



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

MISC.CIVIL APPLICATION NO. E010 OF 2021

JULIUS MUTEMBEI MUCHIRI.....APPLICANT

VERSUS

SAMMY GITONGA MUTINDWA..... RESPONDENT

RULING

1. The applicant herein moved this court vide an application dated **06.12.2021** and wherein he basically seeks for leave to file an appeal out of time from the decision/decree in Civil Suit No.51 of 2014 dated **1st day of April, 2015**.

2. The application is premised on the grounds on the grounds interalia:

- a) THAT the applicant is desirous of appealing against the decree dated 1st day of April,2015 but he is out of time.
- b) THAT the applicant has been jobless hence could not find enough resources to employ the services of a counsel then.
- c) THAT the applicant did file an application to set aside the orders Dated 1st day of April,2015 to no avail.
- d) THAT the applicant stands to lose his only land that he has solely known as home.
- e) THAT if leave is not granted, he stands to suffer irreparably.
- f) THAT his appeal has high chances of success
- g) THAT due to the Covid 19 pandemic the applicant was not able to visit his counsel in time for instructions to set aside the orders/decree or file an appeal.
- h) THAT he erroneously filed this application in the HC MISC. Appl. No. E003 of 2021 instead of ELC and hence causing this delay.
- i) THAT the applicant has a good cause for filing appeal out of time.

3. The applicant in his supporting affidavit dated 6th December 2021 avers that on the 1st day of April,2015, Hon. Mbatia (RM) delivered a judgement/decree in Chuka Civil Suit No.51 of 2014 against him. That on the 16th day of July, 2019, he made an application to set aside the orders as previously ordered by the court to no avail and has annexed the ruling as JMM2.

4. The applicant avers that he is dissatisfied with the decision and his counsel advised him that the application for leave was necessary. He further avers that due to the fact that he had gone to look for money to employ services of a counsel an unfair judgement was entered against him. That due to Covid 19 pandemic, the situation was further aggravated in regard to the scaling down of the court operations being in place.

5. The applicant avers that he applied for certified copies of proceedings and judgement and the same was duly paid for but was received late.

6. The applicant contends that the respondent herein never honoured the deal/agreement thus leading to the disintegration of the same deal/agreement. The applicant further contends that he risks being evicted from the only land he and his family call and have known as home but the court found otherwise, dealing him a blow to his quest for justice hence the reason for the intended appeal and it is in the interest of justice that he makes the present application.

7. The respondent filed his replying affidavit dated 20th January 2022 in opposition to the application. He states that a judgement was issued by this Honourable court on the 4th day of March 2015 against the Applicant after he failed to enter appearance and the same was adopted as the Decree of this Honourable Court.

8. The respondent avers that the allegations by the Applicant that he was never served with the pleadings was a mere lie and only meant to mislead the court as there is a return of service on record that clearly demonstrated service. That the court ruled that there was effective service but the applicant had deliberately failed and refused to enter appearance and the Respondent has attached a copy of the ruling.

9. The respondent contends that four years later, in 2019, the applicant filed an application to set aside the judgement of 2015 but having not demonstrated to the court with any substantial reasons as to why he did not enter appearance, despite being served with the pleadings, the application was dismissed. That notwithstanding, the applicant filed another application at the High court being Miscellaneous Civil E003 of 2021 seeking leave to appeal out of time and upon him realizing that the Respondent's advocate on record had filed a preliminary objection, he hastily moved the court to have the application withdrawn. That it is at this juncture that he has filed another application before this Honourable Court seeking the same prayers of leave to file appeal out of time.

10. The respondent avers that it has taken the applicant over a year to move the court appropriately as his numerous applications are just some fishing expedition. The respondent further avers that the applicant's motive is to take him in circles with the aim of frustrating him from enjoying and utilizing his parcel of land that he voluntarily disposed off. That the applicant's allegations that he will lose his parcel of land is neither here nor there since he offered to dispose off the portion of land without duress and on the contrary, he did not by any chance move the court to challenge by rescinding the contract or rather getting a requisite remedy.

