



**REPUBLIC OF KENYA**

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

**ELC NO. 23 OF 2017**

**NGORIKA FARMER CO-OPERATIVE LTD.....PLAINTIFF**

**VERSUS**

**JOHN KIARIE.....1<sup>ST</sup> DEFENDANT**

**PETER MAINA KIMANI.....2<sup>ND</sup> DEFENDANT**

**MARY WAMBUI KIMOTHO.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 5<sup>th</sup> May, 2021 brought under **Article 259 of the Constitution of Kenya, Sections 1A & 3A of the Civil Procedure Act, Order 10 Rule 11, and Order 50, Rule 6, 51 Rule 1 of the Civil Procedure Rules 2010, and all other enabling provisions of the law**, the Plaintiff sought the following orders:

*(i) ...spent*

*(ii) That this honourable court be pleased to grant the firm of Ms. Ooga & Company Advocates leave to act on behalf of the Plaintiff herein.*

*(iii) The honourable court be pleased to extend and/or enlarge the leave granted to the Plaintiff to appeal out of time against the judgment of 12<sup>th</sup> November, 2019.*

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Gideon Mwangi Rubia, the chairman of the Plaintiff, on 5<sup>th</sup> May, 2021. The Plaintiff contended that the leave granted on 8<sup>th</sup> June, 2020 to appeal against the judgment dated 12<sup>th</sup> November, 2019 had already lapsed hence the necessity of seeking an extension. The Plaintiff further contended that he was unaware of the 45 days extension period since the extension was granted in his absence. The Plaintiff also relied upon the outbreak of covid-19 pandemic as the reason for his failure to utilize the extension of time and the failure to seek a further extension within a reasonable period.

3. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on 30<sup>th</sup> June, 2021 in opposition to the application. It was contended that the Plaintiff had not rendered a satisfactory explanation for seeking a second extension of time to file an appeal. It was further contended that the Plaintiff was simply an indolent litigant who had failed to diligently follow up on its matter.

4. The 1<sup>st</sup> Defendant further contended that although the covid-19 pandemic had slowed down court operations the judiciary was still transacting business and that the Plaintiff was indolent in the pursuit of his intended appeal. It was contended that equity aids the diligent and not the indolent. The court was consequently urged to dismiss the application with costs.

5. When the application was listed for *inter partes* hearing, it was directed that the same shall be canvassed through written submissions. The record shows that the Plaintiff filed its submissions on 26<sup>th</sup> October, 2021 whereas the Defendants filed theirs on 2<sup>nd</sup> November, 2021.

6. The court has considered the Plaintiff's notice of motion dated 5<sup>th</sup> May, 2021, the Defendants' replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the main question for determination is whether or not the Plaintiff has made out a case for a second extension of time to file its intended appeal out of time.

7. The factors to be considered in such an application were summarized in the case of **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR** as follows:-

**“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The court delineated the following as:**

**“the under-lying principles that a court should consider in exercise of such discretion:**

- 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 a reasonable reason for the delay, the delay should be explained to the satisfaction of the court.**
- 5. Whether there will be any prejudice suffered by the Respondents if the extension is granted.**
- 6. Whether the application has been brought without undue delay.**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

8. The court has noted from the material on record that the judgment sought to be appealed was delivered on 12<sup>th</sup> November, 2019. The Plaintiff did not file an appeal within the stipulated time hence it sought an extension of time to do so vide an application dated 28<sup>th</sup> November 2019. That application was allowed on 8<sup>th</sup> June, 2020 and the Plaintiff granted 45 days to file an appeal to the Court of Appeal.

9. The record further shows that the ruling granting an extension of time was delivered in the absence of the Plaintiff. What is perplexing, however, is that the Plaintiff remained indolent for more than one year before filing the instant application for extension of time. The court is of the opinion that a litigant who has filed an application has an obligation to ascertain its outcome. A party who fails to follow up on a pending application or ruling for more than one year is surely not a diligent litigant.

10. The court is not satisfied that the Plaintiff has rendered a reasonable explanation for the lengthy delay in seeking the second extension of time assuming that he was unaware of the initial extension of 45 days. The court is not satisfied either that the Plaintiff was prevented from seeking an extension of time due to covid-19 pandemic since the courts have always been available to deal with urgent applications since the outbreak of the pandemic. Since the decree sought to be challenged was passed nearly 2 years ago, it may be prejudicial to the Respondents to re-open the matter at this juncture. Accordingly, the court is not inclined to allow the application for extension of time.

11. On the issue of the Plaintiff’s application to engage advocates after judgment, the court is of the opinion that the same is unassailable. The Plaintiff has an unfettered constitutional right to be represented by an advocate of its choice. The court is, therefore, inclined to allow the prayer for leave to appoint advocate after judgment.

12. The upshot of the following is that the court finds no merit in the Plaintiff’s application for extension of time to file an appeal out of time. However, the prayer for leave to appoint advocates is merited. Accordingly, the court makes the following orders for disposal of the application dated 5<sup>th</sup> May, 2011:

**(a) The Plaintiff’s prayer for leave to engage an advocate after judgment is hereby granted.**

**(b) The Plaintiff’s prayer for enlargement of time to file an appeal out of time is hereby declined.**

**(c) The Plaintiff shall bear costs of the application.**

Orders accordingly.

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 18TH DAY OF NOVEMBER, 2021** and delivered via Microsoft Teams platform.

**In the presence of:**

Mr. Ooga for the Plaintiff

Mr. Mwangi for the Defendants

CA - Carol

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**Y. M. ANGIMA**

**JUDGE**