



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CIVIL APPEAL NO 27 OF 2019

ESTHER JEROTICH ROTICH.....1ST APPELLANT

JOHN ROTICH.....2ND APPELLANT

VERSUS

SIDIAN BANK LIMITED..... 1ST RESPONDENT

PROTUS WANGA2ND RESPONDENT

RULING

1. By an application dated 13th July 2020, supported by the annexed affidavit of **ESTHER JEROTICH ROTICH**, the applicants (**ESTHER JEROTICH ROTICH**) and (**JOHN ROTICH**) seek that:

a) THAT an injunction do issue against the respondents restraining them from selling and/or transferring the land parcels known as **PIONEER/NGERIA BLOCK 1 (EATEC) 8956 and TARAKWA/LANGWAI BLOCK 1 (BISERIA)/92** pending the hearing determination of this application in the first instance and thereafter pending the hearing of the intended appeal to the Court of Appeal.

b) THAT the time for lodging an appeal against the ruling dated and delivered on the 19th November, 2019 be extended and the notice of appeal filed herein be validated.

c) THAT the costs of the application be provided for.

2. The application is based on the grounds that the intended appeal is arguable and will be rendered nugatory, and the court has the requisite jurisdiction to grant the prayers based on the decision in **Erinford Properties Ltd v Chesire County Council, (1974) 2 ALL ER 274**.

3. It is pointed out that the decision being appealed against was delivered in the absence of the parties and without notice being given by the court. It is also pointed out that the court has the jurisdiction to extend time and validate a notice of appeal.

4. In opposing the application, the respondents by the replying affidavit sworn by **BEVERLINE CHWEYA** insist that the applicants were aware of the ruling and are feigning ignorance, although it is acknowledged that the ruling was not delivered on the due date, and both parties came to learn about the ruling perchance. That in any event, a copy of the ruling was served on the applicants with a host of documents in CMCC No 1225 of 2018 in the list of documents dated 9th January 2020. That file was active and parties appeared before the court on 14th January 2020 when the matter was fixed for 2nd June 2020.

5. The applicant is also accused of delay, laches and indolence, and it is contended that had the applicant been diligent, they or their counsel should have followed up with the court to find out the status of the ruling, as did the respondent, who got to learn about it on 19th November 2019.

EXTENSION OF TIME AND VALIDATION OF THE NOTICE OF APPEAL

6. The applicants depose that this matter came up on the 11th June, 2019 before Githinji (J), who directed that the ruling on the application by the appellants for an injunction would be delivered on the 31st July, 2019 and the status — quo of the properties the subject of appeal was to be maintained. However, on the said date ruling was not ready and the same was deferred to be delivered on notice to the parties.

7. It is contended that no notice was ever given, and the applicants were shocked to read from the Daily Nation Newspaper of the 6th July, 2020 (Ex A) that **Watts Auctions** had scheduled the sale of the property known as **TARAKWA/LANGWAI BLOCK 1 (BISERIA)/92** for

the 24th July, 2020.

8. The appellants claim that when they visited the offices of their advocates they were informed that the decision of the court was being awaited and to the best of their knowledge the order of status-quo subsisted. The advocates wrote to Watts Auctions on 9th July, 2020 attaching the order of the court. Annexed is the letter and order marked as 'B' and 'C' respectively to the affidavit in support of the application.

9. On 10th July, 2020 the appellants' advocates received a letter from the respondent's advocates informing them that the ruling in the matter where the application was dismissed with costs had been delivered in the absence of the both parties on the 19th November, 2019.

10. The applicants were aggrieved by the decision and desire to pursue an appeal, however, the period of appealing has elapsed but the failure to lodge the notice of appeal on time was due to the fact that the appellants were not aware of the decision.

11. It is argued that the appellants were entitled to be issued with a notice by the court prior to the decision being delivered, and this court is urged to be guided by the provisions of order 21 rule 1 of the Civil Procedure Rules, 2010

12. **It is the applicant's case that in this matter no notice was given to the parties and the applicants only came to learn of the decision on the 10th July, 2020 when they received a letter from the advocates for the respondents. The court is urged to be guided by the authority in Sea Turtle Limited Collin Stuart v Equity Bank (Kenya) Limited [2019] eKLR, which observed;**

"The Applicants main ground in this application is that the ruling was delivered without the parties' knowledge and or notification by the Deputy Registrar of the ruling date. The Applicant only found out that the ruling had been delivered 11 days later when their advocate on record thus received a letter from the defendants advocate notifying them of the same. Also, the applicant alleges that its former advocate withheld information from them and demanded for further payment of fees immediately as a security deposit for any appeal.

I have considered the circumstances of the case in view of the applicant's arguments. The ruling intended to be appealed from was delivered in the absence of the applicant and his counsel. Also, I find that there has been no inordinate delay in bringing the application and from the respondent's response, the prejudice that they would suffer if the prayer for extension of time is allowed has not been demonstrated by them. In the circumstance, I exercise the discretion vested in this court in favour of the applicants as no substantial prejudice will be occasioned to the respondent."

13. The applicants fault the respondents' allegation the issue that the appellants had knowledge of the decision earlier, pointing out that the respondents could not annex the ruling of the Githinji (J) to the list of documents which is dated the 9th January, 2019 while the ruling was yet to be delivered in November, 2019. That infact, item 15 in the said list of documents exhibit SB - 1 is inserted by hand to read 19th Nov. 2019, which is a deliberate mischief.

Further, that on the hearing notice dated the 27th August, 2019 and served upon the appellants advocates on the 28th August, 2019, by the said dates the ruling in the High Court had not been delivered and it was not possible for the advocate for the respondents to undertake the impossible by bringing to the attention of the appellants advocates a decision which was yet to be delivered.

EXTENSION OF TIME

14. The applicant relies on the provisions of **section 7 of the Appellate Jurisdiction Act, Cap. 9** which clothes the High Court with authority to 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 filing an appeal may have expired

15. Drawing from the decision in **Humphrey Mukundi Mwangi v Bradegate Holdings Limited, [2017] eKLR** the court is urged to grant the extension and validate action already taken on grounds that the delay has been well explained and the conduct of the appellants upon learning of the decision they moved with speed and lodged the notice of appeal and they seek validation of the same upon the extension of time.

ARGUABLE APPEAL

16. It is submitted that the intended appeal is not frivolous as it raises arguable matters for consideration by the Court of Appeal namely;

- the failure to find that substantial loss had been established as a sale of the property and in the event the appeal was to succeed would be prejudicial to the appellants who will never be able to recover the same from third parties,
- the failure to find that sufficient cause to warrant the grant of an injunction existed as compelling grounds of appeal had been taken up against the ruling of the lower court,
- the finding that the appellants had not suggested a deposit of any security for costs while failing to consider that the court was the one with powers to impose security for the due performance of the order as provided for in order 42 rule 6 of the Civil Procedure Rules, 2010, the driving of the appellants from the seat of justice by concluding that if the appeal was to succeed the 1st respondent being a bank it was capable of compensating any sum monetarily and the failure to adopt the lower risk principle while responding to a prayer for an injunction by preserving the subject matter.

17. The Respondents submit that there is no valid notice of appeal on record and the purported notice of appeal dated 1 July 2020 was filed out of the statutory timelines. and what the applicant purports to seek the court to validate is an invalid/illegal document. Reference is made to **Section 75 of the Appellate Jurisdiction Act** provides as follows -

Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

18. The court is urged to make a finding that there is no pending appeal against the impugned ruling by Justice Githinji since the notice of appeal is invalid. That a situation of a pending appeal would have arisen only if there would be a valid/legal notice of appeal on court record.

19. The respondents contend that the appellants ought to have been diligent to find the ruling of the court to which the applicants submit that the decision of the court was to be given after notice had been issued, so it was not possible for the applicant to have any suspicion that the court would depart from the law and deliver the decision without notice for them to be on the alter and look out as to whether the decision had been delivered.

20. Whilst vehemently opposed to validation of the purported invalid Notice of Appeal, the Respondents submit that in the event this Honourable Court ought to consider extending the time for lodging an appeal, the application has not met the threshold set under in **First American Bank of Kenya Ltd vs. Gulab P Shah 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [20021 1 EA 65**, the court set out three factors to be considered to extend time to file an appeal as follows -

- the explanation if any for the delay;
- the merits of the contemplated action,
- whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

As to the issue of 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, the respondent cites the case of **Nicholas Kiptoo Korir Arap Salat v Independent Electoral Boundaries Commission 7 others**, where the court elaborated the principles the court considers in exercising discretion to time to file an appeal to argue that:

- extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the Court;
- A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- Whether there will be any prejudice suffered by the respondents if the extension is granted;
- Whether the application has been brought without undue delay, and

The respondent also points out that in **Dilpack Kenya Limited v William Muthama Kitonyi [20181 eKLR**, the Appellants filed a memorandum of appeal 5 months after the judgment. The court discovered after 4 years that the appeal was filed out of time. While dismissing the application for extension of time, Odunga (J) held —

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised

The only reason given by the applicant for not taking action within the prescribed time is that of inadvertence It is therefore clear that whereas inadvertence may be a ground for extension of time, the nature and quality of the inadvertence must be disclosed for consideration by the Court”.

