



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**E.L.C MISCELLANEOUS APPLICATION NO. E004 OF 2021**

**FRANCIS MUCHIRA KITHECE.....APPLICANT**

**VERSUS**

**JOSEPH MUTHIKE KIBUCHI.....RESPONDENT**

**RULING**

1. The Applicant vide a Chamber Summons dated 30<sup>th</sup> July, 2021 and filed on 3<sup>rd</sup> August, 2021 is seeking the following orders: -

**a. Spent**

**b. Spent**

**c. That this Honourable Court be pleased to grant leave to the Applicant herein to lodge an Appeal out of time against the judgment of Honourable L. W. Kabaria (Ms.) Senior Magistrate (S.R.M) delivered on 4<sup>th</sup> September, 2020 in the Principal Magistrate's Court at Gichugu in Civil Suit Number 23 of 2016 and against a ruling delivered on 28<sup>th</sup> May, 2021 together with the consequential orders arising therefrom.**

**d. Spent**

**e. That this Honourable Court be pleased to give further orders and/or directions as it may deem fit and just to grant.**

**f. That costs of this application be in the cause.**

2. The application is premised on the grounds set out on the face of the said application and the Supporting as well as the Supplementary Affidavits of the Applicant sworn on 30<sup>th</sup> July, 2021 and 12<sup>th</sup> November, 2021 respectively together with the annexures thereto.

3. The respondent opposed the application vide a Replying Affidavit sworn by himself on 14<sup>th</sup> September, 2021.

4. When the application came up for hearing on 20<sup>th</sup> September, 2021, the parties through their advocates agreed to have the application disposed of by way of written submissions. The applicant filed his submissions on 15<sup>th</sup> November, 2021 while the respondent filed his on 10<sup>th</sup> December, 2021.

**APPLICANT'S CASE**

5. The applicant's case is that he is the registered proprietor of Land Registration Number Baragwe/Raimu/1507.
6. He stated that he had instituted the suit in Gichugu Law Courts seeking declaration of the ownership, eviction order and general damages for trespass. However, the matter was delayed due to the transfer of the trial magistrate gazetted to handle land matters.
7. He stated that the aftermath of the suit was that though the District Land Registrar and County Surveyor made a site visit to the suit land and found that the respondent had trespassed and erected illegal structures thereon, the trial magistrate dismissed the suit for lack of jurisdiction terming the suit as a boundary dispute under *Section 18 (2) of the Land Registration Act, 2012*.
8. He stated that he filed a Notice of Motion in the same suit seeking to settle the matter amicably by involving the District Land Registrar, the County Surveyor and provision of Security by the police but the same was dismissed on 28<sup>th</sup> May, 2021.
9. He further stated that he is a peasant farmer who is old and sickly and by the time of the delivery of the said ruling, he had been suffering from depression, Asthma and Arthritis and thus was unable to file an appeal within the prescribed time.
10. He stated that the delay in filing an appeal is not inordinate since only one month had lapsed and that it was beyond his control and excusable.
11. He stated that the appeal is arguable with overwhelming and high chances of success, raising pertinent points of law, in particular that justice should not be delayed and that the Constitution dictates of justice should be administered without undue regard to procedural technicalities were ignored.
12. He stated that he was facing imminent dispossession and eviction from his rightfully owned land parcel which forms part of his livelihood and that of his family.

#### **RESPONDENT'S CASE**

13. The respondent's case is that the Court was right in arriving at a conclusion that the dispute was a boundary dispute and gave a very well analyzed judgment advising the applicant what to do.
14. He stated that though the applicant alleged having a good appeal, he had deliberately failed to attach a copy of the impugned judgment so that the Court can peruse it and understand the reasoning in it.
15. He stated that upon dismissal of the suit, the applicant filed an application for review and setting aside of the judgment and that the same was also dismissed with costs. Further that the applicant had not attached the said ruling since the Court had made a correct finding of law.
16. He stated that the intended Appeal is incompetent as the attached draft Memorandum of Appeal seems to merge the issues in the judgment and ruling, thus the applicant has to choose either of the two and not both.
17. He stated that the reason offered for failure to appeal in time was casually stated as he had not attached the medical documents to show that he has been ailing.
18. He stated that the applicant had not stated who had been arrested resulting from the alleged demolition and hiring of any goons.
19. He stated that by seeking orders of injunction, the Applicant wants to have him evicted from the old road through the back door.
20. He prayed that the application be dismissed with costs.

