



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 361 OF 2018

JEREMY ARIMBI MURORO.....APPELLANT

VERSUS

STANDARD CHARTERED BANK LIMITED.....1ST RESPONDENT

MARTIN KINOTI KINYUA.....2ND RESPONDENT

RULING

1. In his Notice of Motion application dated 27th February 2020 and filed on 28th February 2020, the Applicant herein sought orders for stay of execution pending the hearing of the present application, extension of time to file his Record of Appeal within forty five (45) days and/or such other time that this court would deem fit to grant and that the original title deed in respect of L.R. No Nairobi/Block 62/345 be deemed to have been duly deposited despite having been deposited late. His application was supported by the Affidavit of his advocate, Anthony Simiyu, that was sworn on 27th February 2020.

2. His advocate stated that despite wanting to comply with the court orders that were issued by this court on 12th November 2019, it was not until 20th December 2019 that he was able to deposit the aforesaid Title Deed. He stated that despite also following up the typed proceedings he had been unable to do so and in view of the impending deadline to file the Record of Appeal, he opted to file the said Record of Appeal which had excluded the certified copies of the typed proceedings.

3. In opposition to the said application, on 27th July 2020, the 1st Respondent's Manager of Collections and Recoveries, Boniface Machuki swore a Replying Affidavit.

4. The 1st Respondent averred that the Appellant had violated the orders that were issued by the court and consequently, the present application ought to be dismissed with costs to it.

5. The Appellant relied on the provisions of Article 159 of the Constitution of Kenya, Section 3A of the Civil Procedure and the case of **Equity Bank Limited vs West Link Mbo Limited [2013] eKLR** urging this court to exercise its discretion to excuse the omission of depositing the security and failure to file a Record of Appeal within the period that had been stipulated in the aforesaid court ruling.

6. On its part, the 1st Respondent placed reliance on the case of **Daphne Perry vs Murray Alexander Carson [1963] E A 546** to argue that the Appellant had not given sufficient reason why he did not comply with the court orders. It asked this court to consider the principles that were set out in the case of **First American Bank of Kenya Ltd vs Gulab P Sha & 2 Others [2002] 1 EA 65** before deciding the present application or not.

7. It added that the Appellant ought to have filed its Appeal and then sought leave to have it admitted out of time as was held by Emukule J (as he then was) in the case of **Gerald M'Limbine vs Joseph Kangangi [2009] eKLR**. It was also its submission that the Appellant could not rely on the oxygen principle and at the same time abuse as was held in the case of **Hunker Trading Company Ltd vs Elf Oil Kenya Ltd [2010] eKLR**.

8. This court carefully considered the submissions by the parties herein and noted that the granting of extension of time was not as a matter of course. It was a discretionary power to avoid injustice against one party but at the same time not to cause hardship to a party who had failed to comply with the orders of the court.

9. The orders this court issued on 12th November 2019 were not contested by any party. What was in contention was whether or not this court could grant the Appellant the extension that he had sought.

10. A perusal of the court file showed that on 20th December 2019, the Appellant deposited the original title deed of L.R. No Nairobi/Block 62/345 and all the requisite documents to effect a transfer in the event his Appeal was unsuccessful and he had failed to deposit the decretal sum of Kshs 1,142,859.20 as had been set out in Paragraph 39 of the Ruling delivered on 12th November 2019. He also filed his Record of Appeal on 26th February 2020 without the certified copies of the proceedings.

11. He filed the present application on 28th February 2020 seeking extension of time in line with Paragraph 39(10) that had given either party liberty to apply in case there had been difficulty in complying. He also filed his Record of Appeal two (2) days before the period expired.

12. Evidently, there was a period of eight (8) days delay between the time when the Appellant was to deposit the Original Title Deed and when he actually deposited it. This period could not be said to have been inordinate. The letters to the Executive Officer Chief Magistrates Court Milimani Commercial Courts showed the diligence he put in this matter. He was not in control of the typing of the proceedings and acted prudently in having filed his Record of Appeal as aforesaid. Indeed, he still had an opportunity of filing a Supplementary Record of Appeal before directions on the hearing of his Appeal were given to annex the certified copies of the proceedings.

13. From the Appellant's conduct, it was clear that he had done all he could to comply with the orders that were issued on 12th December 2019.

DISPOSITION

14. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 27th February 2020 and filed on 28th February 2020 was merited and the same is hereby allowed in terms of Prayers Nos (3) and (4) therein.

15. To progress this matter further, the Appellant is hereby directed to file and serve his supplementary Record of Appeal within one hundred and eighty (180) days from date of Ruling. In the event the proceedings of the lower court and the lower court file will have been placed in the file herein and the Appellant shall have failed to file his supplementary Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.

16. Since the Appellant does not have control of the typing of proceedings and placing of the lower court file, the Registrar of High Court Civil Division Milimani Law Courts is hereby directed to facilitate the typing of said proceedings and placing of the said lower court file within ninety (90) days from date of this Ruling.

17. Either party is at liberty to apply.

18. Costs of the application will be in the course.

19. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of October 2020

J. KAMAU

JUDGE