



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC MISCELLANEOUS APPLICATION NO. 14 OF 2017

LUCY NJERI NJENGA.....APPLICANT

VERSUS

GAKUO KIMU.....1ST RESPONDENT

PAULINE WANJIRU NJOROGE.....2ND RESPONDENT

WISON GACHIE.....3RD RESPONDENT

JOHN NDUNG'U NJENGA.....4TH RESPONDENT

RULING

I have before me the Application dated 14th June 2017 and when it came up on 27th September 2017, counsel for the Applicant **MR. MACHARIA** abandoned prayer No. 2. What is therefore pending are prayers No. 3 and 4 of the said application which seek the following orders:

3: That the applicant herein be granted leave to appeal against the judgment delivered in WANGURU PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No. 138 of 2014 out of time and the said leave do act as stay of execution of the judgment.

4: That the costs of this application be provided for.

The application is premised on the grounds set out therein and is also supported by the affidavit of **LUCY NJERI NJENGA** the Applicant herein. It is brought under the provisions of **Sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Rules** and **Order 42 Rule 6 (1) of the Civil Procedure Rules**.

The gravamen of the application is that the Applicant was the 2nd defendant in **WANGURU PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No. 138 of 2014** which was heard and determined and judgment was delivered and a decree drawn on 8th July 2016.

However, she was not aware about the delivery of the said judgment and neither did her advocate inform her. It was only after the 1st Respondent entered into the rice holding No. 1631C Mwea that she learnt about the judgment. That if she had known about the judgment in time, she would have instituted her appeal without delay. That her appeal is meritorious and the reasons for not filing it in time were not of her own making but rather it was due to the advocate's mistake which should not be visited on her.

Though served with the application as per the affidavit of service filed herein on 27th September 2017, neither the 1st, 2nd or 3rd Respondent filed any replying affidavit or grounds of opposition hereto. I have

nonetheless decided to consider the application on its merits though it is un-opposed.

Section 79G of the Civil Procedure Act 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” Emphasis added

In considering an application such as this one, the Court will take into account:

- ***the length of the delay***
- ***the explanation for the delay***
- ***whether the intended appeal is arguable***
- ***the prejudice that may be caused to the Respondent if the application is allowed***
- ***the public importance of the matter***
- ***the requirements of the interest of justice.***

The Supreme Court in the case of **NICHOLAS KIPTOO arap KORIR SALAT VS I.E.B.C & OTHERS 2014 e K.L.R** laid down the following principles to guide a Court in considering an application to extend time within which to appeal on:

- ***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***
- ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court***
- ***Whether the Court should exercise its discretion to extend time is a consideration to be made on a case to case basis***
- ***Where there is a reason for delay, it should be explained to the satisfaction of the Court***
- ***Whether there will be any prejudice suffered by the Respondent if the extension is granted***
- ***Whether the application has been brought without delay***
- ***Whether in certain cases like election petitions, public interest should be a consideration for extending time.***

It is clear therefore that whether or not to extend time to appeal is at the discretion of the Court to be exercised judicially. Each case must be considered on its merits. Most importantly, there must be ***“sufficient cause”*** to explain why the appeal was not filed in time.

From the Applicant’s supporting affidavit, her explanation for not filing the appeal in time is found in paragraphs seven (7) and eight (8) wherein she has averred as follows:

7: “That had I known of the aforesaid judgment in time, I could have instituted my intended appeal without any delay whatsoever”.

8: “That the delay to file this appeal was not deliberate or of my own making and the mistakes of my former advocate ought not to be visited upon me in the interest of justice and fairness”.

I have looked at the proceedings in **WANGURU PRINCIPAL MAGISTRATE’S COURT CIVIL CASE No. 138 of 2014** and regrettably, the Principal Magistrate **MR. P.M. KIAMA**’s judgment is not dated. There is however annexed to the Applicant’s supporting affidavit a copy of the decree given on 22nd November 2016 and issued on 28th November 2016. The copy of proceedings indicate that though it is un-dated, the judgment was delivered in the presence of **MR. MUTHIKE** holding brief for **MR. OMBACHI** and **MS MUNENE** for **MR. KIAMA**. It is however not clear from the record who those

advocates were appearing for. And since the Applicant has deponed that her advocate did not inform her about the judgment, this Court can only conclude that one of the advocates named above had been on record for her. The Applicant lays the blame at the doors of her advocate and asks this Court not to visit the mistake of her advocate on her. Ordinarily, a Court will not visit the mistakes of an advocate on a party. There is abundant authority for the proposition that the mistake of an advocate is no reason to deny an otherwise deserving party the favourable exercise of its discretion. The most memorable pronouncement in that regard was by the late **MADAN J.A** in **MURAI VS WAINAINA No. 4 1982 K.L.R 38.** Unfortunately for the Applicant, however, she has not told this Court when she eventually became aware of the judgment and decree issued by the **PRINCIPAL MAGISTRATE'S COURT at WANGURU**. As indicated earlier, the judgment of **HON. P.M. KIAMA** does not indicate when it was delivered although in the proceedings of 10th May 2016 when the trial ended, the magistrate directed that the judgment would be delivered on 7th June 2016 and since the judgment itself is un-dated, it may or may not have been delivered on that day. That notwithstanding, the decree issued on 28th November 2016 reads, in as far as is relevant for this application, as follows:

“This matter coming up for ruling on 22nd November 2016 before Hon. P.M. KIAMA Senior Principal Magistrate

And upon delivering of the ruling in presence of M/S G.O. Ombachi advocate for the plaintiffs and all the defendants” Emphasis added

It is clear therefore that as the Applicant was present on 22nd November 2016 when the decree was issued by the trial Court apparently pursuant to another application. This application was filed on 14th June 2017 some seven (7) months later. No explanation has been offered for that delay which is clearly in-ordinate. The Applicant cannot now feign ignorance of the ruling

that led to the issuance of the decree that is now being executed against her. She cannot now turn around and place the blame on her former advocate. A party seeking a discretionary order must come to Court with clean hands. The Applicant has failed that test. The record shows that the ruling was delivered in the presence of **“all the defendants”**. There is therefore no **“sufficient cause”** shown by the Applicant for not filing the appeal in time. This Court cannot therefore exercise its discretion in his favour as there is no basis for doing so. The prayer to file the appeal out of time must be rejected.

Having rejected the prayer to file appeal out of time, this Court cannot consider the prayer for stay of execution of the judgment because that prayer cannot stand on its own.

The up-shot of the above is that the Applicant's Notice of Motion dated 14th June 2017 is dismissed.

B.N. OLAO

JUDGE

19TH OCTOBER, 2017

Ruling delivered, dated and signed in open Court at Kerugoya this 19th day of October 2017

Mr. Macharia for Applicant present

1st Respondent present.

B.N. OLAO

JUDGE

19TH OCTOBER, 2017