



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC MISC CASE NO. 7 OF 2019

SAMWEL AMBASA.....1ST APPLICANT

CHARLES AMBASA.....2ND APPLICANT

NEBART AMBASA.....3RD APPLICANT

SELLA AMBASA.....4TH APPLICANT

VERSUS

STELA INGASIA.....RESPONDENT

RULING

1. This ruling is in respect of an application by way of a Notice of motion dated 12th March 2019 brought under Article 40,48 and 59 (2) of Constitution of Kenya, 2010, section 1,1A,3, 3A 64 (e), 66 and 79G of the Civil Procedure Act, Order 42 rule 6 (1),(2), and (5) and 7 and Order 50 rule 5 of the Civil Rules, 2010 and all other enabling provision of law. The 1st applicant, Samuel Ambasa (the applicant) who appears in person is seeking the following orders:-

a) Spent

b) Spent

c) THAT this Honourable court be pleased to enlarge time to the Appellants to Appeal to this court from Judgment and Decree of the subordinate court in Kehancha PMCC No. 12 of 2015 –Stella Ingasia –vs- Samwel Ambasa, Charles Ambasa, Nebart Ambasa and Sella Ambasa dated and delivered on 20th day of December 2018 and upon time being enlarged as such, the appellants be allowed to file Appeal herein out of time.

d) THAT consequent to prayer three (c) hereinabove being granted, there be a stay of execution of the judgment and Decree of the subordinate court in Kehancha PMCC No. 12 of 2015- Stella Ingasia –vs- Samwel Ambasa, Charles Ambasa, Nebart Ambasa and Sella Ambasa dated and delivered on 20th day of December 2018, pending the hearing and determination of the appeal case.

e) THAT cost of this application be provided for.

2. The application is anchored on the applicant's supporting affidavit of eight paragraphs sworn on even date and accompanying documents marked as "SAI and SA 2" namely copies of draft memorandum of Appeal, proceedings, receipts and Judgment in copy form. The application is further premised on grounds 1 to 6 on its face. The grounds include:-

i. THAT the applicants were represented by the firm of Odhiambo Kanyangi and Company advocates at the trial court with Mr. Kanyangi having the personal conduct over the same.

ii. THAT the applicants only learned that no appeal had been filed by their advocate as intended on 7th day of February 2019 when they visited the Environment and Land Court Registry to confirm if at all the said Appeal was filed.

iii. THAT the draft Appeal which the applicants are desirous to file has raised many serious and significant issues for this court's determination, and is thus not frivolous, as can, be discerned, inter alia, from the memorandum of Appeal.

iv. THAT the execution of proceedings to realize the fruits of that judgment and Decree are imminent.

3. The respondent, Stella Ingasia who is represented by learned counsel, Mr. Thomas Muniko opposed the application by way of her sixteen (16) paragraphs replying affidavit sworn on 25th March 2019 and filed in court on even date. She sought dismissal of the application with costs claiming that the same is misleading, full of falsehood, brought in bad faith, mischievous, frivolous and vexatious. She deponed, inter alia:-

a) "THAT the applicant ought to have filed their Appeal within 30days from the 20th day of December 2018 when the said Judgment was delivered as required by law.

b) THAT the applicant herein have brought this application in bad faith with clear intention to deny me the fruits of my Judgment since there is no sufficient reason having been advanced for staying the subordinate court's verdict and subsequent enlargement of time to file an appeal as sought by the applicants herein hence same is an afterthought altogether."

4. The respondent further deponed in part that the draft memorandum of appeal marked as "SA1" which the 1st applicant intends to file fails to raise serious issues with likelihood of success in the intended appeal. That the applicants have failed to give reasons as to why they neither instructed counsel to file an appeal nor filed their appeal within the prescribed period. That the application is a waste of the court's time and just meant to deny her the fruits of Judgment delivered on 20th December 2018 in the presence of the applicants and their counsel on record then, Mr. Kanyangi.

5. The application was canvassed by written submissions dated 4th April 2019 and 25th June 2019 for the applicant and respondent respectively pursuant to court order of 27th March 2019; see also **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice direction number 33 of the Environment and Land Court Practice Directions, 2014.**

6. The applicant submitted that his failure to file the application within the prescribed period of time was caused by his counsel who was on record at that time. He identified and analysed four (4) issues for determination including whether the applicant has a right to appeal against the verdict of the Magistrate's court and whether he is entitled to the orders sought in the application. He urged the court to find that the application is merited and allow the same as prayed therein.

7. Learned counsel for the respondent submitted that the application does not meet the threshold for the grant of the orders sought therein. That the discretion of the court to issue stay and enlarge time sought in the application needs to be exercised cautiously and judiciously. Counsel identified two (2) issues for determination and submitted that the applicant is not entitled to the orders sought herein as draft Memorandum of Appeal raises no triable issues for determination at the intended appeal.

8. I have duly considered the entire application, the replying affidavit and submissions including issues for determination identified therein by the respective parties. So, has the applicant advanced good and sufficient grounds for the grant of orders sought in the application?

9. I take into account all the provisions of the law under which the application is originated. At grounds 5 to 11 and paragraphs 5 to 12 of his supporting affidavit, the applicant stated, inter alia, that the application has been filed inordinately due to mistake caused by his counsel who represented him in Kehancha Principal Magistrate's Court Civil Suit No. 120 of 2015.

10. This court is aware that mistake of counsel should not be visited upon a client; see **Shabir Din –vs- Ram Parkash Anand (1955) EA CA volume 22 page 48.**

11. Moreover, mistake of a legal advisor may amount to sufficient cause but not inordinate delay on a party **(as per Spry VP in Hamam Singh and another –vs- Mistri (1971) EA 122).**

12. I note that Judgment was rendered on 20th December 2018 in Kehancha PMCC No. 12 of 2015. The instant application was commenced on 12th March 2019. Therefore there was 2 ½ months delay to mount the application.

13. In the case of **Naomi Wangechi Gitonga and 3 others –vs- IEBC and 17 others**, the Supreme Court of Kenya dismissed an application for extension of time to file an appeal where the applicant failed to give reasons for the delay. In the instant scenario, the application has admitted the inordinate delay but blamed it on his counsel and not on his part as held in **Harman Singh case (supra)**. I find his reasons sufficient in the circumstances.

14. It is discernable from the documents annexed to the applicant's supporting affidavit that the subject matter of the intended appeal is LR NO. BUKIRA/BUHIRI MONONO/816. In the case of **Board of Governors Moi High School Kabarak and another –vs- Malcolm Bell (2013) eKLR**, the Supreme Court of Kenya held that the court has authority to issue orders for the preservation, in the interim, of a subject matter of appeal.

15. I take into account that the parties herein are entitled to uncurtailed right to fair hearing under **Articles 25 (c) and 50 (1) of the Constitution of Kenya, 2010**. In that regard, I approve the decision of Simpson and Chesoni JJ (as they then were) in the case of **Hebtulla Properties Ltd (1976-80) 1 KLR 1195 at 1204** that a party has a right to be heard in a matter including objection and applications.

16. The upshot is that the application dated 12th March 2019 in full of merits. I proceed to allow orders 3 and 4 sought therein with no orders as to costs.

17. The applicant shall file and serve an appeal out of time herein within the next 30 days from this date.

18. It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 26th day of SEPTEMBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

The applicant

Mr. Nyakeyo holding brief for Muniko learned counsel for the respondent

Tom Maurice – Court Assistant