



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC MISC. APPLICATION NO. E 064 OF 2021**

**SOPHIA NDINDA MWAKA & JAYNE FRANCES MWAKA**

**(Suing as the legal representatives of the estate of GEDION MWAKA KIVEKE – Deceased)....APPLICANTS**

**VERSUS**

**PATRICK MASILA MALU.....1<sup>ST</sup> RESPONDENT**

**THE REGISTERED TRUSTEES OF TALA CATHOLIC CHURCH.....2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MACHAKOS.....3<sup>RD</sup> RESPONDENT**

**RULING**

What is before Court for determination is the Applicants' Notice of Motion application dated the 1<sup>st</sup> November, 2021 brought pursuant to sections 1A, 1B, 3A 79G & 95 of the Civil Procedure Act and Order 9 (a) & 10 of the Civil Procedure Rules. The Applicants seek the following orders:

- 1. Spent**
- 2. That this Honourable Court be pleased to allow the firm of Donex Juma & Company Advocates to come on record for the Applicants.**
- 3. That this Honourable Court be pleased to grant the Applicants leave to appeal out of time against the whole judgment in Kangundo SPMCC No. 53 of 2014 being GEDION MWAKA KIVEKE Vs PATRICK MASILA MALU & 2 OTHERS.**
- 4. That upon grant of leave to appeal out of time, the Memorandum of Appeal lodged herein be deemed as duly filed upon payment of requisite fees.**
- 5. That costs of this application be in the cause.**

The application is premised on the grounds on the face of it and the supporting affidavit of the 2<sup>nd</sup> Applicant JAYNE FRANCES MWAKA where she deposes that together with the 1<sup>st</sup> Applicant, they are legal representatives of the estate of GEDION MWAKA KIVEKE (deceased) who died on 2<sup>nd</sup> May, 2018. Further, that the deceased was the Plaintiff in SPMCC No. 53 of 2014 (Gedion Mwaka Kiveke Vs Patrick Masila Malu & 2 Others) where he sought an order of specific performance against the 1<sup>st</sup> Defendant to

transfer half of the title in land parcel number Matungulu/ Sengani/1031 as premised on an Agreement for Sale executed on the 1<sup>st</sup> day of May, 1985. She confirms that judgement was delivered on 4<sup>th</sup> November, 2020 in the absence of their Advocate, Mr. Ngulu who had proceeded to the United Kingdom to pursue further studies. Further, that the 1<sup>st</sup> Applicant has also been undergoing treatment in the United States of America. She claims to have learnt of the judgement in August, 2021 and being aggrieved with it, they are desirous of lodging an Appeal. Further, the delay in lodging the Appeal was due to the court scaling down its operations due to the COVID pandemic and also complicated by the travel sanctions including restrictions. She avers that she has an arguable appeal and no prejudice will be suffered since the trial court held that the suit land is public property under the custody of the 3<sup>rd</sup> Respondent. She reiterates that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents will not suffer any prejudice since there is a pending Appeal on the same matter before this Court, which they had filed being Appeal No. 211 of 2014.

The 1<sup>st</sup> Respondent PATRICK MASILA MULU opposed the application by filing a replying affidavit where he deposes that the application is hopelessly defective and is merely intended to embarrass court and waste its time. He insists the Applicants have not advanced any reasons why there was inordinate delay in filing an Appeal against the judgement of the lower court. Further, the Applicants have not annexed any documents to demonstrate they had applied for certified proceedings. He disputes the Applicants averments that their advocate Mr. Ngulu failed to follow up on the judgement and insists, the Applicants were well represented. He avers that the Applicants were not keen to follow up on their judgement and the instant application is an afterthought. He further disputes the medical reports annexed to the supporting affidavit and contends that they should not be entertained by the court. Further, that the allegation of blaming the COVID pandemic is incorrect since the Court embraced the e filing system. He reiterates that the Application for the law firm of Donex Juma & Company Advocates to come on record can only be done in the lower court. Further, that the Applicants should have filed a cross Appeal in ELC Appeal No. 211 of 2014. He states that the intended Appeal is not arguable as the Applicants have not met conditions for grant of leave to lodge an Appeal out of time including providing security of costs.

The Applicants filed a supplementary affidavit sworn by JAYNE FRANCES MWAKA where she reiterated their averments above. She insists they advanced reasons why it was not humanly possible to file the appeal within time. She confirms they applied for certified copies of proceedings but the same was not availed in time due to the bulkiness of the file. She contends that the judgement in the lower court was delivered in the absence of their counsel. Further that the 1<sup>st</sup> Applicant has been unwell for the better part of 2020 and 2021. She reaffirms that they have a right to file the instant application and insists the Magistrate's Court has been rendered functus officio after delivery of the judgment hence the application for the firm of messrs Donex Juma & Company Advocates to come on record is rightly before this court. Further, the issue of cross Appeal is misleading and their Appeal has high chances of success. She confirms that they were also awarded costs in ELC Appeal No. 211 of 2014 which has not been paid and the issue of security of costs is a matter to be determined by the court.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the Applicants' Notice of Motion application dated the 1<sup>st</sup> November, 2021 including the parties' affidavits and rivaling submissions, the following are the issues for determination:

- Whether the firm of messrs Donex Juma & Co. Advocates, should be allowed to come on record for the Applicants.
- Whether the Applicants should be granted leave to file an Appeal out of time.

