



**REPUBLIC OF KENYA**

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

**ELC MISC. APPLICATION NO 9 OF 2018**

**LYDIA WAIRIMU KIMANI.....APPLICANT**

**VERSUS**

**BELIAH WANJIRU WACHIRA .....RESPONDENT**

**RULING**

1. This is the application by way of Notice of Motion by Lydia Wairimu Kimani, the Applicant herein filed on the 15/11/16. The application is brought under Order 50 and 42 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the Constitution of Kenya, the Limitation of Actions Act and any other provisions of the law. The Applicant sought the following orders;

- a. That the Applicant be granted leave to appeal out of time.
- b. Costs be in the cause.

2. The application is based on the grounds annexed to the application. It is supported by the affidavit of the Applicant sworn on the 8/11/16 where she deponed that her husband the late George Kimani Kibe purchased land parcel No LOC 13/KAGOE/163 in 1992. That she filed suit against the Respondent then Defendant in the lower Court, that is to say SPMCC NO 366 OF 2006 where judgment was delivered in 2009.

3. She avers that the trial Court failed to take into account various issues and totally misdirected itself even denying to grant the refund of the purchase price. That she has an arguable appeal.

4. She stated that after the delivery of the judgment she went into a delirium and could not think properly.

5. The Respondent opposed the application and filed Grounds of Opposition dated 10/2/17. In it, the Respondent terms the application misconceived, incompetent, bad in law, gross abuse of the process of the Court, fatally incurable frivolous and vexatious. She sought the dismissal of the same.

6. The Plaintiff filed Written Submissions on the 2/5/17 but the Respondent did not file any by the time of writing this Ruling.

7. The Applicant submitted that she is seeking the mercy of the Court to file an appeal out of time. That the Applicant has an arguable appeal. She argued inter alia that the Defendant had conceded to the refund of Kshs 23,400/- to the Plaintiff, now the Applicant and yet the Learned Magistrate did not grant the said monies to the Applicant. That instead the learned Magistrate considered the length of usage of the land by the Applicant in form of cultivation and converted it as part of the purchase price. She opined that there is no principle of law or equity that justified such a finding.

8. She submitted that the reason for not filing the appeal on time was because she went into delirium and was not in control of her senses.

9. Having reviewed the application, the affidavit evidence and the brief submissions the question that calls for determination by the Court is whether the Applicant deserves the granting of the orders sought that is to say leave to file the appeal out of time.

10. I have seen the judgment of the lower Court delivered on the 11/9/09 wherein the Applicant was the Plaintiff and the Respondent was the Defendant. After hearing the matter fully, the learned Magistrate pronounced a judgment dismissing the Plaintiff's suit.

11. Section 79G of the 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.

12. Parliament in its own wisdom has provided for a right of appeal in civil matters from the decision of a trial Court and has set a statutory period in which the appeal must be filed. This is where the right of appeal is derived from. The period specified in the law is 30 days from the date of delivery of judgment. In arriving at the period of appeal consideration is given to the time which the lower Court may certify as having used for the preparation and delivery to the Appellant of the copy of the judgment and proceedings in the lower Court. The judgment of the lower Court was delivered on the 9/11/2009 and therefore the right of appeal lapsed on the 9/12/2009 by which time the appeal should have been filed. In the alternative if there was delay in obtaining the judgment and proceedings of the lower Court that delay is indicated in the certificate of delay given by the lower Court in which event the number of days stated therein as delay is excluded in calculating the period within which the appellant ought to exercise her right of appeal.

13. In this case there is no certificate of delay that has been proffered before this Court.

14. The power to admit the appeal out of time is provided for under the second limb of section 79G of the Civil Procedure Act. It is a discretionary power and just like all discretionary powers it must be exercised judiciously not in a whimsical or erratic manner. see **Shah V Mbogo (1973) EA 163**.

15. The Court is guided to exercise discretion in favour of the Applicant if the Applicant satisfies the Court that she had a good and sufficient cause for not filing the appeal in time. It is the Applicant who unlocks the exercise of the judge’s discretion by showing good and sufficient cause for indulgence. In the case of **Vallabhadas Damodar trading as D JAMNADAS & Sons Vs Esmail & Misando CA NO 21 of 1975** , the learned justices of the then East African Court of Appeal for East Africa pronounced themselves as thus;

“ it is necessary for the Court to specify what facts constitute the good and sufficient cause upon which discretion to extend time is exercised.”

16. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. There has to be valid and clear reasons, upon which discretion can be favourably exercisable. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA, in **MONICA MALEL & ANOR VS. R ET AL, ELDORET CIVIL APPL. NO. NAI 246 OF 2008**, stated thus:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the Applicants appears to show ... the Applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

17. In exercising discretion, it should not be supposed that the discretion is entirely unfettered as Lord Romilly MR explained in **HAYWOOD V COPE, (1858) 25 BEAV 140:**

“...the discretion of the Court must be exercised according to "xed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the Court may oblige him to do so.”

18. The Appellant has given the reason for delay as that she became delirium and lost her senses upon the delivery of the judgment. It is not clear what these words mean but on the face of it, it means in simple English confusion, restlessness, hallucination or being in a frenzy mood. The Applicant has not produced any medical report to show that her health was affected to the point that she was not in control of her senses as she wants the Court to believe.

19. The law as enacted under section 79G of the Civil Procedure Act could not have envisaged a situation where a man who has succeeded in one Court and has not been challenged within a time specified in a statute should be unsure whether or not at all at some later time his opponent cannot revive the whole matter again in a higher Court in an appeal. There has to be a certainty of the law.

20. The application filed on the 15/11/2016 is coming 7 years later and coupled with the fact that the Applicant has not given a good reason why the Court should excuse her delay, the Court finds that the delay is simply unexplained, not inadvertent and not a mistake.

21. In the case of **M/S Portreitz Maternity -vs- James Karanga Kabia, Civil Appeal No. 63 of 1997** where this Court rendered itself thus:

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

22. Another factor that the Court looks at in considering such an application is whether the Applicant has an arguable appeal. For starters, the Applicant has not bothered to attach a draft Memorandum of Appeal for the Court to appreciate the gist of her plea to the Appellate Court. All that has been gleaned from the affidavit of the Applicant is that the learned magistrate is being faulted for not determining that she was

entitled to a refund of the purchase price. There is not enough material on record in form of the draft memorandum of appeal to enable the Court apply its mind on this factor.

23. According to Page 2 of the impugned judgment the suit land, the subject of the lower Court case in SPMCC No 366 of 2006, was transferred to third parties on the 4/12/1995. It is clear from that finding that save for the Respondent who is likely to be prejudiced by allowing the application there are third parties who are the current or then current registered owners of the said suit land. surely there must be an end to litigation.

24. In the upshot, it must be clear by now that this application is for dismissing. It is dismissed with costs to the Respondent.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANGA THIS 28TH FEBRUARY DAY OF 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Kimakia HB for Kimwere for the Applicant

Respondent – Advocate is absent

Njeri and Irene, Court Assistants