The respondents also cite the case of **County Executive of Kisumu v County Government of Kisumu 8 others [Supra]**, where the appellant delayed filing appeal in time. Even after issuance of certificate delay and certified Proceedings, the appellant took more two months to file it. While considering an application for extension of time on ground of delay in getting typed proceedings and certificate delay issued, the Supreme Court held -

- 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.

· It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court.

The respondent maintains that the question that begs for an answer is whether this further' delay after receipt of the typed proceedings has been explained and submits that the Applicants have clearly –

(a) failed to give any plausible reason for delay to lodge the appeal;

(b) approached the court 40r equity with unclean hands;

(c) failed to conduct due diligence to know that when the impugned ruling was delivered; and (d) the Applicants can be compensated by way of damages in the event time is not extended.

21. That the respondents fault what is described a s feign being unaware of when the impugned ruling was delivered. They claim to have learnt about it from newspapers and correspondence with the Respondents' advocates as by way of evidence, the Respondents have demonstrated that the Applicants were aware of the Ruling but indolently sat on it without preferring an appeal. There impugned ruling was served upon their advocates as a list of documents (Annexure SB — 1) but that in blatant display of insincerity and ethics, the Applicants submit that the same is mischievous as it was dated 9th January 2019. Surely, the date's year was a clerical error.

22. The question that would arise from the above evidence is — why did the Applicants file the Notice of Appeal seven months after being served? They have not given any reason! Furthermore, the Applicants having misrepresented facts to feign ignorance are guilty of coming to equity with unclean hands.

GRANT OF INJUNCTION.

23. The applicants acknowledge that the court had dismissed their application for an injunction awaiting the appeal in the Superior Court, but insist that the said dismissal does not divest the court of jurisdiction to consider an application for an injunction pending an intended appeal against the decision of the Superior Court to the Court of Appeal. In support of this submission the applicant relies on the principles enunciated in the **Erinford Properties Ltd —v- Cheshire County Council, (1974) 2 ALL ER 274** in which Megarry J, had dismissed an application for an interlocutory injunction, nonetheless proceeded to grant an ex-parte injunction to the plaintiff pending an appeal to the Court of Appeal reasoning that the two occasions are quite different as one focuses on whether the applicant has made out a sufficient case to have the respondent restrained pending the trial and the issue for consideration is whether the plaintiff has sufficiently proved his case.

24. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be forced to act despite the pendency of an appeal.

25. This argument is faulted by the respondent who submits that It should be noted that the injunctive orders issued under the **Erinford Principle** are interim in nature while the appeal is pending against the court decision in subject, and that this is not scenario before this court. The Respondents submit that this authority is distinguishable in the instant application as — (a) the Applicants are mischievously representing facts and evidence; (b) there is no pending appeal and the Notice of Appeal is invalid and the court has no powers to invalidate it. Even if it were to have, the application fails to attain the threshold set to extend time.

26. It is also contended that Applicant does not deserve to be issued with interim orders to stop the impending auction since after allegedly becoming aware of the auction on 7th July 2020 (evidence shows they were aware seven months earlier), still in the unusual alacrity, they took seven more days to institute the current application and serve upon the Respondents just two days to the auction.

27. ANALYSIS AND DETERMINATION

The provisions of order 21 rule 1 of the Civil Procedure Rules, 2010 are to the effect that;

In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within six days from the conclusion on the trial notice which shall be given to the parties or their advocates. Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.

There is no dispute that the ruling was delivered in the absence of both parties, and none was ever notified about the delivery, which thus impacted on the period within which the applicants could file the appeal. However, the question for consideration is whether there is a satisfactory explanation for the 7 months delay, before the applicants were stirred up with the notice announcing the intended sale of their property.

28. *In Hussein Hassan Maalim v Osman Hassan Maalim, [2020] eKLR it was observed;*

"The Law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable. "

29. I have considered the contention that the applicants should have been diligent in following up to establish the status of the ruling, and taken note of the documents listed in the list of documents filed in a different case before the magistrates courts. I weigh this argument

against the respondent's submissions that the applicant has been indolent, and that equity does not aid the indolent. I consider the case of **Donald O. Raballa v Judicial Service Commission another** [20181 eKLR, the Court of Appeal observed that when dealing with applications for extension of time, it is approached as court of equity. It held that equity frowns on the indolent conduct of an advocate who took sweet time — precisely two months - to file an application of extension of time after receiving instructions.

