



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELCMISCELLANEOUS APPLICATION CASE NO. 5 OF 2019

JOHN KAMAKIA NTHATU.....APPLICANT

VERSUS

FESTUS KITHINJI NJAGI.....RESPONDENT

RULING

1. This application states that it has been brought to court under Section 79G of the Civil Procedure Act 2010, Order 51 of the Civil Procedure Rules, Article 159(2) (d) of the Constitution of Kenya and all other enabling provisions of the law.

2. The application is supported by the affidavit of John Kamakia Nthatu, the applicant, sworn on **12th September, 2019** and filed on **13th September, 2019**. The application seeks the following orders:

1. That the honourable court be pleased to grant the applicant leave to file an appeal out of time.
2. That consequent to 1 above, the court to order that file Chuka CMCC No. 192 of 2018 formerly Marimanti E.L.C. 45 OF 2017 be transmitted into the intended appeal (once filed).
3. That costs of this application be costs in the intended appeal.

3. The application has the following grounds:-

- a) That the applicant herein is aggrieved by the judgment in ELC No. 45 of 2017 which judgment was delivered on 23rd March, 2018 and seeks to appeal against the said judgment out of time.
- b) That the delay in filing the appeal was occasioned by confusion when lower court file from Marimanti ELC 45 of 2017 was mistakenly allocated a new number namely Chuka CMCC No. 192 of 2018.
- c) That the former advocate on record for the applicant failed to file a memorandum of appeal and wrongly filed a notice of appeal without memorandum of appeal in Chuka ELC Appeal 4/2018 and his mistakes should not be visited on the applicant herein as he is an innocent litigant.
- d) That instead of the former advocate for applicant filing a memorandum of appeal, he wrongly filed a notice of appeal as the honourable judge rightly found out (see Ruling of Justice Njoroge marked JK 3).
- e) That the delay herein is not so inordinate as to be inexcusable.
- f) That the intended appeal is arguable and has high chances of success.
- g) That this honourable court has unfettered discretion in granting leave to file an appeal out of time.
- h) That the Marimanti file has the lower court proceedings ready.
- i) That the applicant has plausible reason why he is filing this now.

j) That this is a land case which should be given special consideration due to its customary attachment to the applicant.

k) That it is in the interest of justice that this application be allowed.

4. The application was opposed through the Replying Affidavit of the Respondent filed on **27th September, 2019** which states:

I, FESTUS KITHINJI NJAGI of P. O. Box 386-60400 Chuka, do hereby make oath and state as follows:

1. That I am an adult male person of sound mind, the respondent in this application hence competent to swear this affidavit.
2. That the application (sic) has and is abusing this honourable court process with endless application that are frivolous.
3. That the applicant has been filing applications in court but fails to turn up to prosecute his application.
4. That this court should not entertain the applicant with vexatious application.
5. That he cannot blame his former advocate whereas he has not been attending court too. A litigant should take a responsibility for his choice of advocate.
6. That the applicant has failed to attach a copy of memorandum of appeal and as such there is no way this court can tell whether he has an appeal with chances of success.
7. That the supporting affidavit is not attested and as such the application is fatally defective.
8. That the applicant has not sought to set aside the orders of this court issued on the 24th July, 2019.
9. That what is deponed to herein is true to the best of my knowledge and understanding.

5. The application was poised to be heard interpartes on **30th September, 2019**. The applicant and his advocate were not in court. Advocate Kijaru told the court that this application was an abuse of the court process because at least two other similar applications had been dismissed by this court in file No. ELCA 4 OF 2018. He prayed for dismissal of the application with costs.

6. From a perusal of the file apposite to ELCA No. 4 of 2018, I confirm that two similar applications were dismissed on 24th July, 2018 and on 24th July, 2019. I also note, as argued by the respondent's advocate, that this application was filed as a Miscellaneous Application perhaps to hide the fact that this court had dismissed similar applications in the past.

7. I do unequivocally find that this application has no merit.

8. This application is dismissed and costs are awarded to the Respondent.

9. It is so ordered.

Delivered in open court at Chuka this 30th day of September, 2019 in the presence of:

CA: Ndegwa

Kijaru for the Respondent

P.M. NJOROGI

JUDGE