



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**MISC E.L.C. CIVIL APPLICATION CASE NO. 22 OF 2015**

**JOSEPH GIAKA MBENJI.....APPLICANT**

VERSUS

**NJUE GIKOMBO.....RESPONDENT**

**RULING**

1. By a notice of motion dated 30<sup>th</sup> January 2015 brought under the provisions of **section 79G of the Civil Procedure Act (Cap 21)** and all other **enabling provisions of the law**, the Applicant sought the following orders;

- a. That leave be granted to the Applicant to file an appeal against the decision of the learned Senior Resident Magistrate A.N. Makau in Siakago SRM CC LDT 11 of 2007 dated 10<sup>th</sup> September 2014 out of time.
- b. That after such leave is granted the court be pleased to certify that there is an arguable point of law in the intended appeal.
- c. The costs of the application be provided for.

2. The said application was based upon the several grounds stated on the face of the motion. It was contended that the proceedings before the Magistrate's court were a nullity in law; that the intended appeal had arguable points of law; that the time for lodging an appeal had lapsed and that it was just to grant the orders sought.

3. The said application was supported by an affidavit sworn by the Applicant on 30<sup>th</sup> January 2015 in which he reiterated and expounded on the grounds stated on the face of the motion. It was contended by the Applicant that he did not have legal representation whilst the Land Disputes Tribunal (hereinafter the *Tribunal*) was adjudicating over the land dispute in LDT No. 11 of 2007 and that when he sought legal advice in 2015 he was advised that he could still lodge an appeal since the Tribunal did not have jurisdiction to deal with matters relating to trust.

4. The Respondent did not file any response to the said application despite service. The said application was, therefore, argued *ex-parte* before the Hon Justice Bwonwonga on 23<sup>rd</sup> March 2015 and the ruling reserved. It was to be delivered on 25<sup>th</sup> June 2015 but due to reasons beyond the control of the court, it was never delivered on the said date or at all.

5. The matter was later on mentioned before me on 28<sup>th</sup> June 2018 when the court fixed the matter for ruling on 6<sup>th</sup> December 2018.

6. The court has considered the Applicant's said notice of motion together with the oral submissions made on his behalf. The main question for determination is whether or not the Applicant has made out a case for the grant of leave to file an appeal out of time.

7. The factors to be considered in granting or declining such an application were summarized in the case of **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.”**

8. It is evident from the record that the decree sought to be challenged was made on 10<sup>th</sup> September 2014 whereas the instant application was filed on 2<sup>nd</sup> February 2015. There was a delay of about 5 months. The reason for the delay was that the Applicant was unaware that the proceedings before the Tribunal and the Magistrate's Court were a nullity for alleged want of jurisdiction. He only came to make such discovery upon seeking legal advice from his advocates on record.

9. It would appear to me that the Applicant was quite content with the proceedings before Tribunal and the Magistrate's court until he obtained legal advice to the contrary. No explanation was given why the Applicant did not seek legal advice soon after the judgement and decree was made on 10<sup>th</sup> September 2014. The court is of the opinion that the instant application was merely filed as an afterthought in order to prolong the litigation between the parties. The court finds and holds that no plausible reason for the delay has been tendered by the Applicant.

10. The Applicant might well have arguable grounds of appeal. He intends to challenge the jurisdiction of both the Tribunal to make the award and the Magistrate's court to adopt the award and enforce it as a decree of the court. But it must be remembered that having an arguable appeal or an appeal with good chances of success is only one of the factors to be considered.

11. The aspect of possible prejudice to the Respondent must also be considered. The record shows that the Respondent lodged his claim before the Tribunal in 2007, that is, about eleven (11) years ago. The matter was concluded with a judgement on 10<sup>th</sup> September 2014, that is, about four (4) years ago. The court is of the opinion that it would be inimical to the efficient administration of justice to revive the matter and keep it alive for several more years simply because the Applicant was not diligent in taking steps to lodge an appeal within the prescribed period.

12. The upshot of the foregoing is that the court is not satisfied that the Applicant has made out a case for the grant of leave to file an appeal out of time. The court finds no merit in the application. Consequently, the Applicant's notice of motion dated 30<sup>th</sup> January 2015 is hereby dismissed. There shall be no order as to costs since the Respondent did not participate in the proceedings.

13. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **22<sup>nd</sup>** day of **NOVEMBER, 2018**.

In the absence of the parties.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**22.11.18**