



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

PETITION NO. 1 OF 2014

**IN THE MATTER OF ARTICLES 22(1,2,3&4), 23 (1, 2, 3 (a, b, c, d, e & f),
25 c), 40 (1, 2 &3b), 37 (1,2, &3), 165, 3A and 67 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE CIVIL PROCEDURE ACT SECTIONS 1A, 1B, 3A and 63
AND IN THE MATTER OF LAND REFERENCE NO.KERICHO/KIPCHIMCHIM/1690**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012 SECTION 71 (1a, 2 & 3)

IN THE MATTER OF JUDICIAL REVIEW APPLICATION NO. 1 OF 2013

AND

IN THE MATTER OF AN APPLICATION BY:

MARTIN MAURICE ODHIAMBO.....PETITIONER

VERSUS

JOEL KIPSANG A. NGENO.....1ST RESPONDENT

KENYA COMMERCIAL BANK.....2nd RESPONDENT

DAWNING AGENCIES.....3RD RESPONDENT

M/S ORINA &CO ADVOCATES.....4TH RESPONDENT

LAND REGISTRAR.....5TH RESPONDENT

RULING

Introduction

1. What is before the court for determination is the Petitioner's application dated 7th December 2018 in which he seeks the following orders:
 - a) Spent
 - b) An order of stay of the order/decreed dated 11.5.2018 pending appeal

c) That the Honourable court be pleased to extend time for giving notice of intent to appeal out of time from the judgment of the Honourable court dated 11.5.2018

d) Any other relief that the honourable court may deem fit and expedient to grant in the circumstances

2. The application is premised on the 23 grounds stated on the face of the Notice of Motion and Petitioner's supporting affidavit sworn on the 7th December 2018. Out of the 23 grounds aforesaid, the only ground that explains why the Petitioner is seeking an extension of time within which to file an appeal is that soon after the judgment was delivered, he filed an application for review which he subsequently withdrew after discovering that the matter was for appeal.

3. The 2nd Respondents opposed the application through the Grounds of Opposition dated 4th February 2019 in which they stated that the application lacks merit and is an abuse of the process of the court. The 1st and 4th Respondents opposed the application through the Replying affidavit sworn by Erastus Orina Advocate in which he depones that the Petitioner is guilty of laches and that he has not demonstrated that he has an arguable appeal.

4. The application was canvassed through written submissions and the parties filed their respective submissions in which they articulated their positions.

Issues for determination

5. Having considered the application, affidavits and rival submissions, the following issues arise for determination:-

- i. Whether the applicant ought to be granted leave to file an appeal out of time
- ii. Whether the applicant ought to be granted a stay of execution of the decree dated 26.5.2014?
- iii. Who should bear the costs of this application.

Analysis and determination

6. The court has a wide discretion to extend time as long as such power is exercised judicially. In the case of **Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** the Supreme Court set down the following principles that should guide the court in deciding whether or not to grant an extension of time:

- 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 an extension of time has the burden of laying a basis to the satisfaction of the court;*
- c) *Whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis*
- d) *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- e) *Whether there will be any prejudice suffered by the respondents if extension is granted;*
- f) *Whether the application has been brought without undue delay;*
- g) *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

7. In the instant case the applicant's failure to promptly file the appeal has been attributed to the fact that he first filed an application for review of the judgment before he changed his mind and decided to appeal. I note from the record that the application for review was filed on 18th June 2018, while this application was filed on 7th December, 2018. It is not clear why it took the Petitioner six months to decide that he wanted to lodge an appeal. In my view, this delay has not been sufficiently explained. As was stated by Musinga J.A in **Donald O. Raballa v Judicial Service Commission & Another [2015] eKLR**:

“Statutory timelines are set for good reasons and in instances where the Court is permitted to exercise its discretion to extend time for such compliance, the law requires that the reasons for failure to meet the timelines be sufficiently explained.”

8. Applying the above principles to this case and taking into account all the factors relating to this case I am persuaded that I ought to exercise my discretion in favour of the applicant. I agree with counsel for the Respondent that the application is an abuse of the court process and I would add that it is merely a delaying tactic.

9. The principles that the court must consider in order to grant an application for stay of execution pending appeal are set out in the case of **Global Tours and Travels Limited Nairobi Winding Up Cause No. 43 of 2000** cited in **Kenya Power & Lighting Company Ltd v Esther Wanjiru Wokabi 2014 eKLR** where Ringera J (as he then was) stated as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. the sole question is whether it is the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

10. Having arrived at the finding that an extension of time will not be granted, there would be no reason to grant a stay of execution. In any event this request is coming rather late in the day without demonstrating sufficient cause.

11. The upshot is that I find no merit in his application. The same is hereby dismissed with costs to the Respondents.

Dated, signed and delivered at Kericho this 28th day of June, 2019.

J.M ONYANGO

JUDGE

In the presence of:

1. The Applicant appearing in person
2. Mr. Mwita for Mr. Orina for the 1st and 4th Respondents
3. Court Assistant – Rotich