



IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 178 OF 2012 (OS)

IN THE MATTER OF PARTNERSHIP OF PLOT NO.10 NDIMAINI MARKET

BETWEEN

DANIEL MWANGI MURIUKI.....1ST PLAINTIFF

SIMON KARIUKI RUKUNGU.....2ND PLAINTIFF

AND

JOYCE GATHONI THUA.....DEFENDANT

JUDGMENT

FACTS

1. The Originating Summons is dated the 7th August, 2012 for the determination of the nature of a partnership; the value of the immovable asset of the partnership; winding up of the partnership; and taking of accounts and sharing of profits and losses as well as the assets and liabilities; lastly who should pay costs; existence of a partnership; the na exists Appellant herein being dissatisfied with the judgment delivered on the 23rd June, 2010 by the Honourable P.M. Mulwa in SPMCC No.33 of 2009 sought redress by filing his Memorandum of Appeal on the 26th June, 2012.

2. The Applicant, **TAIFA SACCO SOCIETY** and **GREENBELS AUCTIONEERS**, filed a **Notice of Motion under a Certificate of Urgency dated 31st May, 2016**; the application was brought under Section 3A and 79G of the Civil Procedure Act and Order 50 Rule 6, Order 51 Rule 1 and Order 42 Rule 6 the Civil Procedure Rules.

3. The Applicant prayed for the following Orders;

(i) Spent;

(ii) That this Honorable Court do order that there be a Stay of Execution of the Decree and the Certificate of Costs herein pending the hearing and final determination of this application; and the applicant's intended appeal against the judgment delivered in PMCC No. 16 of 2013 Othaya – Symon Gachoka Kiago vs Taifa Sacco Society Ltd & Another .

(iii) That the time for filing the Appeal be enlarged and extended and the applicants herein be granted leave to appeal out of time against the judgment in PMCC No. 16 of 2013 aforesaid;

(iv) Costs of the application be in cause.

4. The Applicant relied on the grounds on the face of the application and on the Supporting Affidavit made by Richard Mathenge Kariuki and is dated the 31st May, 2016 and a Further Affidavit sworn on 23/06/2016. Hereunder is a summary of the applicant's submissions.

PLAINTIFFS CASE

DEFENDANTS CASE

ISSUES FOR DETERMINATION

5. Taking into consideration the above submissions this court has framed the following issues;

- (i) Whether the explanation given for the delay is satisfactory; whether this case is a suitable one for this court to exercise its discretion.

ANALYSIS

6. The plaintiffs have filed their claim by way of Originating Summons which is a procedure to be adopted in determination of clear simple and straight forward issues; the matters raised by the plaintiffs are serious and complex in nature and ought to have been canvassed by way of a plaint; in the case of Wakf Commissioners vs Mohammed [1984] KLR 346 the Court of Appeal held that;

“Where complex issues are raised and disputed in an application made by way of originating summons the court should dismiss the summons and leave the parties to pursue their claims by way of ordinary suit”.

7. Dismissal of the claim would have been the action to adopt but the saving grace is that Directions were taken on the 23rd April, 2015 that the Originating Summons filed by the plaintiff shall be deemed to be the Plaint and the Replying Affidavit in response shall be deemed to be the Defence;

8. In the case of Wakf Commissioner The applicant has moved this court by way of Notice of Motion and is seeking expansion of time and leave to file an intended appeal out of time and stay of execution of a decree;

9. The judgment of the lower court in Othaya PMCC No.16 of 2013 was read on the 30/03/2016; The dispute revolves around a claim for loss and damage sustained by the respondent when the applicant illegally entered onto his property ironically also to proclaim and execute a decree and wrongfully attached and sold animals before ascertaining ownership;

10. The only issue this court finds for consideration is whether the delay in bringing the Notice of Motion is inordinate and inexcusable;

11. The applicant contends that they were not duly notified of the judgment date and therefore they were unable to attend; when made aware of the contents of the judgment they instructed their advocate to lodge an appeal but before the process could be effected the respondents were in possession of the decree; and how even proclaimed attachable assets belonging to applicant;

12. The relevant provisions of the law are captured under the provisions of Section 79G of the Civil Procedure Act; it outlines the time for appeals to be filed from a subordinate court to the High Court; the intended appellants are required to file appeals within a period of thirty days excluding the time which the lower court may certify as being required for the preparation and delivery to the appellant copy of decree or judgment.

13. The appellant has demonstrated to this court that the judgment was delivered in their absence; the date taken for judgment was taken in their absence and no notice was effected upon them; that judgment was delivered on the 30/03/2016 and that they got to know the outcome on the 10/05/2016 upon making inquiries and that they were already time barred; nevertheless they proceeded to instruct their advocates to file this instant application;

14. The application herein is dated the 31st May, 2016 which translates to a delay of three (3) months; the fact that neither the applicant nor his advocate knew of the judgment date is not in dispute; and this is supported by an annexure of conversation held between the two Counsel acting for the parties herein;

15. The respondent have given their reasons that due to the demeanor of the applicant there is clearly no justification in re-opening the matter; this court nevertheless reiterates that the fact that is uncontroverted is that both the applicant and their counsel were unaware of the date when judgment was delivered by the lower court; the intending appellant has given satisfactory reasons for the delay;

16. This court is satisfied with the explanation given by the applicant as to why they could not proceed to file the appeal; the delay is not found to be inordinate.

17. The court is alive to the fact that one of the applicants is also a SACCO and has a fiduciary duty to its members to be a good custodian and to properly administer the monies belonging to its members; this court is satisfied that the applicant will suffer substantial loss and also damage to its reputation if the order for stay of execution is not granted; and finds that this is a suitable case for it to exercise its discretion in granting an order for stay of execution.

FINDINGS

18. For the forgoing reasons the court finds that the delay was not inordinate and the explanation given for the delay is reasonable and excusable;

19. The application for expansion of time to file an appeal out of time is found to be meritorious and is hereby allowed; the time for filing the Appeal is hereby enlarged and extended for a period of thirty (30) days from the date hereof;

20. The applicants herein shall file their appeal against the judgment in PMCC No. 16 of 2013 within thirty days from the date hereof;

21. The application for stay of execution is also merited; there shall be a Stay of Execution of the Decree pending the hearing and final determination of the applicant's appeal;

22. The full decretal sum to be deposited in court and to be held therein until the determination of the appeal; within 30 days of today's date.

23. In default of any of the above conditions the respondent shall be at liberty to execute the decree;

24. The Respondent shall have costs of this application.

DETERMINATION

The appeal is therefore incompetent and is hereby struck out with costs to the Respondents.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 14th day of June, 2018.

HON.A. MSHILA

JUDGE