30. The threshold set under in **First American Bank of Kenya Ltd vs. Gulab P Shah 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [20021 1 EA 65**, as factors to be considered to extend time to file an appeal as follows -

- the explanation if any for the delay;
- the merits of the contemplated action,
- whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

31. Whilst there is a valid argument regarding indolence on the part of the applicant, it also does not escape my mind that the court ought to have been diligent enough to notify the parties that the ruling had been delivered, at least even within 6 days after the delivery and the buck stops with the court. The contemplated action would result in the disposal of the applicant's property whereas if they had been notified of the outcome within the required period, they perhaps would have taken appropriate remedial steps.

32. However, the submission that the respondents have not annexed the ruling of the Githinji (J) to the list of documents which is dated the 9th January, 2019 while the ruling was yet to be delivered in November, 2019 and that infact, item 15 in the said list of documents exhibit SB - 1 is inserted by hand to read 19th Nov. 2019, which is a deliberate mischief does not hold water as the list is dated 9th January 2020 not 2019 as argued.

33. **Will the appeal be rendered nugatory?** The applicant submits that is has been settled by the Court of Appeal that an arguable appeal need not be one that must necessarily succeed as was held in **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others, (2013) eKLR** that,

"On whether an appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised"

34. The Respondents submit that there is no valid notice of appeal on record and the purported notice of appeal dated 1 July 2020 was filed out of the statutory timelines. and what the applicant purports to seek the court to validate is an invalid/illegal document.

35. I think I cannot reinvent the wheel on this one and I echo the words in **Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 Others, Civil Application no. 124 of 2008** where the court held;

"Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible"

I have already made the observation that the effect of the sale would be irreversible

36. Of course, the issue that the intended appeal is arguable alone as a reason for extending the period within which to file the appeal was considered in **County Executive of Kisumu v County Government of Kisumu 8 others** where the Supreme Court pointed out that the issue of arguibility of the appeal does not arise where the reason for delay has not been sufficiently explained. It held -

“While we find that indeed the issues as highlighted are germane and novel, this alone cannot be a reason for rant of extension. This Court will not admit a matter for hearing on the premise of the novelty of a matter, but upon due exercise of its jurisdiction and within the laid out legal framework. Arguibility of a matter is not a ground alone for extension of time but must be considered along other prevailing factors such as the reason for the delay, and whether damages would adequately compensate the applicant, or whether in refusing to grant the orders, the intended appeal will be rendered nugatory.

37. nind that the applicant meets two limbs of the three factors set out in The threshold set under in **First American Bank of Kenya Ltd vs. Gulab P Shah 2 Others** (supra), namely

- a) the explanation if any for the delay;
- b) the merits of the contemplated action,

Indeed whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis, and in the present instance there is a reasonable reason for the delay, which has bee explained to the satisfaction of the Court. Further, there will be any prejudice suffered by the respondents if the extension is granted;

I am just curious as to why the applicant elected to seek for orders of injunction instead of stay pending intended appeal. I have considered their arguments based on the **Erinford Properties Ltd —v- Chesire County Council, (1974) 2 ALL ER 274** and the response that it would only apply where there is already an existing appeal. I think the principle objective of an injunction or an order of stay is preservation of the subject matter pending an intended pursuit of court remedies. I therefore hold that the application has merit

38. **THAT** an injunction do issue against the respondents restraining them from selling and/or transferring the land parcels known as **PIONEER/NGERIA BLOCK 1 (EATEC) 8956 and TARAKWA/LANGWAI BLOCK 1 (BISERIA)/92** pending the hearing of the intended appeal to the Court of Appeal on condition that the applicant pays the auctioneer's charges and deposits half the decretal amount in an interest earning account in the names of both counsel at an agreed financial institution within 7 days hereof, failure to which the orders shall stand vacated.

39. **THAT** the time for lodging an appeal against the ruling dated and delivered on the 19th November, 2019 be extended by seven days from today and the notice of appeal filed herein is deemed as valid

40. **THAT** the costs of the application shall be in cause.

Delivered virtually this 24th day of July 2020 at Eldoret

H.A. OMONDI

JUDGE

Mr Mogambi for applicant

Mr Maina for respondent