



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 758 OF 2017**

**(Formerly Kisii ELC Case no. 665 of 2016 )**

**PAMELA ATIENO OTIENO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ZABLON OWIGO OGECHA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**SALMON ATEGO OGECHA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. By an application dated 10<sup>th</sup> December 2018 and filed in court on 11<sup>th</sup> December 2018 pursuant to section 7 of the Appellate Jurisdiction Act as read with Rule 4 of the Court of Appeal Rules and any other enabling provisions of law, the defendants Zablun Owigo Ogecha and Salmon Atego Ogecha (the applicants) through G.S. Okoth and Company Advocates are seeking the following orders.

***a) The Honourable court be pleased to extend the time for filing and serving the notice of appeal out of time.***

***b) The costs incidental to this application do abide the result of the intended appeal.***

2. The application is premised on four (4) grounds set out on it's face. These are ;-

***i. The intended appeal has arguable grounds and the applicants should be allowed to file the appeal.***

***ii. This application has been made without undue delay and the full proceedings have not been supplied and the applicants made the decision to appeal after the expiry of the prescribed period.***

***iii. The suit involves a dispute over land which is emotive and the parties should be allowed to exhaust the available avenues.***

***iv. The instruction to conduct the appeal was given belatedly since a copy of judgment was received from court belatedly to enable the advocate for the applicants consult with and advice on whether to appeal hence final firm instructions to proceed with the appeal was duly issued at a later date.***

3. The application is also supported by the annexed affidavit of G.S. Okoth learned counsel for the applicants and copies of accompanying documents relating to proceedings and Judgment delivered on 17<sup>th</sup> September 2018 marked as "GSO-1" and "GSO-2" respectively. Counsel deponed that upon the delivery of Judgment he advised the applicants that there were available arguments to mount an appeal and they did issue instructions thereof belatedly due to their financial difficulties. That there are arguable grounds in the intended appeal and that the application has been made without undue delay and in good faith.

4. Counsel further deponed that the Judgment and the decree intended to be appealed against involves the suit land LR. NO. Kamagambo/Kongudi/286 and that the applicants together with their families have occupied it for a period in excess of 12 years. That the applicants will suffer irreparable loss as the orders issued in the judgment include their eviction from the suit land.

5. The plaintiff (respondent ) through M/s Oguttu, Ochwangi, Ochwal and Company Advocates, opposed the application, termed it devoid of merits and sought it's dismissal with costs. She averred that the applicants were fully aware of the Judgment delivered by the court on 17<sup>th</sup> September 2018 in the presence of Mr. Mwitia Kerario holding brief for their counsel, Mr. G.S. Okoth That the applicants wrote to the Deputy Registrar for a typed copy of the Judgment and the letter was received on 10<sup>th</sup> October 2018 as per copy of the letter dated 3<sup>rd</sup> October 2018 marked as "PAO-1".

6. The respondent further averred that the affidavit in support of the application was sworn by the applicants' counsel who is a stranger to financial capacity of the applicants. That the application suffers from inordinate delay of three (3) months and that the applicants have not given satisfactory and plausible reasons for flow of discretion in their favour.

7. The application was argued by written submissions further to this court's directions given on 23<sup>rd</sup> January 2019; see **Order 51 Rule 16 of the Civil Procedure rules, 2010** which provides as :-

***“The court may, in its discretion limit the oral submissions by the parties or their advocates or allow written submissions.”***  
(Emphasis added)

8. In their submissions dated 25<sup>th</sup> June 2019, learned counsel for the applicants urged the court to exercise its discretion and grant the applicants the chance to prove their case for a second time with the intended appeal. He relied on case law, inter alia, **Kenya Airports Authority and another –v- Timothy Nduvi Mutungi (2014) eKLR, Philip Chemwolo and another -vs- Augustine Kubende (1986) KLR 495 and Banco Arabe Espanol –vs- Bank of Uganda 1999 2 EA 22** to the effect that the High Court has power to extend time for giving notice of intention to **appeal pursuant to Rule 7 of the Court of Appeal Rules (sic). (clearly meant section 7 of the Appellate jurisdiction Act)**, a party should not suffer the penalty of having his cause determined on its merits due to a mistake made by that party and errors should not necessarily debar a litigant from the pursuit of his rights through unhindered hearing and determination of the dispute respectively.