### **APPLICANT'S SUBMISSIONS**

21. The applicant submitted that he is the legal, bonafide, registered and lawful owner of the suit land which has been trespassed upon by the respondent thus it was necessary for the Court to stop the respondent from tampering with his quiet possession.

22. He submitted that the respondent had not attached any legal documents showing that where he stays belongs to him legally and prayed that status quo be maintained with the respondent being stopped from carrying out any activities that may render the application and intended Appeal to be an exercise in futility. He relied on the cases of **Fatuma Abdi Jillo Vs Kuro Lengesen & Another (2021) e KLR**.

23. He further submitted that a right of appeal is a Constitutional right being part of the right of access to justice and right to a fair hearing enshrined under **Article 48 and 50 of the Constitution**.

24. He submitted that the applicant has filed the application without inordinate delay and the slight delay is excusable as has been explained in the Supporting Affidavit and the Supplementary Affidavit. He relied on the case of **Kenya Power & Lighting Company Ltd Vs Rose Anyango & Another (2020) e KLR**.

25. He submitted that **Article 159 (2) (d) of the Constitution of Kenya** provides the overriding objectives to ensure that strict application of the rules is not administered in a manner that is detriment to substantive justice to the parties herein. He relied in the case of **Kivanga Estates Limited Vs National Bank of Kenya Limited (2017)**.

26. He submitted that it was not the intention of drafters of the Civil Procedure Rules to summarily lock out a party from the seat of justice and thus the respondent's application to have the appeal dismissed is made in bad faith to deny him an opportunity to hear and determine the case on its merits.

27. He prayed that this Honourable Court invokes its discretion judiciously by allowing the application and relied on the case of **Charles Munyeki Wachira Vs Kenya Pipeline Company Limited (2006) e KLR**.

### **RESPONDENT'S SUBMISSIONS**

28. The respondent submitted that the Applicant had proved his allegations that there was intimidation, demolition as provided under **Section 107, 108 and 109 of the Evidence Act**.

29. He submitted that prayers 2 and 4 of the application ought to be dismissed as the intended Appeal was yet to be heard and even the application for leave to appeal was yet to be determined.

30. He submitted that a plain reading of **Order 45 Rule 1 (2) of the Civil Procedure Rules** provide that a party who is aggrieved by any decision has an option of either appealing or seeking review but not both. Thus, the intention to appeal against the judgment and at the same time seek to overturn the order of refusal by the trial magistrate to review the judgment, renders the application incompetent.

31. He thus submitted that the delay for over 10 months since the delivery of the impugned judgment is inordinate and the explanation that he is an old, sickly peasant farmer is not excusable. This is because the treatment notes attached thereto were obtained in June 2021, but has not explained the delay between 4<sup>th</sup> September, 2020 to June 2021.

32. He therefore submitted that the delay in filing the appeal against the judgment and the ruling had not been explained at all and that there were no documents filed to show that at the time of filing the application, he was young and of good health.

33. He submitted that the application lacks merits and prayed that it be dismissed with costs as he had been advised to have land surveyed which was an easy and cheap route to follow.

## **ANALYSIS**

34. I have considered the application herein, the parties' rival affidavits, submissions and the relevant law.

35. First and foremost, it is important to note that though the parties have submitted on prayers 2 and 4 in the application, I am of the view that the same has been spent since they were meant to preserve the status quo pending hearing and determination of the application inter-parties.

36. I am guided by the principles of equity that equity does not act in vain, as by the time the ruling is delivered, even assuming the Court were to confirm the said orders, they could have become obsolete and serve no purpose.