11. The respondent avers that no harm will be occasioned to the applicant upon the dismissal of this application and that it is in fact the respondent who will suffer irreparable damage by not getting a chance to enjoy his parcel of land. The respondent further avers that the issue of Covid-19 pandemic as a cause of the delay in filing his requisite application is a mere excuse because the decree was issued back in 2015 and Covid hit the globe in 2020. That bringing this application post one (1) year is too much time taken to move the court and is not even reasonable time to come to court seeking leave to appeal and the applicant's actions demonstrates his indolence which defeats equity.

12. The respondent contends that the application is incompetent for it has been brought under Order 40 of the Civil Procedure Rules, which provides for injunctions and the same is a wrong provision of the Law.

13. Lastly the respondent avers that the application is frivolous, vexatious and the same should be dismissed with costs to the respondent to allow the respondent implement the decree of this Honourable Court.

14. I have considered the application herein and the rival response by the respondent and it is my opinion that the issue which this court ought to determine is whether the same has merits.

15. The applicant substantially seeks for leave to file an appeal out of time. The decision which is sought to be appealed is from the lower court. Under **Section 79G** of the **Civil Procedure Act**, appeals from the decisions of the lower court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section

however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.

16. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are now settled. The court ought to consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) and Thuita Mwangi –vs- Kenya Airways Limited [2003] eKLR. The question therefore is whether taking into account the facts of the instant case, the applicant has satisfied the said conditions.

17. As for the length of the delay, the judgment of the trial court was delivered on 04.03.2015. The instant application was filed on 6.12.2021. The 30 days' period within which the applicant ought to have filed the appeal lapsed in April, 2015. The application has been brought after a period of over six (6) years. It is my considered view that the application was brought after unreasonable delay.

18. In justifying the said delay, the applicant deposed that he has been jobless hence could not find enough resources to employ the services of a counsel then. That the applicant did file an application to set aside the orders Dated 1st day of April, 2015 to no avail. That the applicant stands to lose his only land that he has solely known as home. That if leave is not granted, he stands to suffer irreparably. That his appeal has high chances of success. That due to the Covid 19 pandemic the applicant was not able to visit his counsel in time for instructions to set aside the orders/decrees or file an appeal. That he erroneously filed this application in the HC MISC. Appl. No. E003 of 2021 instead of ELC and hence causing this delay. It is my opinion that the reasons for the delay were not well explained, are farfetched, and frivolous and the delay was quite inordinate.

19. As for the chances of the appeal succeeding, as alleged by the applicant, at the stage of determining whether to grant leave to file an appeal out of time on the grounds that the appeal is arguable, it is trite that the court is bound to consider whether the said intended appeal raises a bona fide issue for determination by the Court. The court is not supposed to determine as to the success of the appeal but as to whether the same is arguable. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. (See Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008).

20. As for the prejudice which the parties might suffer, the respondent has averred that he stands to suffer prejudice since he is unable to enjoy his land and therefore there must be an end to litigation.

21. As it has always been held, extension of time to file appeal is a matter of exercise of discretion. Where a party is aggrieved and wishes to pursue an appeal, it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. Discretion of the court must always be exercised judiciously. The applicant although having expressed his intentions to be heard by this court on appeal, it is my considered opinion that he ought not to be given an opportunity to pursue the appeal since the delay is quite inordinate. The respondent has clearly elaborated that four years later in 2019, the applicant filed an application to set aside the judgement of 2015 but having not demonstrated to the court with any substantial reasons the application was dismissed. That notwithstanding, the applicant filed another application at the High Court being Miscellaneous Civil E003 of 2021 seeking leave to appeal out of time and the same was withdrawn, hence this application seeking leave to file out of time. In my considered view, the applicant has slept on his rights to challenge the judgement for too long and has failed to explain the inordinate delay. Equity aids the vigilant and not the indolent.

22. For the above reasons, it is my considered opinion that the applicant herein has not satisfied the conditions for grant of leave to appeal out of time. Consequently, the application is dismissed with cost to the respondent.

23. It is so ordered.

Dated, signed and delivered at Chuka this **8th day February, 2022** in the presence of:

C/A: Martha

Julius Gitonga Mutindwa/Applicant present in person

Sammy Gitonga Mutindwa/Respondent present in person

N/A for Advocate for Respondent

C. K. YANO,

JUDGE.



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