



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC MISC APPL CASE NO. 102 OF 2017**

**DORIS ATIENO ONJALA.....1<sup>ST</sup> APPLICANT**

**JOSEPH OGINGA ONJALA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**GEORGE ONYANGO OWANGA .....1<sup>ST</sup> RESPONDENT**

**PIUS OWAGA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**1. Doris Atieno Onjala and Joseph Oginga Onjala**, the Applicants, seeks for leave to file an appeal on the judgment and decree of Tamu SRM CC No.51 51 of 2012, Doris Atieno Onjala & Another –V- George Onyango Owaga & Another, out of time. The application is brought through the notice of motion dated 31<sup>st</sup> May 2017 and is based on the seven (7) grounds on its face summarized as follows;

- a) That the judgment was delivered on the 24<sup>th</sup> March 2016 dismissing the Applicants claim against George Onyango Owaga and Joseph Oginga Onjala, the Respondents.
- b) That the Applicants had communicated to their advocates on record on their desire and determination to appeal on the judgment but he inadvertently failed to lodge the appeal in time.
- c) That the Applicants learnt that their instructions to file an appeal were not acted upon after they were proclaimed.
- d) That the delay in filing the appeal is a mistake by the advocate.
- e) The intended appeal has overwhelming chances of success and that the Applicants should be granted the opportunity to exhaust the fundamental constitutional recourse of appeal.

**2.** The application is supported by the affidavit sworn by Joseph Onyango Onjala on the 31<sup>st</sup> May 2017 in which he depones to the following among others;

- i) That upon the delivery of the judgment on the 24<sup>th</sup> March 2016, the Applicants verbally instructed their advocate on record to closely study the judgment and consider preferring an appeal against it.
- ii) That they were under the impression that their advocate had filed an appeal within the set time until the 15<sup>th</sup> May 2017 when auctioneers proclaimed their movable properties.

iii) That when they visited their advocates they found that no appeal had been filed as the advocate had misconceived their communication.

3. The application is opposed by the Respondents through the grounds of opposition dated 27<sup>th</sup> June 2017 summarized as follows:

- a) That there has been inordinate and unreasonable delay of over one year three months since 31<sup>st</sup> March 2016 in filing the application.
- b) That the application is an afterthought coming after execution proceedings.
- c) That the application is meant to simply forestall execution proceedings.
- d) That the intended appeal is misconceived and has no reasonable prospects of success.
- e) That the application does not meet the criteria in law for grant of extension of time to appeal out of time.

4. The application came up for hearing on the 26<sup>th</sup> September 2017 when Mr. Ouma and Ragot, learned counsel for the Applicants and Respondents respectively, made their oral rival submissions summarized as follows;

**A: APPLICANTS COUNSEL'S SUBMISSIONS;**

- That after the judgment was delivered on the 24<sup>th</sup> March 2016, the Applicants instructed their then counsel on record to file an appeal.
- That the Applicants got to know that no appeal was filed when execution for costs was issued.
- That the Applicants had not been satisfied with the judgment and intended to file an appeal and have exhibited a copy of a draft memo of appeal.
- That the delay in filing the appeal of one year is not inordinate and the Respondents inconvenience may be taken care of through an award of costs.
- That the lower court claim was for damages for crops on the land, which was dismissed on the basis that ownership of the land had not been determined.
- That one do not need to own the land to have a claim of damages for the crops sustained.
- That though litigation must come to an end, the Applicants should be allowed to exhaust the appeal process.
- That **Rule 4** of the Court of Appeal Rules deals with extension of time beyond the 60 days for filing an appeal and that the situation in this matter is different.
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**B: RESPONDENTS COUNSEL'S SUBMISSIONS;**

- That **Section 79 (a) of Civil Procedure Act** requires that appeals be filed in 30 days. That the Applicants did not file an appeal within the time provided and have not offered a plausible explanation.
- That verbal instructions by the Applicants to their counsel on record to closely study the judgment and consider preferring an appeal did not constitute instructions to file an appeal.
- That the Applicants were indolent as they took more than one year without making a follow up on their case. That the Applicants only filed this application after execution proceedings against them commenced.
- That the provision of **Section 79 (A) of Civil Procedure Act** is

similar to **Rule 4 of the Court of Appeal Rules and Rules 53 of the Supreme Court of Kenya Rules** on extension of time. That

in the case of **Aviation Cargo Support Ltd –V- St Mark Freight Services Limited** [2014] eKLR, the Court of Appeal found there was inordinate delay in filing an appeal that was filed outside the 60 days.

- That the court should always uphold the overriding objective for expeditious and effective disposal of suits.
- That in the case of **Reuben M. Muli T/A Konza Merchants –V- Keshra Vishra T/A Alpesh Enterprises** [2007] eKLR, the court of appeal found a delay of 36 days to be inordinate.
- That in the case of **Nicholas Kiptoo Arap Korir Salat –V- IEBC & Others Supreme Court of Kenya Application No.16 of 2014**, the court held that extension of time is an indulgent by the court and not a matter of right.
- The extension of time is a creature of equity and one seeking it must do equity. That as the Applicants have not given good reasons why the appeal was not filed within the 30 days dictated by the law, the application should be refused.

