



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 4 OF 2019**

**EUNICE WANJIKU MUIGAL.....APPLICANT**

**VERSUS**

**GATUNDU NYAKINYUA CO. LTD.....1<sup>ST</sup> DEFENDANT/ RESPONDENT**

**LYDIA WAIRIMU KAGONDO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion Application dated **18<sup>th</sup> January 2019**, by the Applicant herein seeking for the following orders;

- a) THAT the intended Appellant/ Applicant be granted leave to appeal out of time against the judgment delivered by Hon. B. IRERI (P.M) on 24<sup>th</sup> of July 2015***
- b) THAT the memorandum of Appeal annexed hereto be deemed as duly filed and served***
- c) THAT the costs of this Application be provided for***

The Application is premised on the grounds that the lower Court in Thika delivered Judgment on **24<sup>th</sup> of July 2015** without notice to the intended Appellant/Applicant or the Respondents and the Decree was extracted on the **4<sup>th</sup> of April 2016** after time allowed for appeal had lapsed. That the intended Appellant was contacted immediately after the decree was extracted to avail further instructions and by the time sufficient instructions could be obtained from the proposed Appellant, the time to file the appeal had run out. Further that the proposed Respondent is unlikely to suffer any prejudice and the delay occasioned is not so inordinate as to be inexcusable

In her supporting Affidavit, the Applicant reiterated the grounds on the face of the Affidavit and further averred that that she is aggrieved by the decision of the lower Court and had advised her Advocates to appeal against it. However, her Advocate advised her that time allowed to appeal under the Act has since lapsed, but this Court has power to enlarge such time. She averred that despite the Judgment having been delivered in **July 2015**, no notice of Judgment was ever issued and it's only after incessant insistence and perusal of the Court files where it was discovered that Judgment had been delivered. Through her Advocates she then extracted a decree on **4<sup>th</sup> April 2016** and she is still waiting for typed proceedings and judgment.

She further averred that she was unable to file an application for stay pending appeal as the subordinate Courts lacked jurisdiction at the time due to the stay orders issued by **Justice Chitembwe** in Malindi **Petition No. 3 of 2016**. She contended that she is threatened with execution of the decree and unless the appeal filed is allowed, she will suffer prejudice, great loss and damage. She averred that the delay is not inordinate as to be inexcusable. She urged the Court to allow the Application in the interests of Justice.

The Application is contested and **Paul Kagondo Ng'ang'a** filed a Replying Affidavit and averred that he was the Plaintiff in the lower Court. He averred that the Judgment date was given in Court in their presence and that of their Advocates and the Applicants were in Court at the time the Judgment was delivered and he saw her as he was present. He further averred that his wife passed on **23<sup>rd</sup> March 2017** and in November of the same year, he filed an application for substitution as she was the initial Plaintiff wherein he clearly stated he was applying for purpose of execution. He further averred that his Advocates had previously written to the applicant requiring her to pay costs within seven days and as such all the foregoing acts show that the Applicant was aware of the Judgment against her but did not act. He further averred that from the date of Judgment to the time of filing the present application is three and a half years and is clearly inordinate and inexcusable delay.

The parties agreed to rely on the filed documents and did not file written submissions. This Court has now carefully read and considered the pleadings and the annexures thereto and renders itself as follows.

The Applicant herein has urged the Court to exercise its discretion and grant her leave to appeal out of time so that the interest of Justice are met. The order sought by the Applicant is that which requires the Court to exercise its discretion in deciding whether to grant it or not and in so doing to exercise it judicially. Principles have been settled when considering Applications for leave to file an appeal out of time. See the case of **Fakir Mohammed ...Vs... Joseph Mugambi & 2 Others, [2006] eKLR**, where the Court held that:-

***“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance - are all relevant but not exhaustive factors.”***

***The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In Mwangi V. Kenya Airways Ltd, [2003] KLR 48, the Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4 went on to hold;-***

