



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LANDCOURT AT CHUKA**

**CHUKA MISCELLANEOUS APPLICATION ELC CASE NO. 03 OF 2017**

**FORMERLY MERU MISCELLANEOUS CIVIL APPLICATION CASE NO.22/2016**

**GRADIS CIARUA KARUTI (SUING AS THE ADMINISTRATRIX OF THE**

**ESTATE OF MUNG'ATIA MBUNGU (DECEASED).....APPLICANT**

**VERSUS**

**SABASTIAN KIREU MUNGATIA.....1<sup>ST</sup> RESPONDENT**

**PHANUEL RUGENDO MACLUS.....2<sup>ND</sup> RESPONDENT**

**ELIPHAS KATHUNI MUGO.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This application is dated 11<sup>th</sup> March, 2016 and seeks the following orders:

1. That this honourable court be pleased and hereby grant the applicant leave to appeal against the judgment and decree in Chuka SPMCC NO. 42 of 2008 out of time.
2. That this honourable court be pleased to grant any other such orders befitting the circumstances of this case.
3. That the cost of this application be provided for.

2. The application has the following grounds:

- a. That although the judgment in this case was delivered and signed on 28<sup>th</sup> October, 2015 the proceedings and the decree were not ready and made available to the applicant herein until 3<sup>rd</sup> March, 2016.
- b. That a certificate of delay in explaining reasons why the decree and the proceedings were not ready in time as been issued by the Senior Principal Magistrate's citing pressure of work in court.
- c. That the court is ceased (sic) with powers to extend time for the end of justice and in particular the powers donated by section 3A, 79G and 95 of the Civil Procedure Acts and order 50 Rule 6 of the Civil Procedure Rules.
- d. That substantive justice of this application demand that the application should be allowed granted

that the subject of the intended appeal is land and issues of land are very immotive (sic).

- e. That the applicant has in a humble view very strongly arguable and triable issues of appeal.
- f. That the applicant (intended appellant) is a poor widow aged over 84 years whose children have all died and it has been a big problem to raise even a quarter of money required to instruct an advocates and a counsel on record is infact helping the applicant in quasi-probono brief.
- g. That the delay in filing appeal in time has been explained and the said delay amount to a technicality which can be cured by article 159 of the constitution and section 19(1) of the environment and land act 2011.
- h. That the respondent will suffer no irreparable loss if the orders sought by the applicant are granted.
- i. That the orders sought by the applicant are the most apt in the circumstances.

**DATED AT CHUKA THIS 11<sup>TH</sup> DAY OF MARCH, 2016**

- 3. The application was canvassed by way of written submissions.
- 4. In her submission, the applicant, by and large, echoes the contents of the grounds on the face of the application and her supporting affidavit sworn on 11.3.2016.
- 5. A conspectus of her submissions is that copies of the proceedings and a decree were not availed in good time to allow her file the apposite appeal within the stipulated time. She asserts that she has very strong arguable and triable issues. She posits that by March, 2016, she was a poor widow of 84 years who had a big problem in raising the money required to file an appeal in time. She also asserts that filing an appeal out of time is a technicality that can be cured by Article 159 of the Constitution and Section 19(1) of the Environment and Land Court Act.
- 6. The Respondents oppose the application. They say that the apposite judgment was delivered on 28<sup>th</sup> October, 2015 while this application was filed on 24<sup>th</sup> March, 2016, more than 5 months later.
- 7. The respondents say that the judgment had been typed before it was delivered and therefore the applicant had no basis for not filing an appeal on time. They submit that section 3A of the Civil Procedure Act, being relied upon by the applicant, infact supports their opposition to the application, in that its import is to allow the court to make orders which support ends of justice and prevent abuse of the process of the court. They say that this promotes the overriding objective decreed by section 1A of the Civil Procedure Act, which is to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes.
- 8. The respondents have proffered the cases of MARITHA KIAMBUI VERSUS IRENE MWANGI & ANOTHER (2016) eKLR where Abaruli, J, refused to admit an appeal out of time because the applicant had not bothered to apply for the proceedings or the ruing within the statutory 30 days to enable her file an appeal. They also proffered the case of AVIATION CARGO SUPPORT LIMITED VERSUS ST.MARK FREIGHT SERVICES LIMITED (2014) eKLR where Justice G. B. M. Kariuki opined that:  
  
**“Even where an appeal is meritorious, if the delay is too inordinate and has not been explained at all, leave ought not to be granted to lodge the record of appeal out of time”.**
- 9. The respondents say that the applicant was represented by an advocate in the lower court who was present when the apposite judgment was entered. They argue that having been represented in the lower court, arguing that she was a poor window who had no money to pursue her appeal in time has no basis. They also say that her advocate had access to the certified copies of the judgment and proceedings. They say that, if indeed the applicant was a pauper, she should have employed section 3 of the Civil Procedure

Act, and have recourse to file pauper proceedings.

10. The respondents urge the court to dismiss this application.

11. Section 79 G of the Civil Procedure Act provides that an appeal may be admitted out of time if the appellant satisfied the court that s(he) had good and sufficient cause for not filing the appeal in time.

12. The applicant has submitted that the question of not filing an appeal within the statutorily stipulated time is an issue concerning procedural technicality as envisaged by Article 159 (d) of the Constitution of Kenya. I do wholly disagree. It is a legal requirement decreed by a statute which is fully operational.

13. I do not agree that the applicant failed to file her appeal in time because the apposite judgment and proceedings were not available. I agree with the respondents' submissions that the judgment intended to be impugned by a proposed appeal was already typed when it was delivered. I also note that all through the proceedings in the lower court, the applicant was represented by an advocate. It was, therefore, not through lack of legal advice that she did not file an appeal in time. I do not agree that the applicant did not file her appeal in time because she is a poor widow. I also find that the filing of this application was inordinately delayed.

14. He who comes to equity must do so with clean hands. The applicant is economical with the truth. Judgment was delivered on 28<sup>th</sup> October, 2015. The Certificate of Delay issued by the lower court clearly states that the applicant applied for certified copies of the proceedings on 29<sup>th</sup> December, 2015, over 2 months after the apposite judgment had been delivered. Pellucidly, this was way out of the time stipulated by law for an appeal to be filed. Yet, the applicant has hidden this fact from the court.

15. I find that the applicant has not satisfied this court that she has a good and sufficient cause to not have filed her appeal in time. I find that, for this reason, this application merits dismissal.

16. As an obiter dictum, I have carefully considered the judgment delivered by Hon. Alfred Gethi Kibiru in the lower court on 28<sup>th</sup> October, 2015. Although not important for the purposes of this application, I opine that I would have easily rejected the intended appeal summarily if it was brought to me for admission or non-admission. But in the circumstances of this application, this remains mere conjecture.

17. For avoidance of doubt, this application is dismissed.

**Delivered in open court at Chuka this 19<sup>th</sup> day of December, 2017**

in the presence of:

CA: Ndegwa

Parties not present

**P.M. NJOROGE**

**JUDGE**