



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 207 OF 2012

MBUGUA KAMAU MUGWE.....1ST APPLICANT

PETER NJUGUNA KAMANDE2ND APPLICANT

JOSEPH KIMAI NJUGUNA3RD APPLICANT

VERSUS

JOSPEH KIMANI KANGETHE.....1ST RESPONDENT

BENARD MBUGUA NJENGA.....2ND RESPONDENT

KUTUR ARAP CHUMA.....3RD RESPONDENT

RULING

(Application for enlargement of time to file Notice of Appeal out of time; Section 7 Appellate Jurisdiction Act; Judgment delivered in absence of parties; parties later realizing that judgment was delivered; time to lodge Notice of Appeal having lapsed; application not made after inordinate delay; application not opposed; application allowed)

1. The application before me is that dated 27 February 2015 filed by the unsuccessful plaintiffs. It is an application brought pursuant to the provisions of Section 7 of the Appellate Jurisdiction Act, CAP 9, Laws of Kenya and Rules 12 and 42 of the Court of Appeal Rules, 2010. The substantive order sought is for enlargement of time within which the applicants may be allowed to lodge and file a Notice of Appeal and subsequent appeal out of time. The application is based on the ground that judgment was delivered on 30 January 2015 but that both counsel for the applicant and respondent were not aware. Both were therefore absent when judgment was read. It is averred that the plaintiffs' counsel only got hold of the judgment on 23 February 2014 (probably meant 2015) by which time the 14 days to lodge Notice of Appeal had expired.

2. The application is supported by the affidavit of Peter Njuguna Kamande, one of the four plaintiffs. He has averred that judgment was due for delivery on 10 December 2014 but the same was not delivered on the day. His advocates informed him that they would let him know of the new date for judgment. He again called on 20 February 2015 and inquired whether judgment had been delivered and his advocates told him that they would call him back. It is on 23 February 2015 that he received a call from his advocates and they informed him that a new judgment notice had been issued but they had failed to diarize the same and that judgment was delivered on 30 January 2015 in their absence. He has stated that

the plaintiffs are aggrieved by the judgment and would wish to appeal but that they are now out of time for lodging the Notice of Appeal.

3. Mr. Kiiru Chege for the respondents did not oppose the said application and was of the opinion that the delay in filing the application is not inordinate.

4. Section 7 of the Appellate Jurisdiction Act, does allow the High Court leeway to grant leave to file a Notice of Appeal out of time. It is worded 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.

5. It will be seen from the above that the High Court (and arguably courts of similar jurisdiction being the Environment and Land Court and the Industrial Court) have power to enlarge time for the filing of a Notice of Appeal.

6. Although the application as drawn also cited Rules 12 and 42 of the Court of Appeal Rules, I have not seen their relevance. Rule 12 relates to receiving documents out of time and rule 42 relates to the form of applications. These are not necessary in our instance and further, if one invokes of the Court of Appeal Rules, then it will be the Court of Appeal with jurisdiction and not this court. This is because the definition of "court" in the Rules is the Court of Appeal.

7. I have considered the reasons given for the delay in filing the Notice of Appeal. On perusal of the record I have discerned that the matter was heard by my predecessor Lucy Waithaka LJ, and on 24 October 2014, the learned Judge advised counsels that judgment will be on notice. I am not too sure if there was a notice because I cannot see any in the file and I will therefore give benefit of doubt to the plaintiffs.

8. I have also considered the delay which I do not find inordinate. I think there is good reason why the Notice of Appeal was not filed within time. In my discretion, I enlarge time and direct the plaintiffs to file and serve their Notice of Appeal within the next 14 days.

9. The applicant will however bear the costs of this application.

Dated, signed and delivered in open court at Nakuru this 21st day of April 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of:-

Mr Chege for the respondent

No Appearance for M/S Odhiambo & Odhiambo advocates for applicants

Emmanuel Maelo: Court Assistant

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU