



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC MISC. CASE NO. 07 OF 2020

MAKEMBO KAYA KIMEMIA.....APPLICANT

VERSUS

SILAS NYAGA.....1ST RESPONDENT

JOSEPH MWANGANGI KAMUNYU.....2ND RESPONDENT

ELIJAH MUTHENGI KAMUNYU.....3RD RESPONDENT

GRACE GITHINJI KAMUNYU.....4TH RESPONDENT

RUTH MWENDE.....5TH RESPONDENT

JACOB MUTETHIA GAKIRORU.....6TH RESPONDENT

JOHN KAMUNYU.....7TH RESPONDENT

RULING

1. This application states that it was brought to court under Rule 7 of the Appellate Jurisdiction Act Cap. 7 Laws of Kenya and Order 51(1) of the Civil Procedure Rules. It seeks the following orders: -

1. **THAT** this honourable court be pleased to certify this application as urgent and direct that the same be heard ex-parte in the first instant.
2. **THAT** this honourable court be pleased to grant the Applicant leave to file a Notice of Appeal out of time for the judgment of this court dated 21st November 2019 in **ELC CASE NO. 13 OF 2017**.
3. **THAT** this honourable court be pleased to extend time for filling all necessary documents to file the intended appeal to the Court of Appeal.
4. **THAT** this honourable court do make any other orders as would meet the interest of justice in the cause.

2. The application has the following grounds: -

1. **THAT** the Applicant was unable to file the suit within the statutory period due to the Corona Virus Pandemic.
2. **THAT** the judgment in Chuka **ELC CASE NO. 13 OF 2017** was delivered on the 21st day of November 2019 in the absence of the Applicant's Advocates on record.
3. **THAT** the Applicant personally made an application to be supplied with the proceedings and judgment which were supplied to them in July 2020.
4. **THAT** due to the Covid 19 pandemic the court was not able to supply the said proceedings and judgment in time.
5. **THAT** the proposed appeal has High chances of success.

6. **THAT** it is only fair and just that the Applicant be granted leave to file the suit outside the statutory period.

7. **THAT** the Respondent will not be prejudiced if the orders sought herein are granted.

3. The application is buttressed by the affidavit of Makembo, Kaya Kimemia, the applicant, which states as follows: -

1. **THAT** I am the Applicant in respect of this application and I was the Plaintiff in Chuka E.L.C case no. 13 of 2017 hence competent to swear this affidavit.

2. **THAT** the judgment of the said case was delivered on the 21st day of November 2019 in the absence of my Advocates on record.

3. **THAT** I made an application to be supplied with the proceedings and judgment in this case which were supplied to me in the month of July 2020. Annexed hereto and marked as **MKK "1"** is a copy of the said letter.

4. **THAT** the explanation I was given by court was that due to the Covid 19 pandemic the court was not able to supply the said proceedings and judgement in time.

5. **THAT** since I received copies of the judgment and proceedings, I have met with my Advocates, studied the judgment and we have decided that an appeal is necessary as the Applicant's suit was decided contrary to the interest of standard justice.

6. **THAT** it will be in the interest of justice if this application is allowed.

7. **THAT** I swear this affidavit in support of this application for leave to file the Notice of Appeal out of time.

8. **THAT** what is stated to herein is true to the best of my knowledge, information and belief save where the source of my information is otherwise disclosed.

SWORN by the said)

MAKEMBO KAYA KIMEMIA

4. The applicant filed written submissions which state as follows: -

APPLICANT'S WRITTEN SUBMISSIONS

May it please your Lordship;

The application by the Applicant dated 2nd day of September 2020 seeks for extension of time for filing Notice of Appeal and for leave to appeal out of time to the Court of Appeal from the decision of this honourable court delivered on 21st November 2019 in **ELC CASE NO. 13 OF 2017**.

Your Lordship, this honorable court has unfettered jurisdiction to extend time for filing a Notice of Appeal and also grant leave to appeal out of time. In **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)** cited in **Stanley Kaiyongi Mwenda vs Cyprian Kubai[2000] eKLR** the Court stated as follows regarding how such discretion is to be exercised.

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted".

Your Lordship, the judgment in **ELC CASE NO. 13 OF 2017** was delivered in the absence of the Applicant's Advocates who were on record and the Applicant being aggrieved by the decision personally made an application to be supplied with the proceedings and judgment which were supplied to them in July 2020. The reason advanced by court for the delay was due to the Covid 19 pandemic that led to the closure of courts.

Your Lordship, the Applicant submits that the proposed appeal has high chances of success and the Respondents will not suffer any prejudice if this application is allowed.

Your Lordship, the Applicant ought not be shut out of exercising his statutory right to be heard on appeal and therefore we humbly submits that the application dated 2nd day of September 2020 be allowed for the Applicant to be granted a chance to prosecute their intended appeal.

Most obliged.

DATED at MERU this 15TH day of OCTOBER 2020.

FOR: B.G KARIUKI & CO

ADVOCATES FOR THE APPLICANT

5. The respondents filed Grounds of opposition which state as follows:

TAKE NOTICE that Counsel for the Defendants/Respondents shall at the hearing of the application dated 02/09/2020 raise and urge the following grounds in opposition thereto.

1. **THAT** the said application does not meet the threshold for a grant of the orders sought.
2. **THAT** reasons advanced by the Plaintiff/Applicant for delay in preferring an appeal within the stipulated period of time do not warrant the Honourable court to excise its discretion in favour of the Plaintiff/Applicant.

REASONS WHEREFORE the Defendants/Respondents pray that the application dated 02/09/2020 be dismissed with costs.

DATED AT CHUKA THIS DAY OF 2020.

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FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES

ADVOCATES FOR DEFENDANTS/RESPONDENTS

6. I have considered the pleadings proffered by the parties in support of their veritably incongruent assertions.

7. The impugned judgment was delivered on 21st November, 2019. This was almost four months before the corona pandemic affected the operations of courts in Kenya. Any excuses for the applicant's indolence cannot be reasonably ascribed to the corona virus pandemic. The period for filing appeals lapsed on or around 20th December, 2019. This was almost 4 months before the Covid 19 pandemic affected operations of Courts in Kenya. Furthermore, judgments are always delivered in open court on the appointed days whether advocates representing the litigants are present or not present. The absence of an advocate when a judgment is delivered has never been an excuse to warrant extension of time.

8. In the circumstances, I issue the following orders:

- a) This application is hereby dismissed with the result that all orders applied for are denied.
- b) Costs shall follow the event and are awarded to the respondents.

Delivered in open Court at Chuka this 2nd day of December, 2020 in the presence of;

CA: Ndegwa

Makembo Kaya – Applicant

Other parties absent.

P. M. NJORGE,

JUDGE.