



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 05 OF 2018

BONIFACE KIVINDYO MUTISYA.....APPLICANT

-VERSUS-

ALFRED KAVILA KIVINDYO.....1ST RESPONDENT

CONSOLIDATED BANK LIMITED..2ND RESPONDENT

ALMA SOLUTIONS LIMITED.....3RD RESPONDENT

RULING

1. This is the application dated 23rd October, 2019 in which the Applicant (*Consolidated Bank Ltd*) seeks the following orders

i. That pending the hearing and determination of this application, there be a stay of execution of the decree and judgment of this court delivered on 12th November, 2018 and Order dated 18th December, 2018 limited to the release of the title over Land Reference Number Mbooni/Liani/107.

ii. That the court do extend the time to the Defendant for giving notice of appeal from the judgment by Hon. Justice C. Kariuki dated 12th November, 2018.

iii. That the 2nd Defendant be allowed to file the Notice of Appeal within 14 days of the order of court.

iv. That pending the hearing and determination of the appeal, there be a stay of execution of the decree and judgment of this court delivered on 12th November, 2018 and Order dated 18th December 2018 limited to the release of the title over Land Reference Number Mbooni/Liani/107.

v. That costs be in the cause.

2. The application is supported by the grounds on its face and the supporting affidavit by Albert Anjichi.

3. It is the Applicant's averment that following this court's refusal to review the judgment of 12th November, 2018 in respect to the lease of the title over Land Reference No. Mbooni/Liani/107 the Applicant filed an Appeal to the Court of Appeal. According to the Applicant, releasing the above title to the Respondents will expose the Bank over an unpaid debt of Kshs.1,804,725.73 after the sale of Land Reference No. Mbooni/Liani/884.

4. It is on the above ground that it seeks leave to file Notice of Appeal in respect to the judgment by Justice C. Kariuki dated 12th November, 2018.

5. The application is opposed by the Respondent who filed a replying affidavit by Boniface Kivindyo Mutisya in which he has outlined all the evidence adduced in his favour over this matter.

He has a judgment in his favour and wonders why the Applicant did not file a Notice of Appeal within time and no reason has been given for the delay.

6. The Respondent avers that there are no indications of an arguable appeal with possible chances of success.

7. When the application came for hearing Mr. Waigwa relying on the grounds and supporting affidavit submitted that an appeal had already

been filed in respect to this court's ruling of 4th July, 2019 registered as Nairobi Civil Appeal No. 369 of 2019.

8. The Applicant has already done a Memorandum of Appeal in respect to the said Appeal. It is counsel's request that the court grants the Applicant an extension of time to file an Appeal against the judgment so that both the appeals against the judgment and ruling can be heard together.

9. Mrs. Nyaata for the 1st Respondent submits that under section 7 of the Appellate Court Jurisdiction Act, leave to file appeal out of time can only be granted where there is a satisfactory explanation of the reason for delay. She found none in the Applicant's affidavit, or grounds. She further submits that the draft Memorandum of Appeal raises no triable issues before the Court of Appeal, and the application amounts to a fishing expedition.

10. Mrs. Nyaata contends that under section 80 Civil Procedure Act and Order 45 Civil Procedure Rules one cannot appeal and file for review. That it was also not clear what the stay is about. i.e. whether it was in respect of the Appeal or Review. She argues that if it's in respect of the ruling then there is delay in filing it. The Applicant has also not provided any security. She says the issuance of the orders sought would prejudice the Plaintiff/Respondent who has a judgment and he must be allowed to enjoy the fruits of the judgment.

11. In a rejoinder, Mr. Waigwa submits that whether the Appeal and Memorandum of Appeal raise triable issues is a matter for the Court of Appeal. He says the Appeal and Memorandum of Appeal are not a sham and that one Appeal has already been filed, and the stay is therefore not in a vacuum.