9. On the other hand, learned counsel for the respondent in their submissions dated 29<sup>th</sup> July, 2019 and filed in court on 31<sup>st</sup> July 2019, framed four issues for determination based on the competence and merit of the application, termed the application unmerited and urged the court to dismiss it with costs to the respondent. Counsel submitted that the applicants were indolent for 71 days to originate the application yet they were aware of the Judgment. In support of the submissions, counsel cited **Order 19 Rule 3 (1) of the Civil Procedure Rules 2010**, case law namely **Francis Kimutai Bii –vs- Kaisugu (Kenya) Ltd (2016) eKLR, Nicholas Kipchirchir Kimaiyo –vs- Wilson Kibet Kimutai and another (2014) eKLR, Fahim Yasin Twaha –vs- Timamy Issa Abdalla and 2 others (2015) eKLR and Annah Mwaniki wairuru –vs- Hannan Wanja Wairuru (2017) eKLR** on extension of time for appeal.

10. I have duly considered the entire application, the relying affidavit and submissions of counsel for the respective parties herein. In view of the nature of the application, I endorse the three (3) issues for determination as framed in the respondent's submissions. So, is the application merited in the circumstances?

11. I note all the provisions of the law under which the application is brought. **Section 79 G (supra)** stipulates, time for filing appeals from subordinate courts and its proviso reads:-

***“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 filling the appeal in time.”***

12. Quite clearly, this court has the discretionary power to admit the appeal out of time only on good and sufficient reasons; see **Nduri Mutungi case (supra)**.

13. It is not in dispute that judgment herein was rendered in favour of the respondent and in the presence of the applicants' counsel on 17<sup>th</sup> September 2018. The present application was mounted approximately three (3) months later. The applicants' counsel contends that the application has been made without undue delay and in good faith. However, the respondent's counsel asserts otherwise.

14. Grounds (b) and (d) of the application and paragraph 6 of the supporting affidavit of the applicants' counsel reveal that the applicants made the decision to appeal after the expiry of the prescribed period and instructed counsel accordingly. It was clearly inordinate delay on their part and not a mistake of their counsel.

15. This court is aware that mistakes of counsel may amount to sufficient cause but not inordinate delay on the part of a party; see the decision in the case of **Hamam Singh and another –vs- Mistri (1971) EA 122**.

16. Essentially, it is within the discretion of the court to extend time to file an appeal. I bear in mind and subscribe to the views expressed by the Supreme Court of Kenya and the Court of Appeal in **Fahim Yasin Twaha and Annah Mwihaki Wairuru cases** respectively (supra) on the laid down guiding principles for the grant or denial of an extension of time to appeal. The principles are:-

***a) The length of the delay***

***b) The reasons for the delay***

***c) Chances of success of the intended appeal.***

***d) The degree of prejudice to the respondent if the application is granted.***

17. The applicant laments that due to financial difficulties, they filed the application belatedly. The averment was made by counsel for the applicant yet the matter is highly contested hence the affidavit in support of the application strikes at the root of **Order 19 Rule 3 (supra)**. I also approve a useful guide on the same in **East Africa and Foundry Works (K) Ltd and Francis Bii cases (supra)**. To that extent, the instant application is rendered incompetent in the circumstances.

18. Notably, **Article 50 (1) of the Constitution of Kenya, 2010** provides for right to fair hearing. In **James Kanyiita Nderitu and another –vs- Marios Philotas Ghikas and another (2016) eKLR**, the Court of Appeal held that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system; see also **Philip Chemwolo and Banco Espanol cases (supra)**.

19. Be that as it may, the scenario of the instant application is that it is not only incompetent but it was originated with inordinate delay. The same has been done so without sufficient reasons hence bound to fail.

20. Accordingly, I disallow the application dated 10th December 2018 with no orders as to costs.

21. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 8TH DAY OF OCTOBER 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. Oywer holding brief for Mr. D. Adawo learned counsel for the plaintiff/respondent

Tom Maurice – Court Assistant