



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC MISC. CASE NO. 30 OF 2019**

**ROSE MUKONDA OPANDA**

**JAPHETH OPANDA**

**JOSEPH OPANDA**

**JIMMY OPANDA AMBONYA.....APPLICANT**

**VERSUS**

**LEONIDA OMUKOYIA NYANGWESO.....RESPONDENT**

**RULING**

The application is dated 30<sup>th</sup> May 2019 and is brought under Section 1A, 1B, 3A and 79G of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules seeking the following orders:-

1. That this honourable court be pleased to grant the applicant leave to file an appeal challenging the ruling and order made by the subordinate court in Kakamega MCL & E. No. 86 of 2018 out of time.
2. That costs of this application be provided for.

It is based on the affidavit of Rose Mulonda Opana and on the grounds that, on 19<sup>TH</sup> March 2019 Hon. Wandere made a ruling in Kakamega MCL & E. No. 86 of 2018 whereby she restrained the applicant from entering, ploughing, charging, interfering, leasing, selling, disposing and alienating or in any other way interfering with the suit property being Butsotso/Esumeyia/1102. That the ruling was made in the absence of the applicants who had no prior knowledge of the ruling. That it was not until 21<sup>st</sup> May 2019 when the applicants were served with orders emanating from the said ruling that they became aware of the ruling. That having gone through the proceedings the applicants are satisfied that the appeal has good chances of success and more so since the ruling is in respect of a title that does not exist namely Butsotso/Esumeyia/1102. That the ruling will have the effect of evicting the applicant from land which they have occupied since 1989. That on 19<sup>th</sup> February 2019 when the case came up for ruling the honourable magistrate directed that she would deliver the ruling on notice. That it was not until 21<sup>st</sup> May 2019 when the applicant was served with the court order that she found out that the ruling had been delivered on 19<sup>th</sup> March 2019. That the delay in lodging the appeal within the stipulated time is excusable and explainable since the applicants only came to know of the ruling when they were served on 21<sup>st</sup> May 2019.

The respondent submitted that, the appeal has been overtaken by events since the applicants have already reviewed the order being appealed against vide Kakamega High Court Environment and Land case No. 33 of 2019. (Attached and marked L.O.N-1 is a copy of the order). That from the court records, parties agreed to dispose of the application dated 4<sup>th</sup> October 2018 by way of written submissions which were to be confirmed on 17<sup>th</sup> July 2018. That on 17<sup>th</sup> July, 2018 the court was indisposed and further mention date was given for 22<sup>nd</sup> January 2019. That on 22<sup>nd</sup> January 2019 parties had complied and gave the court gave 19<sup>th</sup> March 2019 as ruling date and therefore all counsels were aware of the ruling date.

*This court has considered the application and the submissions therein. Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:*

*“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 been 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 *Paul Musili Wambua v Attorney General & 2 others [2015] eKLR*, the court held that;

**“...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”**

The applicant submitted that, on 19<sup>th</sup> March 2019 Hon. Wandere made a ruling in Kakamega MCL & E. No. 86 of 2018 whereby she restrained the applicant from entering, ploughing, charging, interfering, leasing, selling, disposing and alienating or in any other way interfering with the suit property being Butsotso/Esumeyia/1102. That the ruling was made in the absence of the applicants who had no prior knowledge of the ruling. That it was not until 21<sup>st</sup> May 2019 when the applicants were served with orders emanating from the said ruling that that they became aware of the ruling hence the delay in filing the appeal. I find that from the records both the counsels for the plaintiff and the 3<sup>rd</sup> defendant who is the 1<sup>st</sup> applicant herein were present during the delivery of the ruling. Even if the said applicants were not aware of that the ruling was delivered it is strange that they would sit back for two months until they were served with the order. I find that the reason for the delay is not acceptable and a *good and sufficient cause for not filing the appeal in time has not been demonstrated. I find this application is not merited and I dismiss it with costs.*

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> NOVEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**