



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. NO. 4 OF 2019

ABDUL IBRAHIM MUSA.....APPLICANT

VERSUS

REHEMA BADI ALI.....RESPONDENT

RULING

1. The Application for consideration is the Notice of Motion dated 13th November 2018 brought under Section 1A, B, 3B, 65 and 79G of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and Article 48, 50 and 159 (2) (d) and 259 of the Constitution of Kenya. The applicant seeks for orders:

1. Spent

2. This Honourable court do grant leave to the Applicant to file appeal out of time against the ruling of Honourable E. Mutunga, Senior Resident Magistrate in CMCC No.4016 of 1996 Rehema Badi Ali- v- Abdul Ibrahim Musa delivered on unclear date in the absence of the parties.

3. This Honourable court also grant stay of execution of the ruling and/or order referred to in prayer 2 above pending the hearing and determination of this application and in the event leave is granted pending the hearing and determination of the appeal.

4. Costs of this application be provided for.

2. The Application is based on the grounds on the face of the motion and is supported by the Affidavit of Abdul Ibrahim Musa, the applicant sworn on 13th November, 2018. Briefly, the applicant has deposed that in 1996, the respondent herein filed **Mombasa RMCC No.4016 of 1996 Rehema Badi Ali-v- Abdul Ibrahim Musa** and the Applicant filed defence through Muoko & Co. advocates. The applicant avers that the case was heard on 16th July, 1998 in the absence of the Applicant and his advocates as they were not notified. Consequently, pursuant to a decree issued on 7th August, 1998 the Applicant was ordered to give vacant possession of a house and video café on PLOT 2755 SECTION MAINLAND NORTH MTOPANGA and the same to be demolished as well as cost of the suit plus interest. Aggrieved by the decree, the applicant filed an application seeking to set aside the judgment but the application was dismissed. The applicant then filed another application for review of the order dismissing the application to set aside but again that application was dismissed on an unknown date. The applicant states that when he arrived in Kenya from Dubai where he works on 1st July 2018, he found the respondent had taken possession of his house and on inquiry found out that the applicant's application had been dismissed without notice to his advocates. The applicant argues that he has an arguable appeal with high chances of success.

3. The application is opposed by the respondents who filed a notice of preliminary objection dated 13th March 2019 and a replying affidavit sworn by the respondent on 14th March 2019. The respondent has deposed inter alia that the applicant never appealed against the judgment and/or ruling issued by the court on 7th August 1998 and on 22nd June 2018 respectively, the former having been issued almost 22 years ago. It is the respondent's contention that the application is an afterthought, frivolous, vexatious and an abuse of the court process, and urged the court to dismiss it with costs.

4. The application was canvassed by way of written submissions. The applicant filed his submissions on 15th May, 2019 while the respondent filed hers on 16th September, 2019. I have considered the application and the rival submissions. In the case of County Executive of Kisumu –v County Government of Kisumu & 8 Others (2017) eKLR, the Supreme Court of Kenya stated:

“It is trite law that an application for extension of time, the whole period of delay should be declared and explained

satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties have relied on. The court delineated the following as: “the underlying 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 that burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a considerations to be made in a case to case basis;
4. Whether there is 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.”

5. The applicant’s main ground is that his application for review was dismissed on an unknown date and when he arrived in Kenya on 1st July 2018, he found that the respondent had taken possession of his house and on enquiry he found that the application was dismissed without notice to the applicant’ advocates. From his own deposition, it is clear that the applicant came to know about the dismissal of his application on 1st July 2018. However, this application was only filed on 15th January 2019. The question that begs for an answer is whether there is an explanation given by the applicant for the delay from 1st July 2018 until 15th January 2019, a period of over six (6) months. The court has gone through the affidavit in support of the application. I do not find any explanation given by the applicant for failure to take action from July 2018 up to January 2019. In a nutshell, the applicant has not satisfactorily explained the inordinate delay of over six months upon learning of the dismissal of his application for review.

6. The Applicant has also stated that he has an arguable appeal with high chances of success and has given grounds. However, the arguability of a matter is not a ground alone for extension of time. See **County Executive of Kisumu –v- County Government of Kisumu & 8 Others (supra)**.

7. In my view, the grounds being advanced in support of the application are not applicable and are irrelevant. The applicant has not laid a basis to warrant the court’s discretion to allow him file an appeal out of time. As was stated by the Supreme Court in the above case, laying of basis in this context is confirmed solely in explaining the reasons of the delay of not filing the appeal in time. In my view, the applicant has not given any explanation, let alone a reasonable ground, for the delay to warrant the discretion of the court to allow him file an appeal out of time. His absence from the country is not a reasonable ground enough to warrant a discretion of the court for he was represented in the case by counsel. Moreover, the application herein has not been brought without undue delay and the delay has not even been explained.

8. Accordingly, and in view of the aforesaid reasons, I find that the application lacks merit and the same is hereby dismissed with costs to the respondent

DATED, SIGNED and DELIVERED at MOMBASA this 20th day of November, 2019.

C. K. YANO

JUDGE

IN THE PRESENCE OF:

Abubakar for applicant

Mgupu for respondent

Esther Court Assistant

C.K. YANO

JUDGE