



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.1666 OF 2007

ELIZABETH NJERI KAMAU.....1ST PLAINITFF/APPLICANT

(Suing as the personal representative of the

Estate of WAINAINA MBUTHIA GACHOKA(deceased)

-VERSUS-

CYRUS JOSEPH KARANJA.....1ST DEFENDANT/RESPONDENT

DISTRICT LAND REGISTRAR, KIAMBU.....2ND DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is an application dated 22nd September 2015. The Plaintiff/Applicant has sought for the following prayers:-

1) Spent.

2) That this Honourable court be pleased to enlarge the time within which the Plaintiff/Applicant is required to file her Notice of Appeal intimating her intention to file an Appeal against the Judgement and Decree of Hon Lady Justice Pauline Nyamweya dated 16th april 2015.

3) That the Notice of Appeal filed herewith be deemed to have been filed upon payment of the requisite fees.

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

The application is supported by the grounds stated on the face of the application and on the annexed Affidavit of Elizabeth Njeri Kamau. These grounds are:-

1) That the Plaintiff/Applicant remains ready, willing and committed to pursue her Appeal against the decision, Judgment and Decree of the Hon.Lady Justice Pauline Nyamweya dated 16th April 2015..

2) That the failure to file a Notice of Appeal in time was occasioned by failure on the part of the Plaintiff's/Applicant's former advocates, Njugi B. G & Co. Advocates and Kimandu Gichohi &

Co. Advocates.

3) That the Plaintiff/Applicant has a good Appeal with high probability of success.

4) That it is in the interest of justice that the application herein be allowed.

In her **Supporting Affidavit**, **Elizabeth Njeri Kamau** reiterated the averments on the grounds in support of the application and averred that her advocates on record as at the time of delivering the Judgement, **Njogu B. G & Co. Advocates** failed to file a Notice of Appeal on time and resolved to change the representation and instructed **Kimandu Gichohi & co. Advocates** to take over the conduct of the matter on her behalf as per **annexture “ENK-5”**

The Plaintiff/Applicant averred that the firm of **Kimandu Gichohi & CO. Advocates** failed to update her on the status of the Appeal hence she changed advocates and instructed the **Firm of Alphonse Mutinda & Co. Advocates** as per **annexture “ENK-7”**.

The deponent further averred that the failure to file Notice of Appeal in time is a fault attributed to her former advocates and that she is advised by her advocate on record that a litigant ought not to be punished for the

mistakes of the Counsel.

The Plaintiff also averred that she is committed to prosecuting the Appeal as per **annexture “ENK-8”**

The application is opposed by the 1st Defendant who filed its **Replying Affidavit** and averred that the Applicant was represented by a Firm of advocates and failure to instruct the said Firm to file Notice of Appeal within the time prescribed in law is not an excuse. The 1st Defendant further averred that the Applicant together with her lawyers are conversant with the laid down procedure and are very sure the issue of trying to file an Appeal out of time is an afterthought. The 1st Defendant alleged that the relief sought by the Applicant cannot be granted and the application should be dismissed with costs.

The application was canvassed by way of written submissions. The **Law Firm of Alphonse Mutinda & Co. Advocates**, for the Plaintiff filed their written submissions on **16th May 2016**, and submitted that the instant case warrants the exercise of this Courts discretion in enlarging the time for the Plaintiff/applicant. They relied on various decided cases among them the case of **Stanley Kihoro Mwangi & 2 Others..Vs..Kanyamwi Trading Company Limited (2015)eKLR**, where the Court held that:

“The principles guiding this court on an application for extension of time premised under Rule 4 and 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.”

The 1st Defendant/Respondent filed his written submissions in person on **18th May 2016**, and urged the Court to exercise its discretion in his favour by dismissing the Plaintiff’s application with costs to the 1st Defendant. He relied on the decided case of **Kenya Tea Developers Authority..Vs...Roy Transmotors Limited (2009) eKLR**, where **Justice Alnashir Vishram** stated as follows:

“All litigation should come to an end at some point and to aide an indolent party will be sending the wrong message to litigants that is alright to sleep on your rights and the court will welcome you anytime you wake up!”

This Court has now carefully considered the instant Notice of Motion, the affidavits on record, the written submissions and the relevant provisions of law and makes the following findings:-

The issue of whether to grant or not to grant the orders sought is an exercise of the court’s discretion.

However, the said discretion must be exercised judicially.

The Applicant has hinged her application on Sections 1 and 1A of the Civil Procedure Act which Sections deal with **overriding objective** of the Civil Procedure Act which is to facilitate the **just, expeditious, proportionate** and **affordable resolutions** of civil disputes.

Further, this application is brought under Section 7 of the Appellate Jurisdiction Act, which provides as follows:-

“The High Court may extend the time for giving notice of intention to Appeal from the Judgement 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.”

