



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC. CASE NO. E4 OF 2020

WINDRICK OPARANYA WAMUKOYA.....APPLICANT

VERSUS

BONVENTURE OUNDO MBANDA.....RESPONDENT

RULING

The application is dated 2nd October 2020 and is brought under Section 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act Cap 21 and Order 51 of the Civil Procedure Rules 2010 seeking the following orders;

1. That the application be certified urgent and be heard exparte forthwith in the 1st instance.
2. That the honourable court be pleased to grant the applicant leave to file appeal out of time from the ruling in Mumias SPMC ELC No. 14 of 2020.
3. That costs of this application be in the cause.

It is based on the supporting affidavit of Windrick Oparanya Wamukoya grounds that the time within which to file the appeal has expired hence the need to extend the same. That the delay is not inordinate and is excusable. That the delay in filing the appeal was caused by factors beyond his control. That the intended appeal has overwhelming chances of success. That it is in the interest of justice and fairness that the application be allowed. That this honourable court has legal authority to grant the orders sought. That the respondents will not suffer any prejudice in the event the application is allowed. That it is in the best interest of justice that the orders sought are granted.

The applicant submitted that he was the plaintiff in Mumias SPM ELC No. 14 of 2020. That they filed the suit together with an application dated 15th May, 2020. That they took directions that the application be dispensed with by way of written submissions. That all parties filed their respective submissions and ruling was to be delivered electronically on 25th June, 2020. That on 25th June, 2020 the honourable court delivered its ruling electronically. That he lost touch with his lawyers on record for reasons beyond his control and he only learnt of the terms of the ruling way later in mid July after its delivery. That he then instructed his advocates on record to file an appeal on his behalf. That on 2nd July, 2020 they did write a letter to the trial court requesting for typed proceedings. That that they did write a reminder to the court on 9th July, 2020. That on 20th July, 2020 the typed proceedings were ready for collection but since physical attendance at the court registry had been prohibited the typed proceedings would be delivered by Express Mail Service (EMS). That on 12th August, 2020 the typed proceedings were physical delivered to his lawyer's office. That they could not file the said appeal during that period as Kakamega Law Courts were closed down for 2 weeks to enable staff to be quarantined after Covid-19 cases had been confirmed in the premises. That his advocates on record advised him to settle legal fees to enable them pursue the appeal but he was not in a position to do so until late September, 2020.

The respondents submitted that the delay herein is inordinate. The ruling was electronically delivered on 25th June, 2020, and the same was received by the parties advocates on the same day. The applicant had upto 24th July, 2020 to file his appeal as per section 79G of the Civil Procedure Act. The application is dated 2nd October, 2020 and the court stamp does not show when it was filed. Assuming that it was filed on 2nd October, 2020, it means there was a delay of 80 days from 24th July, 2020 to 2nd October, 2020. The applicant's reasons for the delay is that he lost touch with his advocates, could not raise instruction fees and closure of courts for two weeks and receiving the proceedings late.

That as regards proceedings the applicant is not being honest. Annexure WOW2 (letter dated 2nd July, 2020 applying for the proceedings and ruling has no payment receipt. Proceedings cannot be supplied without payment. Filing an appeal in the High Court, one does not file the records contemporaneously with the memorandum of appeal. Legal fees is an issue between the advocate and his client and it is not a reason for delay. On the issue of closure of courts, the same came after the lapse of time to file appeal which was on 24th July, 2020. The notice is for 17th – 30th August, 2020. There was nothing which barred the applicant to file the present application between 25th July, 2020 to 16th August, 2020. The applicant is thus being dishonest to state that the closure was a reason for delay. There was already a delay before the notice took effect. Furthermore, time bound pleadings were to be filed electronically. That on the issue whether the intended appeal has a

chance of success, they submit it has none. The issue of the land in question was determined by this court in Kakamega ELC No. 171 of 2017. So the matter before the trial court was res judicata and thus the appeal has no chances of success at all.

This court has considered the application and the submissions therein. Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:

“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.”

In the case of Paul Musili Wambua v Attorney General & 2 others (2015) eKLR, the court held that;

“.....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

The applicant submitted that on 25th June, 2020 the honourable court delivered its ruling electronically in this matter. That he lost touch with his lawyers on record for reasons beyond his control and he only learnt of the terms of the ruling way later in mid July after its delivery. That on 2nd July, 2020 they did write a letter to the trial court requesting for typed proceedings. That on 20th July, 2020 the typed proceedings were ready for collection but since physical attendance at the court registry had been prohibited the typed proceedings would be delivered by Express Mail Service (EMS). That on 12th August, 2020 the typed proceedings were physical delivered to his lawyer's office. That they could not file the said appeal during that period as Kakamega Law Courts were closed down for 2 weeks to enable staff to be quarantined after Covid-19 cases had been confirmed in the premises. That his advocates on record advised him to settle legal fees to enable them pursue the appeal but he was not in a position to do so until late September, 2020. The time to file appeal which was on 24th July, 2020 but it was not until the 9th October 2020 that this application was filed. The applicant further states he was not in a position to settle legal fees until late September, 2020. I find that the reason for the delay is not acceptable and a good and sufficient cause for not filing the appeal in time has not been demonstrated. Losing touch with ones advocate and settling legal fees with ones lawyers are not valid excuses and I reject them. Secondly, lower court proceedings were not necessary at that point. On the issue of chances of the appeal succeeding, this suit was dismissed for being res judicata Kakamega ELC No. 171 of 2017 where the parties are the same and the subject matter. I see no chances of success in this case. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 9TH DECEMBER 2020.

N.A. MATHEKA

JUDGE