



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC MISC. CIVIL APPLICATION NO.17 OF 2018

WILLY NJUGUNA.....APPLICANT

VERSUS

NJOROGE GITHAE.....RESPONDENT

RULING

The matter for determination is Notice of Motion Application **dated 16th June 2018** brought by the Applicant herein seeking for the following orders;

- 1. That this Honourable Court be pleased to allow the Applicant file his Appeal out of time.***
- 2. That this Application be in the cause.***

The Application is based on the grounds that;- the trial court asked for the Applicant's phone numbers for communicating when the Judgment and other rulings will be delivered but it failed to communicate to him. Being dissatisfied with the Court's Judgment, he wishes to appeal out of time.

In his **Supporting Affidavit**, he averred that Judgment was delivered on **19th February 2018**, against him without his knowledge. It was his contention that he was asked by the Court to furnish them with his mobile number so that he could get confirmation on when to collect copies of the Judgment and he left his number with the magistrate and he was never reached until the **12th June 2018**, when he was served with the a Decree. It was his contention that he when he went to Court to confirm if the document was genuine, he learnt that the Judgment was delivered and the Respondent has extracted the Decree. He was then furnished with copies of the proceedings and Judgment of court upon his request. It was his allegation that the error was on the trial court for failing to inform him of the Judgment date and as he is dissatisfied with the ruling and Judgment of Court, he wishes to Appeal against it albeit late. He attached a copy of Memorandum of Appeal and averred that he seeks leave of Court to appeal out of time as the orders will not prejudice any party and he urged the Court to allow his Application unconditionally.

The Application is opposed and the Respondent filed a **Replying Affidavit** dated **31st August 2018**. However the said **Replying Affidavit** has not been commissioned and thereby has failed to comply with the Statutory and Declarations Act and is therefore struck out.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered. The issue for determination before this Court is whether or not the Applicant has achieved the threshold for grant of leave to file appeal out of time.

This Court has jurisdiction to allow an Applicant to file an appeal out of time but in doing so the Court is to use its discretion and be satisfied that the Applicant has given sufficient reason to warrant the grant of the said

leave. **Section 79G** of the **Civil Procedure Act**, provides that:-

“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 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 **Nicholas Kiptoo Arap Korir Salat...Vs....The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR**, the Court held that:-

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. "We derive the following as the underlying principles that a court should consider in exercising such discretion:-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; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

In line with the foregoing cases it is this Court's opinion that the question that must then be answered is whether the Applicant has explained the reason for the delay to the satisfaction of this Court.

It is not in doubt that the Judgment herein sought to be appealed against was not attached to confirm that it was delivered in the absence of the Applicant. The Applicant has blamed the trial Court for failing to inform him of when the copies of the Judgment was ready despite having being assured that he would be called once the said Judgment was read. However there is no evidence of such allegations that have been made against the trial Court. Even so it is my opinion that a party has a duty to follow up with its own case. Section 107 and 108 of the Evidence Act are very clear that he who alleges must prove. A letter that has been produced by the Applicant before this Court confirms that the Applicant sought for the copies of the Judgment and proceedings on the 13th June 2018. The receipt also provided confirms that the same was paid for on the same day. This Court can only rely on the evidence that has been produced before it and it cannot be seen to speculate on issues. There is no evidence produced before Court to indicate that before the 12th June 2018, when the Decree was allegedly served upon him, the Applicant had attempted to follow up on the issue of the said Judgment or at the very least to procure the same.

There has been no evidence of Notice of Appeal that was served upon the Respondent making him aware of the intended Appeal or even an iota of evidence that the Applicant intended to appeal the matter and therefore it is this Courts opinion that the reason as to why there was a delay of over 3 months in filing an appeal in this Court are not believable and this Court is not satisfied that the delay or default on the part of the Applicant has been satisfactorily explained.

It is clear that the Applicant slept on his rights and only woke up when he was served with the Decree. It is this Court's opinion that the decree acted as a trigger to the Applicant and thus filing of this application. What if the Respondent never extracted the Decree, would the applicant still be waiting for the Court to call him to pick up the documents or would he have made attempts to get the documents? I guess these are questions that we may never get an answer to.

The Judgment having been delivered on 19th February 2018, and the Application having been brought 3 months later and with no satisfactory explanation as to why the Applicant did not file the Appeal on time, this Court finds that the Applicant has failed to satisfy this Court with explanation of the said delay and Consequently has failed in the first limb of persuading the Court to exercise its discretion and therefore his Application has no merit and the Court has no option but to dismiss it. See the case of Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading

Company Limited (2015)eKLR, where the court held that;

"The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour."

The Upshot of the foregoing is that the Applicant's Notice of Motion application dated 16th June 2018 has no merit and the same is hereby dismissed entirely with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered at Thika this 3rd of May 2019.

L. GACHERU

JUDGE

3/5/2019

In the presence of

Applicant in person - present

Respondent in person - present

Lucy - Court Assistant

L. GACHERU

JUDGE

3/5/2019