It is evident that the Judgement intended to be appealed against was delivered on **16th April 2015**, and the instant application was filed on **2nd September 2015**. It is evident that the Applicant was supposed to have filed her Notice of Appeal within a period of 14 days after the delivery of the impugned Judgement and then the Memorandum and record of Appeal within a period of 60 days after the filing of Notice of Appeal. The applicant herein did not file the said Notice of Appeal within the stipulated time and she has now filed the instant application seeking for extension of time to file such Notice of Appeal. The Respondent has opposed the said application and has averred that there is inordinate delay on the part of the Applicant. That the application herein is an afterthought and it should be dismissed.

Being guided by the provisions of Section 1A of the Civil Procedure Act and Section 7 of the Appellant Jurisdiction Act, the Court will now determine whether the Applicant is deserving of the orders sought.

Since Section 7 of the Appellant Jurisdiction Act gives the Court power to extend the time of Notice of Appeal and since that power is discretionary, the Court will rely on various principles that have been set out by courts while determining such applications for extension of time. These principles are set out in Rule 4 of Civil Procedure Rules and in various judicial decisions. The principles are that the powers of the Court in deciding such an application are discretionary and unfettered. Further, it is upon the applicant under this Rule to explain to the satisfaction of the Court that he is entitled to the exercise of such discretion of the Court in his favour. In the case of **Mutiso..Vs...Mwangi, Civil Appl.No.NAI 255 of 1997 (UR) and Fakir Mohammed..Vs...Joseph Mugambi & 2 Others, Civil Appl.No.332 of 2004**, the Court held that:-

“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 if 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.”

It is therefore very clear from the above findings that the matter to be considered are not exhaustive and each case may raise matters that are not in other cases for consideration. This was the finding in the case of **Mwangi...Vs..Kenya Airways Ltd (2003) KLR486**, where the Court held that:-

“The list of factors a Court would take into account in deciding whether or not to grant an extension of time is not exhaustive”.

The intended Appeal herein is in respect of a **Judgement** that was delivered by **Nyamweya J** on **16th April 2015**. The Applicant alleges that though she was aggrieved by the he said Judgement, her then **advocate Njugi B.G** did not file a Notice of Intention to Appeal within the stipulated time. She alleged that she **changed her advocate** to **Kimandu Gichohi Advocates** who first filed an application for change

of advocates dated 7th May 2015.

It was her allegation that the change of advocates further caused the delay in filing of the intended Notice. Therefore this application has been filed after about a period of 5 months after delivery of the impugned Judgement. Though there is indeed delay on the part of the Applicant, that delay has been explained. Indeed the Applicant has explained the reason for the delay was solely caused by the former advocate. The Court should therefore not punish the Applicant herein for the mistakes of her advocate. See the case of **Shah H. Bharmal & Brothers...Vs..Kumari (1961) EA 679**, where the he Court held that:

"the mistake of legal advisor may amount to sufficient reason."

Though the Respondent has averred that this application was brought after lapse of unexplained length of time and as an afterthought, the Court finds that it has to balance the competing interests of the Applicant and the Respondent. See the case of **M/S Portreiz Maternity..Vs.. James Karanga Kabia, Civil Appeal No.63 of 1997**, where the Court held that:-

"That the right of Appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the Judgement delivered in his favour. There must be a just cause for depriving the Plaintiff of that right".

It is therefore evident that for the Court to exercise its discretion, there must be satisfactory explanation for the delay. The Applicant has explained the reason for the delay and that reason is the mistakes of the advocate who failed to file the Notice of Appeal within the stimulated period of 14 days. That explanation is satisfactory as the mistake of an advocate should not be visited on her.

This Court finds that it has discretion which is unfettered in determining this matter. The said discretion was explained by **Lord Romilly MR** in the case of **Haywood..Vs...Cope(1858)22 BEAV 140** as;

"The discretion of the court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair, you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the other person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so."

This Court has now considered the instant application and the fact that the Judgement was delivered on **16th April 2015**, but the Applicant did not file the Notice of Appeal within the stipulated period of 14 days. However, the Applicant has offered adequate and/or sufficient explanation for the delay. The Court finds that its right and proper to exercise its discretion in favour of the Applicant herein.

For the above reasons, the ***Court allows the Applicant's Notice of Motion dated 22nd September 2015 entirely in terms of prayers No.2 and 3 with costs being in the cause.***

Further, the Applicant to file the Notice of Appeal within a period of 14

days from the date hereof and thereafter the Appeal to the Court of Appeal within a period of 60 days from the date of this Ruling. Failure to comply as above, the extension of time or the window granted to file the Appeal herein shall automatically lapse.

It is so ordered.

Dated, Signed and Delivered at Thika this **10th** day of **November 2017**.

L. GACHERU

JUDGE

10/11/2017

In the presence of

Mr. Maweu holding brief for Mr. Gichigo for Plaintiff/Applicant

1st Defendant/Respondent in person present (Cyrus Karanja)

Lucy - Court clerk.

L. GACHERU

JUDGE

10/11/2017