37. In the case of *Eric V. J. Makokha & 4 others Vs Lawrence Sagini & 2 others [1994] e KLR*, the Court of Appeal held that: -

*"As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes."*

38. The remaining issue is that of leave to appeal out of time under the provisions of *Section 79G of the Civil Procedure Act* which provides that: -

*"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time".*

39. The above principles for extension of time have been outlined by the Supreme Court of Kenya in **the case of Nicholas Kiptoo Arap Korir Salat Versus Independent Electoral and Boundaries Commission & 7 others (2014) e KLR** as follows: -

***"(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.***

***(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.***

***(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.***

***(4) Whether there is reasonable explanation for the delay. The delay should be explained to the satisfaction of the court.***

***(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.***

***(6) Whether the application has been brought without undue delay; and***

***(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time."***

40. It is evident from the above authority that extension of time is not a right of a party as purported by the Applicant in his application and submissions. The same is discretionary and only available upon satisfactory explanation of the delay.

41. The applicant has stated that he was aggrieved by the trial Court's Judgment which was delivered on 4<sup>th</sup> September, 2020. The applicant later filed an application dated 16<sup>th</sup> February, 2021 seeking review of the said judgment and resultant decree, however the same was dismissed on 28<sup>th</sup> May, 2021.

42. The applicant has blamed the delay in appealing against the judgment and ruling on his old age, ill health and inability to raise funds to file the appeal. He has attached his National Identity Card and treatment note to prove the same.

43. I have considered those documents and find that the delay has not been explained to the satisfaction of this Honourable Court.

44. I have noticed that though, judgment in the trial Court was delivered on 4<sup>th</sup> September, 2020, it was not until 16<sup>th</sup> February, 2021 that the applicant decided to challenge it by way of review. This was approximately, 6 months later.

45. This clearly shows that the applicant's challenge of the judgment was an afterthought and filed the application for review on realization that time to appeal had lapsed. Be that as it may, I am guided by *Section 80 of the Civil Procedure Act* which provides that: -

*Any person who considers himself aggrieved –*

*(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.*

46. I am also guided by *Order 45 (2) of the Civil Procedure Rules* which provides that: -

*A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.*

47. From a clear reading of the above provisions of the law, it is clear that a party cannot apply for review and appeal from the same decree or order as is the case in this suit.

48. The applicant has already exhausted the option of review and therefore the room for appeal against the impugned judgment is not available for him.

49. Turning to the issue of leave to appeal against the ruling, upon the attempt to review to failing on 28<sup>th</sup> May, 2021, he filed the instant application on 3<sup>rd</sup> August, 2021. This was approximately after 3 months.

50. The undated letter from Embu County Government Health Department marked as annexure **FK3** does not explain the period of the inability to do the said daily duties. Further the treatment notes from Tenri Children Hospital only indicates one hospital visit on 2<sup>nd</sup> June, 2021.

51. Save for the said 2<sup>nd</sup> June, 2021, all other days within the said period of the 3 months are unexplained. This shows not only the indolence on the part of the applicant but also lack of seriousness thereof. In the case of *Joreth Limited Vs Mbugua & 3 others (Civil Application E219 of 2021) [2022] KECA 163 (KLR) (Civ) (18 February 2022)*, the Court of appeal held that: -

*“It therefore follows that the applicant has not accounted for the three (3) months and fifteen (15) days delay in seeking the Court's intervention. In my opinion, this demonstrates lack of seriousness in their alleged desire to progress their intended appellate process.”*

52. The orders which are being sought are discretionary in nature. As such, this Court is guided by the principles of equity such as equity does not aid the indolent which I find relevant in the circumstances of this case.

53. On the issue of substantive justice, it has been severally held that justice is a double edged sword which cuts on both sides.

54. Both the impugned rulings and judgment were made by a Court of competent jurisdiction and I am therefore of the view that the respondent cannot be denied justice by the Applicant's indolence and lack of seriousness allegedly in the interests of justice as claimed by the applicant.

**CONCLUSION**

55. In view of the matters aforesaid, it is my finding that the Chamber Summons dated 30<sup>th</sup> July, 2021 is without merit and the same is hereby dismissed with costs to the Respondent. It is so ordered

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 11TH DAY OF MARCH, 2022.**

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**HON. E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

*Mr. Ndana holding brief for Maina Kagio for Respondent*

*Ms Hamba holding brief for Karanja for Applicant*

*Kabuta – Court clerk.*



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