



**REPUBLIC OF KENYA**

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

**ELC MISC CASE NO. 68 OF 2019**

**JOSEPH MWIRIGI M'ITHIRI.....APPLICANT**

**VERSUS**

**SOLOMON GICHURU MAUGO.....RESPONDENT**

**JUDGMENT**

1. Before me is a notice of motion brought pursuant to provisions of Section 79 G of the Civil Procedure Act, Order 50 Rule 6 and Order 42 Rule 6 of the Civil Procedure Rules seeking leave to file an appeal out of time against the Judgement/Decree of the Chief Magistrate in Meru CMCC NO. 77 OF 2016. The applicant also sought a stay of execution of the aforementioned judgment pending the hearing and determination of the current application and the appeal.

2. Vide a consent entered into by the parties through their advocates signed in court on 2.12.2019, it was agreed that the prayer for stay of execution be allowed while the court was to give a determination on the issue of extension of time.

3. Further, this court was urged to look at the submissions of the applicant which were to be filed by close of business on 27.10.2020. I have not seen any such submissions.

4. The applicant contends that the date of judgment was given as 18.1.2018, but when he went to court with his advocate, they found that judgment was not ready and they were told that judgment would be delivered on notice. In the month of August 2018, they learnt that judgment was delivered on 24.1.2018 in their absence and without notice.

5. The respondent has opposed the application vide a replying affidavit filed in court on 2.12.2019. He has given a general out look of the merits of his case before the lower court. His application before that court to execute the judgment was allowed on 9.10.2019.

6. I have considered all the issues raised herein. **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 of a copy of the decree or order:”***

7. In the case of **Fahim Yasin Twaha vs Timamy Issa Abdalla & 2 Others [2015] eKLR**, the court had this to say on the issue of extension of time to appeal.

***“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”.***

8. Thus extension of time is not a right and a party needs to adequately demonstrate that the court’s discretion should be exercised in their favour. The applicant avers that they only learnt about the judgment in the month of August 2018.

9. The current application was filed on 18.10.2019. The applicant contends that he had not been supplied with copies of the proceedings until June 2019 and that is why he was unable to lodge the appeal on time. In the case **Meru ELC Misc Appl No. 31 of 2018 Genesis Mutwiri Mwereria vs Augustus Kabira M’ Muraga**, this court cited the case of **AIG Insurance Company Limited v Michael Okoth [2018] eKLR**, where Judge C.W.Githua had expressed herself as follow;

***“I must say with respect to the applicant’s learned counsel that the above explanation is based on a total misconception of the law. Under Order 42 of the Civil Procedure Rules, an appeal to the High Court is instituted by merely filing a memorandum of***

***appeal which need not be accompanied by a certified copy of the decree or order appealed against. The applicant did not need a certified copy of the ruling in order to file its appeal.”***

10. I find that the delay of more than one year in filing the appeal has not been satisfactorily explained. I find no merits in the prayer for extension of time. Ultimately, the consent order for stay of execution lapses. In the circumstances, the application dated 17.10.2019 is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF DECEMBER, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given via a notice dated 7.12.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**