



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC APPLICATION NO. 9A OF 2020

SHIDA KARAO KAMETE.....APPLICANT

VERSUS

KATANA KIRAO.....1ST RESPONDENT

CHARO KIRAO.....2ND RESPONDENT

KATANA KAZUNGU.....3RD RESPONDENT

ALFRED NICOLUS MWACHUGHA.....4TH RESPONDENT

POCHITHELE.....5TH RESPONDENT

SAIDI BAGRA.....6TH RESPONDENT

RULING

1. By this Notice of Motion application dated 17th July 2020 and filed herein on 20th July 2020, Shida Kirao Kamete (the Applicant) prays for orders: -

3. That the Honourable Court be pleased to stay execution of the Judgment of the Honourable Chief Magistrate Dr. Julie Oseko delivered on 30th April 2020

in Malindi ELC No. 46 of 2019 pending the hearing and determination of the intended appeal;

4. That the Honourable Court be pleased to grant the Applicant leave to appeal out of time against the Judgment of the Honourable Chief Magistrate Dr. Julie Oseko delivered on 30th April 2020 in Malindi ELC No. 46 of 2019; and

5. That the costs be in the cause.

2. The application which is supported by an affidavit sworn by the Applicant is premised on the grounds that:

i) The time for lodging an appeal has expired;

ii) The Ruling sought to be appealed was not delivered in the presence of the Applicant and they were not notified of its delivery;

iii) The Applicant's appeal has high chances of success and raises weighty issues of law and fact;

iv) Following the decision, the 1st Respondent has started selling parts of the suit property to third parties who have commenced construction thereon and unless a stay is granted, the Appeal will be rendered nugatory;

v) The Applicant stands to suffer irreparable loss as he relies on the suit property as his home and source of livelihood.

vi) The Applicant is willing to provide any reasonable security as may be required by the Court; and

vii) This application has been filed without delay and the Respondents will not suffer any prejudice if the application is allowed.

3. The application is opposed. In a Replying Affidavit sworn by the 4th Respondent Alfred Nicolus Mwachugha on 24th August 2020 and filed herein on 16th September 2020, the Respondents aver that the Applicant's suit was dismissed on 30th April 2020 for want of locus standi on the part of the Applicant. The Respondents aver that the Applicants have been negligent and hence their failure to apply for the Court's Ruling in good time.

4. The Respondents further aver that the striking out of the Applicant's suit was proper in the circumstances and that the draft Memorandum of Appeal is a sham and lacking in merit. The Respondents assert that the suit property is registered in the name of Coast Development Authority and the Applicant has no proprietary interest therein and hence the suit in the lower Court was bad in law.

5. The Respondents further assert that the Applicant has not been in occupation of the suit property and the allegation that he is bound to suffer irreparable damage or loss is unfounded. The 4th Respondent asserts that he purchased the property in question and restraining him from occupation thereof would deprive him of his rightful share of ownership contrary to the rules of natural justice.

6. I have given full consideration to the application and the response thereto. I have also taken into consideration the rival submissions as filed herein by the Learned Advocates for the parties.

7. Section 79 G 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 of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfied the Court that he had good and sufficient cause for not filing the appeal in time.”

8. Therefore, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. In ***Daphne Parry –vs- Murray Alexander Carson (1963) EA 546***, it was held that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction so as to advance substantial justice when no negligence, nor inaction, nor want of bona fides is imputed upon the appellant, its interpretation must be in accordance with judicial principles.

9. In ***First American Bank of Kenya Ltd –vs- Gulab P Shah & 2 Others (2002) 1EA 65***, the Court set out the factors to be considered in deciding whether or not to grant such an application to be the following: -

i) The explanation if any for the delay;

ii) The merits of the contemplated action, whether the matter is an arguable one deserving a day in Court or one which would only result in the delay in the course of justice;

iii) Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

10. In the matter before me, the application for enlargement of time has been brought some three (3) months after the Ruling was delivered in the lower Court on 30th April 2020. Explaining the reasons for the delay, the Applicant avers that the matter was last in Court on 22nd October 2019 when the Court set a date for the delivery of the Ruling on 19th November 2019. On that date however, the Applicant's Advocates were told verbally by the Court Assistant that the Ruling was not ready and that the same would be delivered on notice.

11. The Applicant further told the Court that they did not receive any such notice despite enquiries made and that it was not until 30th July 2020 when they wrote an email to Court that they were informed that the Ruling had been delivered in the absence of both parties on 30th April 2020.

12. While the Respondents herein accused the Applicant of negligence, there was no demonstration on their part that any notice was given of the Ruling date including even to themselves. It was also apparent from a perusal of the record that the Ruling was indeed delivered in the absence of the parties. In the circumstances I find the reasons given by the Applicant plausible as they have sufficiently explained why they could not file the appeal within the 30 days as provided under Section 79 G of the Civil Procedure Act.

13. On the prayer for stay of execution of the Judgment or decree of the trial Court pending the hearing and determination of the intended appeal, Order 42 Rule 6(2) of the Civil Procedure Rules provides that: -

“No order for stay of execution shall be made under sub rule (1) unless-

a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

14. As the Court stated in *JMM –vs- PM (2018) eKLR*: -

“.....I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a Judgment in his favour without just cause.”

15. In the matter before me it is apparent that the Applicant had been granted orders of injunction before his suit was dismissed without a hearing in the lower Court after the Learned Chief Magistrate determined that he had no locus standi to bring the suit as the suit property was apparently registered in the name of a different entity.

16. Aggrieved by the said determination, the Applicant intends to Appeal and avers that the Respondents have pursuant to the determination in the lower Court sold the land to third parties who have since commenced construction thereon. In his response to the application, the 4th Respondent does not categorically deny selling portions of the property and/or that there is construction going on. Instead, he avers at paragraph 13 of the Replying Affidavit thus: -

“13. That in response to paragraph 13 of the Applicant’s Affidavit the Applicant has not proved that I have sold the property in dispute and cannot prove that the house under construction does not belong to me.”

17. Arising from that averment, it is clear that there is construction going on on the suit property with the concomitant danger that the character thereof may seriously change such as to render the intended appeal nugatory.

18. Accordingly, I am satisfied that there is merit in the application and I allow the same in terms of Prayers 3 and 4 thereof. The Applicant has 14 days from today to file and serve the Intended Appeal.

19. The costs of the Application shall be in the Appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021.

J.O. OLOLA

JUDGE