from 16th March, 2020, the public had been advised to stay at home because of the Corona Virus; that the Appeal has high chances of success and that she has been in occupation of the suit property with her family for the last thirty-seven (37) years since 1983 to-date and has developed the land.

4. The Respondents' response to the Application is not on record. The Application was canvassed vide written submissions. However, it is only the Applicant's submissions which are on record.

5. Learned counsel for the Applicant submitted that Order 50 Rule 6 of the Civil Procedure Rules grants the court powers to enlarge time where a limited time has been fixed for doing any act or taking proceedings under the Rules or by summary notice or by an order of the court.

6. Counsel submitted that the Applicant has substantially developed the suit premises; that the demolition of a home has an emotional and financial impact and that the Application was timeously presented to court. Counsel placed reliance on the case of *Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR* where it was stated that:

“...It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

7. The Applicant is seeking for leave to file an Appeal to the Court of Appeal challenging the decision of this court out of time. That being the case, it was erroneous for the Applicant’s counsel to file this Application under the provisions of Order 42 Rule 6, Order 51 of the Civil Procedure Rules and Section 79 G of the Civil Procedure Act.

8. The relevant provision of the law for this kind of Applications is Section 7 of the Appellate Jurisdiction Act which provides as follows:

“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:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

9. Rule 75 of the Court of Appeal Rules provides as follows:

“75. (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

10. The factors to be considered by the court before granting a party leave to Appeal out of time against its decision were stated in the case *Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR* as follows:

“... It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

11. In *Fakir Mohammed vs. Joseph Mugambi & 2 Others, Civil Application No. NAI 332 of 2004 (unreported)* the Court of Appeal stated the test thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

12. The court delivered its Judgment in this matter on 24th April, 2020 electronically. Indeed, at the time of the delivery of the Judgment, there was in place a directive by the President for the cessation of movement in and out of Nairobi due to the COVID 19 pandemic that was ravaging the country and the world at large. The courts had to scale down their operations significantly during the said period.

13. Consequently, the reasons given by the Applicant that neither her nor her counsel could not attend the session for the delivery of the Judgment on 24th April, 2020 due to the pandemic, and that they only learnt about the existence of the Judgment on 15th June, 2020 after the upscaling of the court’s operations are plausible.

14. Indeed, taking cognizance of the fact that the said Judgment was not delivered in the open court as per the provisions of the Civil Procedure Rules due to Covid-19, and the fact that the Application was filed within two (2) months of the decision of the court, I shall allow the Application dated 17th June, 2020 as follows:

a) Leave be and is hereby granted to the Plaintiff to lodge her Notice of Appeal out of time.

b) The Notice of Appeal to be filed within fourteen (14) days of the date of this Ruling.

c) Each party to bear his/her own costs.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 6TH NOVEMBER, 2020.

O. A. ANGOTE

JUDGE