



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: GATEMBU, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 109 OF 2020**

**BETWEEN**

**ELIJAH OCHIENG OGUL.....APPLICANT**

**AND**

**TOBIAS OMONDI.....RESPONDENT**

*(Being an application for leave to file an appeal out of time*

*from the judgment of the Environment and Land Court at Kisii*

*(J.M. Onyango, J.) delivered on 5<sup>th</sup> March, 2020 in Kisii ELC Case No. 1123 of 2016)*

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**RULING**

1. In his application dated 28<sup>th</sup> September 2020 made under Rule 4 of the Court of Appeal Rules, the applicant, Elijah Ochieng Ogui, seeks an order that “*leave and time be extended within which to file and serve records of appeal out of time.*”

2. The judgment he is intent on challenging is dated 21<sup>st</sup> February 2020 but was delivered on 5<sup>th</sup> March 2020 by the Environment and Land Court at Kisii ordering him to vacate and deliver vacant possession of the property known as Title Number Kanyamkago/Kamgundho/1105 within 60 days from the date of delivery of the judgment failing which an eviction order was to issue.

3. I have considered the application alongside the supporting affidavit and submissions as well as the replying affidavit by Joseph Mboya Oguttu, and the respondents’ submissions.

The application calls for exercise of judicial discretion along the principles pronounced in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR*, where the Supreme Court of Kenya stated that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. The Supreme Court stated further that whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and public interest are matters for consideration.

4. In this case, there is no doubt that the applicant promptly filed a notice of appeal on 6<sup>th</sup> March 2020, a day after the delivery of the judgment, although the respondent complains that it was not served within 7 days as required under the rules. It is also evident and acknowledged by counsel for the respondent that the applicant applied for the typed proceedings within 30 days of delivery of the judgment and copied the same to the respondents. The respondent however says that notification by the court that the proceedings were ready for collection was given on 6<sup>th</sup> July 2020 but the applicant's advocate "*went into slumber*" and delayed in collecting the same.

5. There is indeed on record a copy of a letter dated 6<sup>th</sup> July 2020 from the Deputy Registrar, High Court Kisii addressed to the advocates for the applicant notifying that the proceedings were ready for collection on payment of balance of fees of Kshs.1560.00 which was receipted by the court on 10<sup>th</sup> September 2020. The applicant says that the delay in collecting the proceedings was not intentional but "*due to the pandemic period of Corona Virus in the entire country*", a matter that is contested by the respondents. I am prepared to give the applicant the benefit of doubt alive to the fact that operations of the courts were scaled down during the period in question.

6. I think this is a proper case for the Court to exercise its discretion in favour of the applicant. It has not been demonstrated that the respondent will suffer prejudice, for which an award of costs will not suffice. The present application was filed within the month when the proceedings were collected, and the delay involved in doing so is not inordinate in the circumstances.

7. Consequently, I allow the application. The applicant shall file and serve his memorandum and record of appeal within 45 days from the date of delivery of this ruling. I award the costs of the application to the respondent.

*Dated and delivered at Nairobi this 19<sup>th</sup> day of March, 2021.*

**S. GATEMBU KAIRU, (FCI Arb)**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**



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