The Applicants in their submissions reiterated their averments as per the affidavits and contended that the application for the firm of messrs Donex Juma & Co. Advocates to come on record for them is properly before this court. They further submitted that they have offered sufficient explanations to warrant the orders of extending time to file an appeal out of time. They contended that they filed the instant application three months after learning of the impugned judgement. They reaffirmed that there are merits to the contemplated action and no prejudice will be occasioned upon the Respondents. To support their arguments, they have relied on the following decisions: **First American Bank of Kenya Ltd Vs Gulab P Shah & 2 others (2002) 1EA 65; Paul Musili Wambua V Attorney General (2015) eKLR; Kenya Power & Lighting Company Ltd V Rose Anyango & Another (2020) eKLR; Equity Bank Limited V Richard Kerochi Ayiera (2020) eKLR; Vishva Stone Suppliers Company Limited V RSR Stone (2006) Limited (2020) eKLR and Martha Wangari Karua V Independent Electoral & Boundaries Commission & 3 Others (2018) eKLR.**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their submissions relied on their averments as per the replying affidavit and insist no explanation for the inordinate delay in filing this appeal within the stipulated period has been advanced. They reaffirm that the Applicants should have filed a cross appeal instead of seeking leave to appeal out of time. Further, that the Applicants filing of the Memorandum of Appeal without leave of court is fatally defective. To buttress their averments, they have relied on the following decisions: **Eldoret HCCCC Misc. App. No. 4 of 2021 Evans Kiptoo Vs Reinhard Omwoyo; Kiambu HCCC Misc. No. 54 of 2018 Hannah Wambui Nyoike Vs Lebanson Njuguna & Another and County Executive of Kisumu Vs County Government of Kisumu & 8 Others (2017) eKLR.**

As to whether the firm of messrs Donex Juma & Co. Advocates, should be allowed to come on record for the Applicants. I note the Applicants' erstwhile advocate Mr. Ngulu who is out of the country did not object to this application. Order 9 Rule 9 of the Civil Procedure Rules provides that:

**'When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.'**

Based on these legal provisions, noting that judgement had already been passed in the lower court. Further, that the firm of messrs Donex Juma & Company Advocates has sought to come on record as per these legal provisions, I will proceed and allow it, to come on record for the Applicants herein.

As to whether the Applicants should be granted leave to file an Appeal out of time.

The Applicants have sought for leave to file their Memorandum of Appeal out of time from a judgement delivered on 4<sup>th</sup> November, 2020, which application has been vehemently opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

On enlargement of time to file the Memorandum of Appeal, I will proceed to highlight certain relevant legal provisions here below:

Section 79G of the Civil Procedure Act 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.'**

Further, Section 95 of the Civil Procedure Act provides as follows: **'Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.'**

While Order 50 Rule 6 of the Civil Procedure Rules stipulates that: **'Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.'**

The Applicants in their supporting affidavit annexed a draft Memorandum of Appeal as annexure 'JFM 6' wherein they highlighted their reasons for the appeal and contended that they have an arguable appeal. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents insist that the Applicants have not demonstrated the arguability of the Appeal. In the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR**, the Learned Judge stated that: **'Our case law has developed a number of factors which aid our Courts**

in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.....

Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is *not* required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.

See also the following decisions: *Vishva Stone Suppliers Company Limited V RSR Stone (2006) Limited (2020) eKLR* and *Martha Wangari Karua V Independent Electoral & Boundaries Commission & 3 Others (2018) eKLR*

In the instant case, the lower court dismissed the Applicants suit on 4<sup>th</sup> November, 2020. The Applicants are yet to lodge an Appeal. They have explained that their erstwhile Advocate was not present at the time of delivery of the judgement as he had travelled to the United Kingdom for further studies. They have further explained that they learnt of the Judgement in August, 2021 and filed the instant application in November, 2021. Further, that the 1<sup>st</sup> Applicant has been unwell and out of the country, of which they annexed medical records. The Applicants have also stated that the COVID pandemic presented travel restriction including challenges. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents insist that no reason has been canvassed for the delay in filing the Appeal within time. I have had a chance to peruse the lower court judgement and the draft Memorandum of Appeal and it is my considered view that the intended Appeal is arguable. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not demonstrated what prejudice they stand to suffer if the Applicants were granted leave to file an appeal out of time. Further, since the suit land is registered in the name of the 3<sup>rd</sup> Respondent, I do not find any prejudice any party will suffer if the orders sought are granted. From the reasons advanced including the annexures presented in the instant application, I find the Applicants' explanations plausible. Further, it is trite that indeed the COVID pandemic actually culminated in the court scaling down its activities and presented restrictions, which in turn affected litigants and hence I have no reason to doubt the Applicants' explanations on this point. Based on my analysis above while associating myself with the cited decisions, I find that the reasons advanced by the Applicants are plausible and will exercise my discretion to enlarge time to enable them file the Memorandum of Appeal.

It is against the foregoing that I find the Applicants' Notice of Motion dated 1<sup>st</sup> November, 2021 merited, and will allow it.

I direct the Applicants to file and serve the Memorandum of Appeal within fourteen (14) days from the date hereof.

Costs will be in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 28<sup>TH</sup> DAY OF APRIL, 2022**

**CHRISTINE OCHIENG**

**JUDGE**



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