



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MISC APPLICATION NO. 18 OF 2019

PAUL HIBRO ISATU.....APPLICANT

VERSUS

BAGASI NABOSU.....1ST RESPONDENT

HALATI ZAKARIA.....2ND RESPONDENT

ZEINABU ESINFECHA.....3RD RESPONDENT

RULING

1. This matter relates to a Notice of Motion dated 4/4/2019 and amended on 23.5.2019 brought pursuant to provisions of section **1A,1B, 3A, 63E of the Civil Procedure Act, order 22 rule 22, order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules**. The applicant seeks leave to extend time to file an appeal out of time, a stay of the judgment of hon B.M. Ombewa delivered on 3.12.2018 in Marsabit P.M.C.C NO, 5 of 2017 and an order restraining the defendants through their servants, employees or whoever is acting on their behalf from entering, destroying, constructing or in any manner dealing with the plaintiff's properties MARSABIT/JIRME/445 and MARSABIT/JIRME/449 hived out of MARSABIT/JIRME/658.

2. The grounds in support of the application are set out in its body and the supporting affidavit of Paul Hibro Isatu sworn on 22.5.2019. It is contended that the applicant is the registered owner of MARSABIT/JIRME/445 and MARSABIT/JIRME/449 hived out of MARSABIT/JIRME/658. The judgment delivered in Marsabit PMCC No. 5 of 2017 did not cure or address any problem since the issue of surveyor's report did not feature during the proceedings prior to the judgment as neither party raised the same. The boundary and ownership dispute ought to have been resolved if the court exercised due care and order for production of the surveyor's report instead of dismissing the suit. The judgment failed to address the applicant's complaints. The applicant therefore contends that he stands to suffer irreparable damage and loss if the orders sought herein are not granted.

3. This application was opposed vide the replying affidavit of Bagasi Nabosu sworn on 17/5/2019. He averred that the application has been brought in bad faith and is an abuse of the court process. That the applicant has brought the application through wrong provisions of the law. Moreover, the applicant seeks for stay of execution which is not available for he has failed to first seek for extension to file the appeal out of time considering the judgment was delivered on 3/12/2018.

4. This matter was canvassed by way of written submissions. The applicant submitted by making reference to his amended application dated 22/5/2019 where he seeks in addition leave to appeal out of time and restrain the respondents from dealing with the Suit Land parcels. He stated that the delay was occasioned due to the delay in obtaining typed proceedings and judgment which was beyond his control. He obtained a certificate of delay with regard to the same on 3/4/2019 and then proceeded to file the initial application on 4/4/2019.

5. The 1st respondent submitted that the applicant ought to have first filed an appeal and then seek leave afterwards and not the other way round. As for the similar application dated 22/5/2019, the same was filed without leave of the court which amounts to an abuse of due court process. Thus, both applications ought to be dismissed.

6. I am of the opinion that the issue of the amended notice of motion ought to be addressed first. The applicant filed his application on 4/4/2019 and then filed an amended application 23/5/2019. Indeed, no leave was sought to file the application of 23.5.2019. What the applicant did was to take cue from the issues raised in the replying affidavit of 1st respondent and he then decided to rectify the mistake without leave. However, on 23/5/2019, the issue of the amended application did crop up. What the counsel for the respondent stated is that they had just been served with the new application and they needed time to respond of which the court granted them 14 days to file their response. The same was not forth coming. I therefore find that the amendment is a non-issue hence the application of 23.5.2019 is properly on record.

7. The other issues for determination are ***whether to grant the applicant leave to file his appeal out of time, Whether to stay the judgment of the lower court and whether to restrain the respondents from dealing with the Suit Parcels.***

8. Concerning the first issue, **Section 79G of the Civil Procedure Act** provides that an appeal from a subordinate court to the High Court should be filed within a period of thirty (30) days from the date of the decree or order appealed against. But an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not doing so. In this case, the applicant stated that the delay occurred due to the delay in acquiring copies of the proceedings and judgment. He availed a certificate of delay dated 3.4.2019 which confirms this. I am however at a loss as to why the applicant has not filed a draft memorandum of appeal. Nevertheless, this court will grant the applicant an opportunity to file the appeal out of time.

9. I will deal with the second and third issue together. I have read the judgment of the lower court which has been availed by the applicant. In it, the applicants' suit (where he was the plaintiff) was dismissed with costs to defendant.

10. It is trite law that stay orders can only be issued in respect of positive orders. See the case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** where Kantai JA stated thus:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose’ (emphasis supplied).

11. In the Court of Appeal case, **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others [2016] eKLR**, it was stated as follows;

“In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C.”

12. Likewise in the present matter, there is nothing to stay as the trial court did not give any positive orders save on costs. In the circumstances, there is nothing to stay hence the court cannot grant any injunctive orders.

13. **Final orders:**

1) The applicant is hereby granted leave to file and serve his memorandum of appeal out of time within the next fourteen (14) days from the date of delivery of this ruling, failure to which the leave granted herein shall lapse.

2) Other prayers in the application are hereby dismissed.

3) Costs of this application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 29TH JANUARY, 2020.

IN THE PRESENCE OF:-

C/A: Kananu

Applicant in person- present

No appearance for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE