



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL NO. 26 OF 2016

JORIM OBURA OMOLLO

LAWI OUMA ODERO.....APPELLANTS

VERSUS

TOBIAS OTIENO AYIEKO.....RESPONDENTS

RULING

The Respondent herein filed an application seeking to strike out this appeal on the grounds that the appeal was filed out of time without leave; that the 1st Appellant died in 2010 and could not have given instructions; and that the appeal is an abuse of the process of this court.

The Appellants subsequently filed an application seeking to enlarge time of appeal on the grounds that the appeal was filed 3 days out of the stipulated statutory period; that the delay was inadvertent and excusable; that the Respondent will not be prejudiced if the application is allowed; and that the Appellant is willing and prepared to abide by any reasonable and just condition that the court may impose in enlarging time for filing the appeal. Counsel for the Defendant deponed in an affidavit that the reason for the delay was the fact that they had to seek formal instructions from the client before proceeding to file the appeal.

The Respondent in a replying affidavit contended that for two years, the Appellants did not file an application seeking leave to be allowed to file the appeal out of time and only moved after the Respondent's application to strike out the appeal was filed. That even after filing a record of appeal the Appellants did not fix the appeal for hearing or even file an application to enlarge time. The Respondent contended that the Appellants' application was clearly an afterthought. The Respondent faulted the reason given for filing the appeal late and averred that the 1st Appellant Jorim Obura was his neighbor and died in 2010, therefore could not have instructed his Advocates from the grave.

The 2nd Appellant confirmed that the 1st Appellant was indeed deceased. He averred that he was not aware of the strict timelines for filing an appeal before this court hence the delay.

Issues for Determination

1. *Whether application for the enlargement of time is merited*

Section 79G of the Civil Procedure Act provides that:

“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.”

Odunga J. in *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR held:

“Therefore an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others* [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in *Daphne Parry vs. Murray Alexander Carson* [1963] EA 546 that though the provision for extension of time requiring “sufficient

reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”

The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR enumerated the principles to consider before granting extension of time as follows:

“... it is clear that the discretion to extend time is indeed unfettered... we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

Analysis

The judgment appealed from was delivered on 28th October 2016 and the memorandum of appeal was filed on 1st December 2016, 3 days after the statutory time period. However, the application to enlarge time to file the appeal was filed on 15th April 2019, more than two years after the judgment. The delay is without a doubt inordinate and would require the Appellant furnishing a good cause for the delay to convince the court to exercise its discretion.

However, the reason for the delay canvassed, that is the Appellant’s ignorance of the time limits and the Appellant’s counsel having to wait for instructions from their client, still fails to explain the two year delay in seeking to have the appeal admitted out of time. Upon receiving instruction, it was upon the Counsel to diligently rectify the default. The inaction of the advocate cannot be excused as inadvertence as per *BABER ALIBHAI MAWJI v SULTAN HASHAM LALJI AND OTHERS* [1995]eKLR.

The Appellant’s application to enlarge the time to file an appeal can only be viewed as a knee jerk reaction to the Respondent’s application to strike out the appeal on the ground of filing out of time.

2. Whether to strike out the appeal

There are no sufficient reasons for filing the appeal out of time, the appeal is incompetent and struck out.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 22nd DAY OF NOVEMBER, 2019.

In the presence of:

Mr. Juma holding brief for Mr. Mwamu for Applicant

Mr. Oriero holding brief for Yogo for Respondent

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE