



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C MISC. APPLICATION NO. 20 OF 2017

TABITHA WANDAMA MURIITHI.....APPLICANT

VERSUS

SAMUEL MURIUKI KATHENGE.....RESPONDENT

RULING

The Applicant herein by her Notice of Motion dated 25th September 2017 seeks the following orders:

- 1. That this Court do grant an extension of time to the Applicant to file and serve the Notice of Appeal, Memorandum of Appeal and record of Appeal out of time.***
- 2. That the orders in Kerugoya Court Suit No. 126 of 2015 and the entire judgment be set aside pending the hearing and determination of this application and the intended appeal.***
- 3. That costs be provided for.***

The application is based on the grounds set out therein and is also supported by the affidavit of **TABITHA WANDAMA MURIITHI** the Applicant herein.

The gravamen of the application is that the Applicant was the defendant in **KERUGOYA CHIEF MAGISTRATE CIVIL CASE No. 126 of 2017** in which judgment was delivered against her on 3rd August 2017. However, she was not present during the trial since her advocate did not inform her and she only learnt about the judgment when she was served with an order on 9th September 2017. She then went to the Court on 12th September 2017 and upon perusal of the file, she learnt that the case against her had proceeded ex-parte. Attempts to trace her advocate were in vain and so she sought the services of another advocate whom she instructed to file an appeal. A draft memorandum of appeal is annexed to the application.

Though served with the application, the Respondent did not file any response. The application is therefore not 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

It is clear therefore that the law allows the filing of an appeal beyond the thirty (30) days if there are "***good and sufficient***" reasons to do so. In ***NICHOLAS KIPTOO arap KORIR SALAT VS I.E.B.C & OTHERS 2014 e K.L.R.***, the Supreme Court laid down the following principles that should guide a Court considering an application such as this one. These are:

- 1. 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.***
- 2. A party who seeks for such extension has the burden of laying a basis to the satisfaction of the Court.***
- 3. Whether or not the Court should exercise its discretion to extend time is a consideration to be made on a case by case basis.***
- 4. Where there is a reason for delay, it should be explained to the satisfaction of the Court.***
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted.***
- 6. Whether the application has been brought without delay.***
- 7. Whether in certain cases like election petitions, public interest should be a consideration for extending time.***

Guided by the above principles, it is clear to me that the Applicant moved to this Court expeditiously upon learning that the judgment sought to be appealed had been delivered in her absence. The said judgment, a copy of which has been availed was delivered by **HON. S.M.S SOITA CHIEF MAGISTRATE** on 3rd August 2017 and this application was filed on 27th September 2017. Taking into account the fact, which is confirmed from the judgment itself, that it was only delivered in the presence of the Respondent, I am satisfied that there is no un-reasonable delay in filing this application since the Appellant only learnt about it on 12th September 2017 as per her supporting affidavit which is not rebutted. The Respondent did not file any response to the application and therefore there is nothing to suggest that granting the orders sought will prejudice him in any manner. This is therefore a proper case to grant the extension sought.

The other limb of this application is to set aside the entire judgment pending the hearing and determination of this application and the intended appeal. If I grant that order, I will in effect have determined the appeal itself. That prayer is therefore not available.

The up-shot of the above is that the Applicant's Notice of Motion dated 25th September 2017 is allowed in the following terms:

- 1. The Applicant is allowed to file the appeal within thirty (30) days from today.***
- 2. No order as to costs.***

B.N. OLAO

JUDGE

8TH DECEMBER, 2017

Ruling delivered, dated and signed in open Court this 8th day of December 2017 at Kerugoya

Mr. Macharia for Mr. Kimemia for Applicant present

Respondent present

Mr. Gichia Court clerk present.

B.N. OLAO

JUDGE

8TH DECEMBER, 2017