Analysis and determination

12. I have considered the application, affidavits and submissions by both counsel. There is no dispute that Justice C. Kariuki delivered a judgment in this matter on 12th November, 2018. One of the orders made by the Honourable Judge was the release of title Land Reference No. Mbooni/Liani/107 to the Plaintiff/Respondent. Vide an application dated 15th May, 2019 the Applicant sought to review the order/orders in the said judgment. The application was disallowed by this court vide its ruling dated 4th July, 2019.

13. The 2nd Defendant/Applicant filed a Notice of Appeal dated 8th July 2019 in respect of the ruling dated 4th July, 2019. From annexure No. 2 in this application there is a Memorandum of Appeal filed in Civil Appeal No. 396 of 2019 – Nairobi Court of Appeal in respect to the ruling of 4th July 2019.

There is also a draft Memorandum of Appeal in respect of the judgment of 12th November, 2018 in this matter.

14. What is in contention in both the judgment of 12th November, 2018 and ruling of 4th July, 2019 is the title **Land Reference No. Mbooni/Liani/107**. The leave sought for extension of time is in respect of the judgment of 12th November, 2018. Section 7 of the Appellate Jurisdiction Act provides:

“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.”

15. This court is being called upon to exercise its discretion to extend time for filing Notice of Appeal in respect of the judgment delivered on 12th November, 2018. In the case of **Leo Sila Mutiso –Vs- Rose Hellen Wangari Mwangi, (Civil Application. No. Nairobi 255 of 1997) (UR)** the Court of Appeal stated this in regard to exercise of the discretion of extending time.

“It is now well settled that the decision whether or not to extend 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 time of 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.”

16. From my reading of the grounds and supporting affidavit the Applicant only realized the need to file an appeal after its application for review dated 15th May 2019, was dismissed. It's for that reason that there is so much reference to what this court said in the ruling dated 4th July, 2019. As per my finding in the ruling of 14th July, 2019, the Applicant had a right of Appeal and it should have exercised that right and appealed against that judgment of 12th November, 2018. It promptly filed a Notice of Appeal against the ruling of 4th July, 2019.

17. My view is that it would be in the interest of justice and all parties that the Court of Appeal gets an opportunity to dissect both the judgment of 12th November, 2018 and ruling of 4th July, 2019. It is only through that, that the court will resolve the issue as to whether the title in issue was ever charged or not on its merits.

This is despite the fact that the Applicant herein did not explain the reason for the delay in filing an appeal.

18. On whether the draft Memorandum of Appeal raises any arguable trial issues my answer is in the affirmative. This is a matter touching on title to land and money borrowed from the bank which has not been repaid to date. The issue is whether indeed the said title was used as

security to obtain money from the Applicant's bank.

19. The trial judge found it had not been used yet the Applicant claims to have documents to confirm it had been used and that the trial court did not consider that fact or overlooked it. An appeal court would re-evaluate the evidence and come to its own conclusion on the merits of the case. I find that the intended appeal is not a sham.

20. If the title deed in question is released to the Respondent as ordered in the judgment of 12th November, 2019 he would be at liberty to deal with it as he deems fit. However, in view of the pending appeal and the intended one it would be safer to stay the release of the title deed as the appeal if successful would be rendered nugatory, in the absence of the title deed.

21. The Applicant has indicated its willingness and readiness to deposit security for costs.

22. The upshot is that the application has merit. I allow it and make the following orders:-

i. Time for giving Notice of Appeal from the judgment of Justice C. Kariuki dated 12th November, 2018 is hereby extended as prayed.

ii. The 2nd Defendant/Applicant to file the Notice of Appeal within seven (7) days of this order.

iii. There shall be stay of execution of the decree and judgment of this court delivered on 12th November, 2018 and order of 18th December, 2018 limited to the release of the title deed Land Reference No. Mbooni/Liani/107.

iv. The 2nd Defendant/Applicant shall deposit in court Kshs.100,000/=(One hundred thousand) as security for costs.

Orders accordingly.

Delivered, signed and dated this 22nd day of January, 2020 in open court at Makueni.

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H. I. Ong'udi

Judge