



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ELC MISC. APPLICATION NO. 2 OF 2018

PHILIP KIPKOSKEI KOECH.....APPLICANT

VERSUS

DENNIS KIPROP LANGAT.....RESPONDENT

RULING

Introduction

1. The Applicant's Notice of Motion is brought under Order 50 Rule 6, Order 22 Rules 22 & 25, Order 42 Rule 6 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A & 79(g) of the Civil Procedure Act and Article 159 of the Constitution. The Applicant seeks the following prayers: -

(i) *That this honourable court be pleased to grant the applicant leave to file an appeal out of time.*

(ii) *That there be a stay of execution of the judgment in Kericho CMCC No. 445 of 2013 pending the hearing and determination of the Applicant's appeal.*

2. The application is based on the grounds set out on the body of the Notice of Motion and the Supporting Affidavit sworn by the Applicant. Among the cogent reasons raised by the Applicant in both the grounds and Affidavit in support of the application is that the Applicant was unable to file appeal against the said judgment within the stipulated time as he was under the mistaken impression that since he had filed an application to set aside the same judgment, time could be enlarged to file the appeal until the said application to set aside the judgment was determined.

3. The application is opposed by the Respondent through his Replying Affidavit sworn on 16th February, 2018 in which he raises pertinent issues on why the application for leave should not be granted. The Respondent states that the application is brought in bad faith, is an afterthought and that the Applicant is guilty of laches.

4. He further states that the Applicant was aware of the judgment having filed appearance and defence through a firm of Advocates who had been served with a Hearing Notice and failed to attend Court.

Applicants case

5. It is the Applicant's case that Judgment was entered against him on 28th May, 2015 by the lower court in Kericho CMCC no. 445 of 2013 in a claim relating to the use, occupation and title to that parcel of land known as L.R NO. KERICHO/NYAMANGA/594, registered in his name.

6. The Applicant avers that during the pendency of the suit, he had instructed the firm of Morara and Co. Advocates who did enter an appearance on his behalf but never prosecuted the suit and in-fact never ever notified him of its progress.

7. The Applicant further avers that sometimes in the month of December, 2016, he was shocked to learn that the matter had proceeded and Judgment had been entered against him without his participation. He has annexed a copy of the said Judgment as annexure "PKK1". The applicant states that he instructed the firm of Ogaro Orayo & Co. Advocates to file an application to set aside the said ex-parte Judgment.

8. He states that the said application was never determined as he was advised by the trial court that its jurisdiction had been challenged and a stay of proceedings issued pending the determination of the appeal arising from the Judgment of the court in Malindi High Court Constitutional Petition No. 3 of 2016.

9. That in the meantime, the court granted him reprieve by ordering a stay of execution against the impugned Judgment; pending the hearing

and determination of the application which was subsequently fixed for ruling on 24th January, 2018.

10. The Applicant further avers that on 30th January, 2018, he was shocked to learn that an order to the effect that the Plaintiff/Respondent was at liberty to execute the Decree of the lower court against him had been issued.

The Applicant states that he intends to prefer an appeal against it to this honourable court, and therefore prays for leave. He has annexed a copy of the Draft Memorandum of Appeal.

11. The Applicant contends that the delay in filing the appeal was largely occasioned by the fact that he was under the mistaken impression that the pendency of his application for stay and setting aside the lower court's judgment coupled with the fact that the jurisdiction of the magistrates' courts had been challenged hence delaying the determination of his application, aforesaid; essentially operated to enlarge time to file his appeal against any subsequent determination by the lower court.

12. Further the Applicant avers that during the pendency of the said application, the trial court had ordered on 29th March, 2017 that allegations of forgery of my signatures on a Sale Agreement relied on by the Respondent in his evidence be investigated by the Directorate of Criminal Investigations whose officers concluded their investigations and submitted a Forensic Document Examination Report on 29th November, 2017. He has annexed a copy of the said Report, forwarding Letter dated 29th November, 2017 and Order of the Court dated 29th March, 2017 as annexures "PKK 4a, 4b & 4c."

The applicant argues that the findings of the DCI in the said report vindicated his position regarding the said Agreement which was largely relied on by the Plaintiff to procure Judgment against him. In the circumstances the Applicant pleads with this honourable court to allow the application.

Respondent's case:

13. The respondent argues that no reasons have been presented in support of the prayer for stay of execution of the judgment.

