



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC MISC. APPLICATION NO. 27 OF 2014**

**KENGA IHA MITSANZE.....APPLICANT**

**=VERSUS=**

**1. KITSAO KARISA**  
**2. SAFARI KARISA**  
**3. CHARO KARISA.....RESPONDENT**

**R U L I N G**

1. The Application before me is the one dated 2<sup>nd</sup> October 2014. In the Application, the Applicant is seeking for the following orders:
  - (a) **THAT, the Applicant be granted leave to file his appeal from the Judgment of the lower court in civil case No. 214 of 2009, out of time.**
  - (b) **THAT, Civil Appeal No. 11 of 2014 which was filed late by 10 days on 22<sup>nd</sup> April 2014 be deemed to be properly filed and served upon the respondents' counsel.**
  - (c) **THAT the costs of this application be provided for**
2. The Application is premised on the grounds that the appeal was filed under the mistaken belief that it was still within time; that the delay of ten days is not inordinate and that the appeal is crucial to both parties because it will resolve issues that were not resolved.
3. According to the Affidavit of the Applicant's advocate, he filed the Memorandum of Appeal before obtaining a copy of the Judgment and that when the Judgment by the lower court was delivered, it was his client who was in court.
4. Consequently, it was deponed, he inadvertently filed the appeal out of time.
5. In his Replying Affidavit, the 2<sup>nd</sup> Respondent deponed that appeal number 11 of 2014 was filed without the leave of the court and that therefore there is no competent appeal before the court; that the Application for leave to appeal out of time has been made eight months from the date of the Judgment and that the delay is inordinate and has not been explained.
6. According to the 2<sup>nd</sup> Respondent, the current Application has been filed after the Respondents filed ELC Land Case Number 181 of 2014 and that great prejudice will be occasioned if leave is granted to the Applicant to file the appeal out of time.
7. The advocates filed their respective submissions and authorities which I have considered.
8. The Judgment in Malindi CMCC No 214 of 2009 was delivered on 11th March 2014. The said Judgment was delivered in the presence of the Respondents' advocate but in the absence of the

- Applicant's advocate.
9. On 18<sup>th</sup> March 2014, the Applicant's advocate requested for certified copies of proceedings and Judgment for the purpose of filing an appeal. It would appear that the advocate was aware that the Judgment was indeed delivered by the lower court on 11<sup>th</sup> March 2014. I say so because his letter dated 18<sup>th</sup> March 2014 referred to a Judgment delivered on 11<sup>th</sup> March 2014.
  10. The Applicant's advocate proceeded to file a Memorandum of Appeal on 22<sup>nd</sup> April 2014, which was after the 30 days allowed for filing of an appeal.
  11. According to counsel, he was under the mistaken belief that he had filed the appeal within time. Counsel wants the said appeal to be deemed as having been filed within time.
  12. The filing of the Memorandum of Appeal on 22<sup>nd</sup> April 2014, albeit out of time by ten days is a demonstration that the Applicant intended to appeal against the Judgment of the lower court.
  13. It is understandable and excusable when an advocate gets his arithmetic wrong in terms of when the thirty days start running.
  14. The fact that the Application has been filed after eight months is due to the fact that the Applicant and his counsel all along believed that they had filed an appeal within time and all they were waiting for are certified copies of proceedings to file the Record of Appeal.
  15. Although the Memorandum of Appeal was filed out of time, this court, pursuant to the provisions of Order 51 of the Civil Procedure Rules, can enlarge time for the filing of the appeal.
  16. In the case of **Michael Kinyanjui Mbuthia Vs John Kamau Ngange (2009) e KLR, Okwengu J**, as she was then, extended time for the applicant to file an appeal out of time and the appeal that had been filed out of time was deemed to have been filed within time.
  17. I concur with the above holding. Once the court is satisfied that good reasons have been given as to why leave to appeal out of time should be given, it can allow the appeal which has been filed out of time to remain on record.
  18. I am satisfied, as I have already stated above, that the filing of the Appeal after the period within which the Appeal should have been filed was an inadvertent bona fide mistake by counsel. The Applicant has been desirous to file and pursue the appeal against the lower court Judgment.
  19. For those reasons, I allow the Application dated 2<sup>nd</sup> October, 2014 in the following terms.

**(a) Leave be and is hereby granted to the Applicant to file his appeal from the Judgment of the lower court in Malindi CMCC NO. 214 of 2009 out of time.**

**(b) Civil Appeal No. 11 of 2014 which was filed out of time be deemed as properly filed and served upon the Respondents.**

**(c) Each party to bear his own costs.**

Dated and delivered in Malindi this **8<sup>th</sup>** day of **May**, 2015.

**O. A. Angote**

**Judge**