



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC MISC APPLICATION NO. 15 OF 2019

MARY MUTHONI NYAGA.....1ST APPLICANT

JANET WAMBETI NYAGA.....2ND APPLICANT

PETER MURITHI NYAGA.....3RD APPLICANT

LYDIA NJOKI NYAGA.....4TH APPLICANT

JAMES NJAGI NYAGA.....5TH APPLICANT

LEONARD MUCIRA NYAGA.....6TH APPLICANT

VERSUS

MORRIS RUTERE NJIRU.....RESPONDENT

RULING

1. By a notice of motion dated 1st October 2019 brought under **Order 42 Rule 6(1), Order 43 Rule 1 (1) (f) of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act (Cap. 21) and any other enabling provisions of the law**, the Applicants sought the following orders:

a. That leave be granted to appeal out of time against the whole ruling in Embu Chief Magistrate ELC Case No. 57 of 2018 by honourable Mr. H. Nyakweba (Principal Magistrate) delivered on 20th August 2019.

b. That pending the hearing and determination of the intended appeal there be a stay of the proceedings in Embu Chief Magistrate ELC Case No. 57 of 2018.

c. That the costs of this application be provided for.

2. The said application was based upon the grounds set out on the face of the motion and supported by the affidavit sworn by the 2nd Applicant on 1st October 2019. It was contended that the Applicants were desirous of appealing against the ruling and order of Hon. H. Nyakweba (PM) dated 20th August 2019 by which the court dismissed their application for leave to amend their defence. It was further contended that the Applicants only learnt of the delivery of the ruling after the lapse of the statutory period for appealing. It was also contended that there was no inordinate delay in the filing of the application and that the Respondent was unlikely to suffer any prejudice if the orders sought were granted.

3. The Respondent filed a replying affidavit sworn on 23rd October 2019 in opposition to the said application. It was contended that the said application was bad in law, incompetent and an abuse of the court process. It was contended that the application had not been filed without unreasonable delay and that no substantial loss had been demonstrated to warrant a stay of proceedings before the Magistrate's court.

4. When the said application was listed for hearing on 5th November 2019, the parties were directed to file their respective written submissions by 8th November 2019. By the time of preparation of the ruling, however, none of the parties had filed their written submissions.

5. The court has considered the Applicants' said notice of motion, the Respondent's replying affidavit in opposition thereto as well as the material on record. The first question for consideration is whether or not the Applicants have made out a case for the granting of leave to file an appeal out of time. The factors to be considered in granting or refusing an application for extension of time to appeal out of time were

summarized in the case **Mwangi Vs Kenya Airways Ltd [2003] KLR 486** as follows;

“Over the years, the court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance in Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1997 unreported), the court expressed itself thus;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also settled that in general the matters which this court takes into account in deciding whether to grant an extension are; first, the length of the delay. Secondly, the reason for the delay; third (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted.”

6. The court has considered the length of the delay and the explanation for the delay. The period of delay is about one and a half months which does not appear to constitute undue delay. The Applicants’ explanation that their advocate was absent when the ruling of 20th August 2019 was delivered is not wholly unreasonable. Although it was the duty of the Applicants’ advocate to either appear or send a representative to court on the date of the ruling, his failure to do so should not be visited upon the Applicants.

7. The court has perused the draft memorandum of appeal annexed to the application. The court is of the opinion that the proposed grounds of appeal are not merely fanciful or frivolous. Those grounds may well be arguable before this court. The court is thus of the opinion that the Applicants have made out a case for an extension of time to file an appeal out of time. The court is not satisfied that the Respondent shall suffer any prejudice if leave to appeal out of time is granted. The Respondent would still have had to oppose the appeal if it had been filed within the stipulated time.

8. The second aspect for consideration is whether the Applicants have made out a case for stay of further proceedings in Embu CMCC No. 57 of 2018. The court is aware that granting an order under **Order 42** of the **Civil Procedure Rules** would be an exercise of its *appellate* jurisdiction under the law. The court is further of the opinion that such jurisdiction can only be exercised during the existence or pendency of an appeal before this court. Since it is evident that there is no pending appeal as yet, there is no basis upon which the court may grant an order of stay pursuant to its appellate jurisdiction. The Applicant shall, however, be at liberty to file an appropriate application at the opportune moment.

9. The upshot of the foregoing is that whereas the court finds merit in the Applicants’ prayer for leave to appeal out of time, the court finds the application for stay of further proceedings premature since there is no pending appeal. Accordingly, the court shall make the following orders for disposal of the application dated 1st October 2019.

a. The prayer for leave to appeal out of time is hereby granted in terms of order No. 1 of he said application.

b. The Applicants shall file and serve their memorandum of appeal within 14 days from the date hereof in default of which the leave granted shall lapse automatically.

c. The prayer for an order of stay of proceedings in terms of order No. 2 of the application is hereby struck out for being incompetent and premature.

d. Costs of the application to the Respondent.

10. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 14TH DAY OF NOVEMBER, 2019.

In the presence of Mr. Manyara holding brief for Mr. Guantai for the Respondent and in the absence of the Applicants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

14.11.19