5. The issues for determination by the court is first whether or not there has been inordinate delay in bringing the application. Secondly whether the delay has been reasonably explained.

Thirdly who pays the costs.

6. The court has carefully considered the grounds on the notice of motion dated 31<sup>st</sup> May 2017, grounds of opposition dated 27<sup>th</sup> June 2017, affidavit evidence by the 2<sup>nd</sup> Applicant, submissions by both counsel and concluded as follows:

a) That the provision of **Section 79 G of the Civil Procedure Act Chapter 21 Laws of Kenya** requires appeals on decisions of the subordinate courts to be filed within 30 days from the date of the decree or order appealed against. The section is in the following words;

*“ 79 G. 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.”*

b) That as shown in the proviso to **Section 79 G of Civil Procedure Act** above, a party desirous of filing an appeal who fails to do so in 30 days and seeks to file it out of time has the obligation to give **“good and sufficient causes for not filing the appeal in time.”** The reason or cause given by the Applicants in their attempt to explain their failure to file the appeal within the 30 days is that they were failed by their advocate on record to whom they had given verbal instructions. That explanation is covered at paragraph 5 of the supporting affidavit in the following words;

*“ 5. That upon delivery of the judgment on the 24<sup>th</sup> March 2016, 2016, and being completely dissatisfied with the entire judgment, we verbally instructed the advocate on record to closely study the judgment and consider preferring an appeal against the entire judgment.”*

The learned counsel for the Respondents has submitted that deposition cannot be taken to be evidence to counsel to file the appeal. That considering that the Applicants did not disclose to having taken any further steps between the 24<sup>th</sup> March 2016, when the judgment was read, to the 15<sup>th</sup> May 2017 when execution was done by auctioneers proclaiming on their imovable properties, and in the absence of an affidavit by the counsel then on record confirming that indeed verbal instructions to appeal had been given to him, the court finds that the Applicants have failed to explain the over fourteen months delay in moving the court for leave to file the appeal out of time.

c) That a reading of paragraph 5 of the supporting affidavit shows at best that the Applicants had

asked their counsel to “**study the judgment and consider preferring an appeal**” which implies that there would be further consultation between the Applicants and their counsel when a final and firm decision or instruction to appeal would be made. That there was no further visit by the Applicants to their Advocates until after fourteen months and the fact that there was no appeal filed could either be because counsel found filing an appeal not to be the way to go or that no instructions to appeal was ever given.

d) That there is no certificate obtained from the trial court on any delay attributed to the court. That in any case the copy of the judgment annexed to the supporting affidavit indicates clearly that it was certified as a true copy of the original on the 19<sup>th</sup> May 2016, which is about two months after the delivery of the judgment and about one year before this application was filed. That the Applicants therefore had no reasons not to have moved the court at least soon after receiving the copy of the judgment, and the period of about one year delay thereafter is inordinate and unexplained.

e) That though the Applicants cited **Order 46 Rule 6 of Civil Procedure Rules**, the court finds that provision deals with the power of arbitrator or umpire appointed by the court and therefore is not relevant to this application. That possibly the Applicant had meant **Order 50 Rule 6 of Civil Procedure Rules** which deals with the courts power to enlarge time.

f) That **section 1A and 1B of Civil Procedure Act** that are also cited by the Applicants sets out the objective of the Act and duty of the court respectively. The parties to a suit and their advocates are enjoined to assist the court to further the overriding objective of “**the Act which is to facilitate the just, expeditious proportionate and affordable resolution of the civil disputes governed by the Act.**” The Applicants delay of over fourteen months in moving the court cannot be said to be aimed at attaining that objective.

g) That the other Sections cited in the application are **sections 3 and 3A of the Civil Procedure Act** that deals with saving the special jurisdiction of the court and the inherent powers of the court respectively. The fact that the Applicants only moved to the court after being proclaimed which leads the court to wonder whether they would ever have followed up with their advocate if no execution proceedings were undertaken against them. That fact leads the court to agree with counsel for the Respondents that this application is an afterthought aimed at delaying the execution and therefore has no merit.

7. That for reasons set out above the court finds the Applicants notice of motion dated 31<sup>st</sup> May 2017 to be without merit and is dismissed with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF NOVEMBER 2017

In presence of;

Applicants                      Absent

Respondents                    Absent

Counsel                         Mrs Onyango for Ragot for the Respondent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**29/11/2017**

29/11/2017

S.M. Kibunja Judge

Oyugi/Joan Court assistants

Parties absent

Mrs. Onyango for Ragot for the Respondents.

Court: Ruling dated and delivered in open court in the presence Mrs. Onyango for Ragot for the Respondents.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**29/11/2017**