



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 102 OF 2009

CLEMENSIA NYANCHOKA KINARO.....PLAINTIFF/RESPONDENT

VERSUS

JOYCE NYANSIABOKA ONCHOMBA.....DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 14th September 2020 the Applicant filed an application seeking an extension of time for filing a Notice of Appeal against the ruling of this Honourable Court delivered on 23rd April 2020. The application is anchored on the grounds stated on the face of the application and the Applicant's supporting affidavit sworn on the 14th September 2020.

2. The main reason advanced by the Applicant is that the ruling was delivered in her absence and in the absence of her advocate as it was delivered electronically via Zoom owing to the Covid-19 pandemic. During this period the courts had scaled down their operations and the Applicant's advocate had closed his office. The Applicant's advocate only came to learn that the ruling had been delivered when he resumed operations in June and went through his emails. By this time the time for filing the Notice of Appeal had lapsed.

3. The application is opposed by the Respondent through her Replying Affidavit sworn on the 9th April 2021. She deposes that the Applicant's counsel was aware of the ruling as a copy of the same was sent to the advocates' email addresses soon after delivery via Zoom. She deposes that there is nothing to show that the Applicant's advocate did not receive the said email containing the ruling on 23rd April 2020. She is of the view that the court became *functus officio* after delivering the ruling and if the Applicant wishes to appeal, she should seek leave to file the Notice of Appeal from the Court of Appeal.

4. The application was canvassed by way of written submissions and both parties filed their submissions.

ISSUES FOR DETERMINATION

5. Having considered the Notice of Motion, rival affidavits and submissions filed by both parties, issues for determination are:

- i. Whether the Court has jurisdiction to extend time for filing a Notice of Appeal.
- ii. Whether the Applicant should be granted leave to file a Notice of Appeal out of time.

ANALYSIS AND DETERMINATION

6. Section 7 of the Appellate Jurisdiction Act (Cap 9) of the Laws of Kenya provides as follows:

Section 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

7. As can be gleaned from the above provision of the law, this court has the power to extend time for filing a Notice of Appeal. In the case of **Edward Njane Nganga & Another V Damaris Wanjiku Kamau & Another [2016]eKLR**, the court adopted the judgment of Munyao J in the case of **Loise Chemutai Ngurule & Another v Winfred Leshwari Kimung'en & 2 Others [2015]eKLR** in which he observed as follows:

“It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of Simon Towett Martim v Jotham Muiruri Kibaru, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004) eKLR. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.

With respect I disagree with the above decision. Section 7 of the Appellate Jurisdiction Act, CAP 9, is drawn as follows:-

Section 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.

Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned. That provision is drawn as follows:-

Rule 4: Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the Court of Appeal Rules which provides as follows:-

One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.

*The matter indeed arose in the case of **Kenya Airports Authority & Another vs Timothy Nduvi Mutungi, Court of Appeal, Civil Application NO. NAI 165 of 2013 (UR 113/2013) (2014) eKLR**. In the case, an application for extension of time to lodge Notice of Appeal was filed in the High Court and the High Court declined to hear it, instead asking the applicant to file the application in the Court of Appeal. Githinji JA, had this to say on that point:-*

"The application of 10th December, 2012, was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal Rules (sic) (clearly meant Section 7 of the Appellate Jurisdiction Act) which provides:-(Section 7 of the Appellate Jurisdiction Act set down)... Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined..."

I concur with the above decisions.

8. I will now proceed to determine whether the Applicant has demonstrated that she is entitled to the orders sought. In the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997)** (unreported), the Court expressed itself thus:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted".

The court further noted that:

"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.....

9. In the instant case, it is not in dispute that both the Applicant and her advocate were absent when the ruling was delivered. The said ruling was delivered electronically via Zoom owing to the Covid-19 pandemic that had resulted in the scaling down of court operations between March and June 2020. Even though the ruling was transmitted to both advocates via email soon after it was delivered, the Applicant has deposed that owing to the fact that her Counsel had closed his office during this period, he did not see the email until June 2020 when the time for filing the Notice of Appeal had lapsed. I take judicial notice of the challenges that were brought about by the Covid-19 pandemic as the courts scaled down their operations and both advocates and litigants had difficulties in communicating with the court.

10. As correctly submitted by counsel for the Respondent, the court must balance the rights of the Respondent who is entitled to the fruits of her judgment against the Applicant's right of appeal. Considering the special circumstances of this case, I am inclined to exercise my discretion in favour of the Applicant although the Respondent will be compensated by costs.

11. Accordingly, I find merit in the application and grant it. The Applicant shall file her Notice of Appeal within 14 days from the date of this ruling.

The costs of the application shall be borne by the Applicant.

DATED, SIGNED AND DELIVERED AT KISII THIS 7TH DAY OF OCTOBER, 2021.

J.M ONYANGO

JUDGE



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