***“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”***

This Court will therefore be guided by the above principles in deciding whether or not to grant the orders sought. The Court will also consider the reasons that have been advanced by the Applicant specifically the delay of over four years in bringing the instant Application. See the case of **Habo Agencies Limited ...Vs... Wilfred Odhiambo Musingo [2015] eKLR** wherein the Court cited the case of case of **Ratnam...Vs...Cumarasamy [1964] 3AllER 933** reiterated:-

***“...in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. And it is worth repeating that if a law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the Rules, which is to provide a timetable for the conduct of litigation.....Nevertheless, there must be some material on which the court can exercise its discretion.”***

The Applicant has averred that Judgment in the lower Court was delivered in her absence and she was never notified of the said Judgment date but later got to know of the delivery of the Judgment after making incessant follow ups at the registry. On the other hand the 2<sup>nd</sup> Respondent has averred that the Applicant was in Court when the judgment date was set and was also present when the Judgment was delivered. It is trite that **“whoever alleges must prove”**. In this Instant case, it is the Applicant that alleged that she was not present when the judgment was delivered and therefore unaware of the delivery of the said Judgment. However no evidence has been produced before this Court in form of Court records to show that the Applicant was absent during the delivery of Judgment. This Court will take judicial notice that during the delivery of Judgments, it is standard practice that judicial officers will always indicate parties present. Further the Applicant has alleged that she made follow ups to the registry to try and locate the file as it had been missing in the lower Court. Again no documentation has been provided before this Court to show that any incessant follow up was ever made.

It is however clear that the 2<sup>nd</sup> Respondent’s Advocates sent out a letter dated **5<sup>th</sup> August 2016** to the Applicant’s Advocates in which they notified them of the need to pay costs and further from the Applicant’s supporting Affidavit it is clear that as early as **April 2016**, they were aware of the Judgment. No reasonable explanation has been given as to why they did not bring this Application in the year **2016** and opted to file it in the year **2019**. This Court finds that the reason of the issue of Jurisdiction does not have any bearing on this instant Application as correctly pointed out by the 2<sup>nd</sup> Respondents. This is so as they have brought the instant Application before this Court and not the lower Court and therefore the reason that the lower Court did not have jurisdiction in this Court’s opinion is a fallacy.

This Court therefore finds that the Applicant has not given sufficient reason for the delay in bringing this Application and even if the Court was to exercise its discretion in her favour, the Applicant has failed to produce any documentation to evidence that she applied for proceedings and or the same are ready. If this Court is to exercise its discretion then it is not clear how long the Applicant may take to file the record of appeal. This Court is therefore not satisfied with the explanation advanced by the Applicant as the explanation for the delay are not satisfactory. See the case of **Okiya Omtatah Okiiti v Kenya Power and Lighting Company & 10 others [2019] eKLR** where the Court of Appeal held that;

***“The Court however notes that the delay sighted in that case was only for one day. In this case, there is no plausible explanation given for the delay of over 40 days, and another 10 days delay in filing this application after serving the Notice of Appeal late. I appreciate the applicant’s profound apology for the delay but that is not enough. As stated earlier, some credible material has to be placed before the Court to enable it exercise its discretion in favour of the applicant. There is paucity of material placed before me to enable me exercise my discretion in favour of the applicant. Sympathy cannot suffice.”***

Consequently the Court finds that the Notice of Motion Application dated **18<sup>th</sup> January 2019**, is not merited and the Court is inclined to disallow the extension of time.

The Upshot of the above is that the Notice of Motion Application dated **18<sup>th</sup> January 2019** is dismissed with costs to the 2<sup>nd</sup> Respondent. This Court notes that the 1<sup>st</sup> Respondent did not oppose the Application and therefore will grant costs to the 2<sup>nd</sup> Respondent only.

It is so ordered.

*Dated, Signed and Delivered at Thika this 26<sup>th</sup> day of July 2019.*

**L. GACHERU**

**26/7/2019**

**JUDGE**

In the presence of

No Appearance for Applicant

No Appearance for 1<sup>st</sup> Respondent

No Appearance for 2<sup>nd</sup> Respondent

Lucy . - Court Assistant.

Court; Ruling read in open Court in the absence of the parties

**L. GACHERU**

**26/7/2019**

**JUDGE**