



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 288 OF 2014

MICHAEL WACHIRA GAKUO APPLICANT

-VERSUS-

ELIZABETH WAMUYU GITHINJI RESPONDENT

RULING

1. Before me is the Applicant's notice of motion dated **18th April, 2017** through which applicant seeks leave to appeal out of time.
2. The application is premised on the grounds that the applicant was dissatisfied with the ruling of this court delivered on 30th January, 2017; that the ruling did not indicate the time within which an appeal could be lodged by any party aggrieved by it; that being a layman, the applicant thought he could appeal anytime; that he later on learnt that he was supposed to file a notice of appeal within seven (7) days and an appeal within (60) days of delivery of the ruling; that failure to file an appeal within the time stipulated in law was not intentional; that he was ailing and that he is not guilty of delay.
3. The application is opposed on the grounds that this court lacks jurisdiction to grant the orders sought (to extent the time within which to file an appeal); that the application is lacking in merits, vexatious, incompetent and that the applicant is guilty of inordinate delay.
4. When the application came up for hearing, on 15th June, 2017 the applicant urged the court to allow the application as it was unopposed.
5. From the pleadings filed in this matter, I find the issues for the court's determination to be:
 - (i) Whether this court has jurisdiction to extend the time within which to file an appeal?
 - (ii) Whether the applicant has made up a case for being granted time to file appeal out of time and
 - (iii) What is the order as to costs.
6. On whether this court has jurisdiction to extend time within which to file an appeal, I adopt the judgment of **Munyao J.**, in the case of **Loise Chemutai Ngurule & Another v. Winfred Leshwari Kimung'en & 2 Others (2015)eKLR** which, in my view, correctly captures the legal position concerning the issue. In that case the judge stated: -

“It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of Simon Towett Martim v Jotham Muiruri Kibaru, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004)eKLR. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.

With respect I disagree with the above decision. Section 7 of the Appellate Jurisdiction Act, CAP 9, is drawn as follows:-

S. 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.

Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned.”

.....In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the Court of Appeal Rules which provides as follows: -....

One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.”

7. Having determined that this court has jurisdiction to hear and determine the application, I turn to the merits of the application.

8. The principles that guide a court in considering an application for leave to file an appeal out of time were laid down by the Court of Appeal in the Case of Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015)eKLR thus:-

“The principles guiding the court on an application for extension of time premised upon *Rule 4 of the Rules* are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of

the Court that he is entitled to the discretion being exercised in his favour.

The parameters for the exercise of such discretion are clear. See *MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR)*, *MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486* and *FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported)* where this court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the

importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

9. In applying the guidelines set out above to the circumstances of this case, the ruling sought to be appealed from was delivered on 30th January, 2017.

10. Under **Rules 75 and 82** of the Court of Appeal Rules, the applicant was under an obligation to file his notice of appeal within 14 days of delivery of the decision and an appeal within sixty days from the date he filed the notice of appeal.

11. In this case, neither the notice of appeal nor the intended appeal was filed within the time stipulated in law for doing so.

12. The applicant explains that he failed to file the notice of appeal and the appeal within the time stipulated in law because being a layman, he thought he could do so any time from the time the ruling was delivered. He also explains that he was ailing.

13. I have considered the reasons advanced by the applicant for failure to file an appeal against the judgment of this court and the law applicable to such an application, whilst I sympathize with the applicant for his ignorance of the law, upon review of the law applicable to such an application and in particular the requirement that the appeal must be arguable, although the applicant has not highlighted the grounds upon which he intends to appeal, noting that the suit was dismissed because it was found to be res judicata other proceedings having been instituted by the applicant and which proceedings were never appealed, I find and hold that the intended appeal may not be arguable.

14. For that reason, I find the application to be lacking in merit and dismiss it with costs to the respondent.

Dated, signed and delivered in open court at Nyeri this 12th day of October, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Michael Wachira Gakuo – Applicant

N/A for the respondent

Court assistant - Esther