



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC MISC. CASE NO. 1 OF 2019

BENARD OTIENO OBUNGA.....APPLICANT

VERSUS

LAWRENCE OGUDA OBUNGA.....RESPONDENT

RULING

1. The applicant namely **BENARD OTIENO OBUNGA** through Nyauke and Company Advocates filed an application by way of a Notice of motion dated 4th February 2019, filed on 11th February 2019 under certificate of urgency pursuant to section 1A,1B,3A and 79G of the Civil Procedure Act, (Cap 21 Laws of Kenya; Order 51 Rule 1 of the Civil Procedure Rules, 2010). He is seeking the following orders:-

a) Spent

b) That the applicant be granted leave to file his appeal out of time against the judgment in Homa-Bay CMC Land Case No. 6 of 2016.

c) That the costs of this application be provided for.

2. The application is premised on the applicant's supporting affidavit sworn on 4th February 2019, an annexed memorandum of appeal marked BOO1 and a list of authorities dated 4th February 2019 which include **Imperial Bank Ltd (in Receivership) & Kanother –v- Alnashir Popat & 18 others (2018) eKLR** and **Samwel Mwaura Muthumbi –v- Josephine Wanjiru Ngugi and another (2018) eKLR**. The grounds of the applicant are inter, alia;

a) That the said judgment was given without notice to the advocates of the applicant herein.

b) That the time for filing appeal against the said judgment had elapsed by the time we found out that judgment had been delivered.

c) That the applicant has acted with speed to have this application filed to prevent inordinate delay in filing the intended appeal.

d) That the appeal is arguable and we urge this court to allow for its filing.

3. The respondent **LAWRENCE OGUDA OBUNGA** through Owade and Company Advocates, opposed the application by way of grounds of opposition dated 20th February, 2019 and filed on even date. The grounds include:-

i. That the applicant's intended appeal does not raise prima facie case with a high probability of success.

ii. That it is in the interest of justice that litigation should come to an end expediently hence any attempt to commence a fresh litigation is in bad taste and amount to an injustice to a successful litigant and is an abuse of the process of the honourable court.

iii. That the application herein is frivolous, inept, an abuse of the honourable court's process and is in want of merit hence pray that the same be dismissed with cost.

4. On 26th February 2019, the court allowed counsel for the respective parties to argue the application orally and briefly further to Order 51 Rule 16 of the Civil Procedure Rule, 2010. Learned counsel for the applicant relied on the grounds on the face of the application, the applicants supporting affidavit and the list of authorities. Learned counsel for the respondent relied on the grounds of opposition to the

application.

5. I have noted the entire application, the grounds of opposition and submissions of counsel for the respective parties. So, has applicant shown sufficient cause for the grant of leave and costs as sought in the application?

6. The application is brought under the legal provisions relating to the overriding objective, special and inherent powers of this court as well as time for filing appeals from subordinate courts. The proviso to **Section 79 G of the Civil Procedure Act (Cap 21 Laws of Kenya)** reads:-

“Provided that an appeal may be admitted out of time if the appellant satisfies the court that he has good and sufficient cause for not filing the appeal in time” (Emphasis laid)

7. It follows that it is within the discretion of the court to admit an appeal out of time. The court’s discretion exercise is always for the purposes of upholding the law as far as possible and this would require preserving the claims of the parties so that they may be heard and determined according to the law as recognised in the case of **Oraro –v- Mbaja (2008) 1KLR 142 at 149 and 150.**

8. In the exercise of its discretion, the court has to be satisfied that the applicant (appellant) has good and sufficient cause for not filing the appeal out time. **Black’s Law Dictionary, 10th Edition** defines the term **“good cause”** as follows:-

“A legally sufficient cause. Also termed good cause shown , just cause, lawful cause, sufficient cause”

9. The applicant contends that judgment in Homa-Bay CMC Land cause number 6 of 2016 was delivered against him on 25/9/2018 without notice to his advocate and that he filed the application to prevent inordinate delay in filing the intended appeal. I note that the application was filed four months or thereabout after delivery of judgment by the trial court. **Section 79 G (supra)** specifies that every appeal from a subordinate court to the High Court (also read Environment and Land Court under **Article 162 (2) (b) of the Constitution of Kenya, 2010**) from a subordinate court to the High Court shall be filed within a period of thirty (30) days from the date of the decree or order appealed against.

10. I am of the considered view that the instant application has been filed without un reasonable delay. By grounds of the application and the supporting affidavit thereto the applicant contends that judgment was delivered without notice to him and that he has acted with speed in filing the instant application. Therefore he ,has not failed to give good and sufficient reasons for the delay of four (4) months in seeking extension of time to file appeal out of time; see also the decision of the Supreme Court of Kenya in **Naomi Wangechi Gitonga and 3 others – IEBC and 17 others (2018) eKLR.**

11. Moreover, I have looked at the memorandum of appeal and the grounds thereon. I find that the appeal raises issues including ownership of the suit land, LR NO. EAST/KANYADA/KANYADIER/3465 and the nature of defence of the appellant filed before the trial court. The intended appeal is arguable in the circumstances. Quite clearly, the applicant can not be shut out of its fair hearing in view of the decisions in **Kanathor and Muthumbi cases (supra)** and in line with **Articles 50 (1) and 23 (c) of the Constitution of Kenya, 2010.** The grounds of opposition fails to displace the good cause shown by the applicant in the instant application.

12. Wherefore, I allow the notice of motion application dated 4th February 2019 for leave to file his appeal out of time in the terms sought therein.

13. Costs of the application shall be in the cause.

DELIVERED, DATED and SIGNED AT MIGORI THIS 20th DAY OF MARCH 2019.

G.M.A. ONG’ONDO

JUDGE

In presence of :-

Ms. E. Kijana, learned counsel for the applicant

Mr. Owade, learned counsel for the respondent

Tom Maurice – Court Assistant