14. He further states that the Applicant was aware of the judgment having filed appearance and defence through a firm of Advocates who had been served with a Hearing Notice and failed to attend Court.

15. The Respondent further argues that when the Applicant became aware of the judgment, he opted to file an application to set aside the judgment instead of filing an appeal or seeking leave to file an appeal out of time. The said application was prosecuted and the trial Court issued various orders including orders to the effect that the DCIO Kericho should investigate allegations of forgery of the Sale Agreement. A report was filed to that effect and the trial Magistrate declined to entertain any further proceedings and as such the application became spent and no orders were issued setting aside the judgment.

16. It is on that background that when the matter was mentioned for directions on 24th January, 2018, the Court allowed the Respondent to proceed with the execution of the decree.

17. Pursuant to the said decree, a Certificate of Title was issued to the Respondent as this was the only step that had been held in abeyance by the Lands Registry at the point of issuance of the stay orders.

18. The Respondent argues that at the time of filing this application he is the registered owner of the suit property and as such, the entire application has been overtaken by events and is thus merely an academic exercise. He also argues that the orders for stay issued after the execution of the decree are now moot.

Issue for Determination

19. I have considered the application, affidavits and annexures and rival submissions and the main issue for determination is:

Whether the Applicant is entitled to an order for leave to appeal out of time.

Analysis and Determination

20. Section 79(G) of the Civil Procedure Act, Cap 21 Laws of Kenya provides that the High Court is vested with jurisdiction to grant leave to file appeals out of time.

21. The Applicant nonetheless contends that though the jurisdiction of the High to grant leave to file appeal out of time has never been ousted, it is now shared between it and Courts of Equal Status i.e Environment and Land Court and the Employment and Labour Relations Court (ELC and ELRC).

22. In support of this position, the Appellant relies on the findings of the court in *Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR* where it was held as follows:

...it will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think

Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.

23. The court has a wide discretion to extend time as long as such power is exercised judicially.

24. In the case of **Aviation Cargo Support Limited V St. Mark Freight Services Limited (2014) eKLR** the Court of Appeal in determining an application for leave to file and serve a record of appeal out of time stated as follows:

“The order whether or not to grant extension of time to file and serve the record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merits. For the court to exercise its discretion in favour of an applicant the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate, the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable.

In the normal vicissitudes of life deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to these facts. When this happens, the reasons why this occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time”

25. What can be gleaned from the above case is that the power to grant an extension of time against a final decision in a case must be exercised judicially. As per the case of **Sayers V Clarke Walker (a firm) 2002 EWCA Civ 645** the Supreme Court of Judicature Court of Appeal, Civil Division observed as follows:

“The courts should consider all the circumstances of the case including:

- a. The interest of the administration of justice***
- b. Whether the application for relief has been made promptly***
- c. Whether the failure to comply was intentional***
- d. Whether there is a good explanation for the failure***
- e. The extent to which the party in default has complied with other rules, practice directions and court orders***
- f. Whether the failure to comply was caused by the party or his legal representative***
- g. The effect which the failure to comply had on each party and***
- h. The effect which the granting of relief would have on each party.”***

26. Based on the explanation given by the applicant, particularly the manner in which the applicant’s application to set aside the ex-parte judgment was treated by the lower court, the lapse of time occasioned by the suspension of land matters in the Magistrates’ courts pending the decision in Malindi Petition No 3 of 2016 and all other attendant factors, I am satisfied that the applicant has made out a good case for leave to appeal out of time.

27. I note that the applicant’s prayer for stay of execution presents some challenges as a title deed has already been issued in the name of the Respondent. However, this does not preclude the appeal from being heard. Whether or not the Respondent continues to hold the said title will depend on the outcome of the appeal. Should the applicant be so minded, he may apply for an injunction with respect to the said title pending the hearing and determination of the appeal.

28. Accordingly, I grant the application in terms of prayer 2 and direct as follows:

- a) That the applicant be and is hereby granted leave to appeal out of time against the whole of the judgment and consequential orders in CMCC No. 445 of 2013.
- b) That the Memorandum of Appeal be filed and served upon the Respondent within the next 14 days.
- c) The costs of this application be borne by the Respondent.

Dated, signed and delivered at Kericho this 27th day of June, 2018.

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J. M ONYANGO

JUDGE

In the presence of:

1. Mr. Chelule for C. Koech for the Applicant
2. N/A for the Respondent
3. Court assistant - Rotich