



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC MISC APPLICATION NO. 31 OF 2018

GENESIO MUTWIRI MWERERIA.....APPLICANT

VERSUS

AUGUSTUS KABIRA M'MURAGA.....RESPONDENT

RULING

1. This matter relates to a Notice of Motion dated 14/12/2018 brought pursuant to **Section 1A, 1B, 3A and 79G of the Civil Procedure Act CAP 21 Laws of Kenya and Order 51 of the Civil Procedure Rules**. The applicant seeks leave to file an appeal out of time against the ruling of the Senior Resident Magistrate Tigania dated 11th October 2018 in Tigania PM ELC Case No. 56 of 2018.

2. The grounds in support of the application are set out in the body of the application and in the supporting affidavit of Genesio Mutwiri Mwereria sworn on 14/12/2018. It is contended that the application for certified copy of the ruling was made immediately after the ruling was read, and the payment for such proceedings were made too. However, the ruling was availed to them when time to appeal had expired.

3. The application has been opposed vide the replying affidavit of Augustus Kabira M'Muraga sworn on 25/03/2019. He deponed that the application has no merit and ought to be dismissed. That the ruling and proceedings were available for collection and it is the applicant who did not bother to collect them. Thus, the application is an afterthought and an abuse of the due process. He will be gravely prejudiced in terms of further expenses and time if the application is allowed.

4. This matter was canvassed by way of written submissions. The applicant submitted that he has laid down a satisfactory basis to warrant the court to extend time to file the appeal. He relied on the cases of **Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] Eklr**, **Thuita Mwangi vs. Kenya Airways (2003)Eklr**, and **Stanley Kahoro Mwangi & 2 Others vs. Kanyamwi Trading Company Limited (2015)Eklr**.

5. The Respondent submitted that the delay in filing the appeal within time has not been genuinely and sufficiently explained. If the application is allowed it will occasion prejudice and injustice to the respondent, yet the applicant will not suffer any prejudice, if the application is not allowed.

6. The issue for determination is **whether to grant leave to appeal out of time or not**.

7. **Section 79G of the Civil Procedure Act** being the operative part of the law in answering this question provides as follows:

“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.”

8. Case law has developed a number of factors which aid the courts in exercising the discretion on whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR 486** where it was stated that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (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.”

9. An appeal from the subordinate court to the High Court should be filed within thirty days from the date of the decree or order. The ruling and or order that the applicant seeks to appeal against was delivered on 11/10/2018. This means that the applicant should have filed his

appeal by 11/11/2018 of which he did not. He then filed this application over thirty days past the deadline.

10. The applicant stated that the delay was due to holdup in receiving a certified copy of the ruling. The respondent contends that the applicant failed to collect the ruling or seek the handwritten copy considering they received their copy of the ruling on 18/10/2018. From the documents produced by the applicant, his advocate wrote a letter a day after the ruling was delivered seeking a certified copy of the ruling. The applicant has not demonstrated to the satisfaction of this court that indeed there was a delay in the preparation of the proceedings or that they requested for a certificate of delay.

11. Further, I must state that the applicant did not need a certified copy of the ruling to file his appeal. C. W. Githua J expressed this point as follows in the case of **AIG Insurance Company Limited v Michael Okoth [2018] eKLR**:

“I must say with respect to the applicant’s learned counsel that the above explanation is based on a total misconception of the law. Under Order 42 of the Civil Procedure Rules, an appeal to the High Court is instituted by merely filing a memorandum of appeal which need not be accompanied by a certified copy of the decree or order appealed against. The applicant did not need a certified copy of the ruling in order to file its appeal.”

12. It is also not lost to this court that the suit before the lower court is at the infancy stage, but the matter appears to be rather acrimonious. There is a need to determine the issues in dispute expeditiously so as to settle the question of ownership of the suiland. The respondent and perhaps even the applicant stands to be prejudiced if this application is allowed as the prosecution of the lower court case will be halted. The prayers sought herein are given at the discretion of the court and having considered the issues arising herein, I find that such discretion ought not to be exercised in favour of the applicant. In the circumstances, I proceed to dismiss the application with costs to the Respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 11TH DECEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muriithi for respondent

Ms. Otieno for the applicant

Applicant

Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE