



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**MISCELLANEOUS APPLICATION BO. 48A OF 2020**

**IN THE MATTER OF AN APPLICATION TO BE ENJOINED AS INTERESTED PARTIES**

**IN THE MATTER OF ORDER 1 RULE 10 OF THE CIVIL PROCEDURE RULES 2010**

**IN THE MATTER OF NAKURU CHIEF MAGISTRATE'S COURT CIVIL SUIT NO. 336 OF 2014 (FORMERLY NAKURU HIGH COURT CIVIL SUIT NO 99 OF 2013)**

**JOHN MABTIA KIBEBO.....1<sup>ST</sup> APPLICANT**

**RUTH NYAMBURA KIBEBO.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**MARY WANJIRU DANSON.....1<sup>ST</sup> RESPONDENT**

**ELIUD MBATIA KIBEBO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a ruling on application dated 27<sup>th</sup> March 2020 brought under Section 79 G and 95 of the Civil Procedure Act and Order 48 and Rule 3 & 4 of the Civil Procedure Rules 2010, seeking the following orders:-

*a) Spent*

*b) That this Honourable Court be pleased to stay the proceedings in Nakuru Chief Magistrate's Court No. 336 of 2014 upon such terms and conditions as it deems fit pending the hearing and determination of this application.*

*c) That the proposed appellants be granted leave to appeal out of time against the whole judgment/ruling of the Hon. Mrs. E.K. Usui, Chief Magistrate delivered on 22<sup>nd</sup> January 2020.*

*d) That the memorandum of appeal annexed hereto be deemed as duly filed.*

*e) That the Honourable Court be pleased to stay the proceedings in Nakuru Chief Magistrate's Court No 336 of 2014 upon such terms and conditions as it deems fit pending the hearing and determination of the appeal*

*f) That the costs of the application be provided for.*

2. Grounds on the face of the application are that applicants are the biological parents of the respondents and the applicants applied to be enjoined as interested parties in Nakuru CMCC No 336 of 2014, where the 1<sup>st</sup> respondent seeks to be recognized as a legal wife by cohabitation and maintenance. The applicants seek to be enjoined as parties to the suit to assist the court make a fair and just determination.

3. The applicants further contend that they applied for typed proceedings which they did not receive on time and the 2<sup>nd</sup> proposed interested party has the authority of the 1<sup>st</sup> proposed interested party to execute all documents on his behalf.

4. She averred that she was unwell for some time and thus could not file the application in time; that the delay is not inordinate so as to be inexcusable and the 2<sup>nd</sup> respondent will not suffer prejudice if the stay is granted. In her supporting affidavit, she restated the grounds of the application.

5. In response, the 2<sup>nd</sup> respondent Eliud Kibebo filed a Replying affidavit dated 20th January 2021. He averred that leave to file an appeal was granted by the lower court instantly when judgment was delivered and the applicant has failed to adduce plausible reasons for the delay in filing the appeal; that no evidence has been tendered to prove she was following up on the typed proceedings and the delay is inexcusable and insufficient as invalid excuses have been tabled in court.

6. The 2<sup>nd</sup> respondent further averred that he will suffer prejudice if the interested parties are enjoined since the plaintiff has closed her case and defence is part heard; that the suit has been in court for 8 years and the applicants are not justified in bringing the application to be enjoined at this stage. He averred that he is of ill health and the prolonged delay is causing mental anguish. Further, that the applicants have not demonstrated an arguable appeal and entertaining the application will further delay the conclusion of the matter; that he is undergoing treatment and the continued delay of the suit has occasioned mental turmoil on him.

7. In a rejoinder, the applicants filed a supplementary affidavit and averred that the delay in filing appeal was occasioned by the Covid-19 pandemic that saw the closure of the court and stated that she has employed all measures to ensure that the application was filed within the stipulated timeline and further stated that the 2<sup>nd</sup> respondent has presented untrue information about his health and the medical records are a forgery geared at seeking the sympathy of the court; that the 2<sup>nd</sup> respondent has applied technical mechanism to defeat substance in the court and added that the Chief Magistrate Court lacks the pecuniary jurisdiction to entertain the suit. She stated that their involvement in the case will enable the court arrive at a just and fair decision as they have new information and evidence on additional properties of the 2<sup>nd</sup> respondent.

#### **APPLICANTS' SUBMISSIONS**

8. The applicant submitted that Section 79G of the Civil Procedure Act provides 30 days period for filing appeal to the High Court and delay of 20 days in filing the appeal was not inordinate; that the delay was occasioned by the Covid-19 pandemic and the measures put in place to curb the pandemic and cited the case of **Kenya Power & Lightning Company Ltd vs. Rose Anyango & another (2020)**.

9. The applicants submitted that they have an arguable appeal that should be allowed and restated that the magistrate's court lack pecuniary jurisdiction. They urged this court to allow the application.

#### **2<sup>ND</sup> RESPONDENT SUBMISSIONS**

10. The 2<sup>nd</sup> respondent submitted that the applicants were granted leave to appeal on 22<sup>nd</sup> January 2020 when the ruling was delivered and they have not adduced sufficient reasons for the delay and submitted that the delay in bringing the application is inexcusable as; that no letter has been produced in court showing the vigilance of the applicants in obtaining typed proceedings.

11. Further, the failure to file the appeal in time by the 2<sup>nd</sup> applicant should have been cured by the 1<sup>st</sup> applicant and cited the case of **County Executive of Kisumu vs. County Government of Kisumu & 8 others (20107) eKLR** where the court held as follows:-

**“... 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.”**

12. The 2<sup>nd</sup> respondent submitted that grant of stay orders will occasion miscarriage of justice as he will suffer irreparable harm as the matter has been in court for 8 years and defence is part heard as the defendant was stood down during cross-examination when the court was taken ill. That further delay on the matter will cause mental torture and anguish.

13. The 2<sup>nd</sup> respondent urged this court to ignore the allegation that the court has no pecuniary jurisdiction an averment that was introduced in the replying affidavit and the submissions; and the ruling having been delivered on 22<sup>nd</sup> January 2020, the applicants should have filed appeal by 23<sup>rd</sup> February 2020 which is before Covid -19 measures were put in place on 19<sup>th</sup> March 2020.

14. Further that the applicants have not shown that they have an arguable appeal and no evidence has been adduced to the effect that the applicants have new and important evidence against the 2<sup>nd</sup> respondent. He urged this court to dismiss the application with costs.

#### **ANALYSIS AND DETERMINATION**

15. I have considered averments and submissions by the parties herein and what I consider to be in issue are as follows:-

- i. Whether the applicants have met threshold for grant of stay pending appeal
- ii. Whether delay in filing appeal has been explained

#### **(i) Whether the applicants have met threshold for grant of stay pending appeal**

16. The applicants seek stay of proceedings in **Nakuru CMCC No. 336 of 2014, Mary Wanjiru Danson vs. Eliud Mabatia Kibebo** pending the hearing and determination of intended appeal; they sought to be enjoined as parties but the trial magistrate dismissed their application on 22<sup>nd</sup> January 2020. Being aggrieved by the said ruling, they wish to appeal against the ruling but they failed to file appeal within the stipulated period.

17. The threshold for a stay of proceedings is set out in *Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332* as follows:-

**“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”**

**“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”**

**“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”**

18. From the foregoing, there is no doubt that stay of proceedings interferes with the right of a litigant to conduct his litigation and thus infringes on the right to access justice and to be heard without undue delay. This matter was filed in the year 2013 in the High Court. It was transferred to the Chief Magistrate in the year 2014 and has been pending for 8 years.

19. The 2<sup>nd</sup> respondent has attached documents to the effect that he is ailing and needs medical attention. There is no doubt that further delay in this matter will occasion delay in justice being served on the 2<sup>nd</sup> respondent. From the averments, the applicants were granted orders of stay immediately after the order dismissing their application to be enjoined. The ruling was delivered on 23rd January 2020; that was before closure of courts due to Covid-19 pandemic. The pandemic cannot therefore be reason for delay in filing the appeal.

20. Further to the above, as observed above, this matter has been pending in court for 8 years, reason for delay in filing application to be enjoined has not been explained. New evidence the applicants allege have emerged, have not been disclosed. In my view, the application is intended to prolong the pendency of this matter in court. It will not be in the interest of justice to stay proceedings. The applicants have failed to meet the threshold of granting an order of stay of proceedings. In the case of **Salat v Independent Electoral & Boundaries Commission & 7 others [2014] KLR-SCK**, the court held as follows:-

***“In an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. The underlying principles that a Court should consider in the exercise of the discretion to extend time are:-***

- a. 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;**
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- c. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;**
- d. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;**
- e. Whether there would be any prejudices suffered by the respondents if the extension was granted;**
- f. Whether the application had been brought without undue delay; and;**
- g. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”**

21. Section 79G of the Civil Procedure Act give clear timelines within which an appeal from the subordinate court to the High Court is to be filed. Time is a requirement under the law and parties are bound to adhere to strict timelines. The Applicants have failed to meet the threshold of extending time to file an appeal. This application is not merited.

## **22. FINAL ORDERS**

- 1) Application dated 27<sup>th</sup> March 2020 is hereby dismissed.**
- 2) Costs to the respondents.**

**RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 21ST DAY OF OCTOBER , 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

1<sup>st</sup> applicant in person

2<sup>nd</sup> applicant in person

Ms. Nancy Njoroge holding brief for Ms. Kairu for 2<sup>nd</sup> respondent