



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. APPL. NO. 24 OF 2021

EVANS FANUEL WANJALA.....PLAINTIFF/APPLICANT

VERSUS

BEATRICE ABISAKI.....1ST DEFENDANT/RESPONDENT

BENSON KILUI.....2ND DEFENDANT/RESPONDENT

RULING

(On extension of time within which to

file an appeal)

1. Being dissatisfied with the judgment of **Hon. S. N. Makila Principal Magistrate** in **Kitale CMC Land Case No. 24 of 2021** delivered on **13/10/2021**, the Applicant had the right challenge the decision by way of an appeal to within thirty (30) days of its delivery. He failed to do so, necessitating the filing of the instant Application.

2. In his Notice of Motion dated **23/11/2021** and filed on **8/12/2021**, the Applicant sought the following orders:

(1) ...spent

(2) That time within which to lodge an appeal against the decision of the Honourable S. N. MAKILA, PRINCIPAL MAGISTRATE delivered on 13/10/2021 in Kitale CMCC (sic) Land Case No. 16 of 2021 between Evans Fanuel Wanjala vs Beatrice Abisaki and Another be enlarged and the annexed memorandum of appeal be duly filed subject to payment of court fees.

(3) Pending the hearing inter parties and thereafter pending the hearing and determination of the application, there be a temporary injunction restraining the respondents from entering onto, trespassing thereto, cultivating, fencing of, claiming a right to or ownership thereto or in any other manner interfering with or dealing with 5 acres comprised in L.R. 5335/24 Kinyikewi farm (hereinafter known as the "suit land") other than their entitlement of 1 (one)acre which they occupied currently. He also sought for any other relief that the court would deem fit to grant together with costs of the application.

3. The Applicant relied on a number of grounds which he expounded by his supporting affidavit sworn on **24/11/2021** and filed on **8/12/2021**. In it he deponed that he was the Plaintiff in **Kitale CMC Land Case No. 16 of 2021**. He stated that the trial Court delivered judgment on **13/10/2021** in the presence of his advocate. Thereafter he sought a copy of the ruling (sic) from his Advocate. It took him time to collect it. He annexed a copy of the judgment and marked it as **EFN '1'**.

4. His further claim was that he went home, read the ruling (sic) and by the time he instructed his Advocate to appeal against the judgment time to lodge it had lapsed. Later, he was advised by his advocate to seek leave of the court to file an appeal out of time. He was desirous to file and pursue the appeal. To demonstrate it, he attached a draft Memorandum of Appeal which he claimed that it was marked as '**EFW 2'** (which I note was not marked but filed together with the Application).

5. According to him, the Appeal raised weighty issues of law and fact which ought to be determined on appeal. His contention was that he sought orders of eviction and a permanent injunction restraining the Respondents from trespassing onto or interfering with the Estate of his deceased father comprised in the suit land. Further, the respondents had claimed **5 acres** from the suit land on the premise that their mother had purchased it from his deceased father yet he was aware that the land they (the respondents) bought was one (1) acre only. He annexed to the Supporting Affidavit a sale agreement marked it as '**EFW 4'**. He then prayed for that the respondents be restrained from interfering with the suit land in any manner whatsoever.

The Response

6. The Application was opposed through grounds of opposition dated **14/12/2021** and filed on **15/12/2021**. The Respondents stated that prayer 2 of the motion was not tenable. They argued further that they had been in occupation and possession of the suit land since **1986** without any interruption and undertook farming activities thereon for subsistence and commercial use all through. They contended further that there was no plausible explanation by the Applicant for delaying to lodge the intended appeal. They then attacked the Application on the ground that the copy of the judgment attached was faint and illegible and could not offer sufficient interpretation before this court and further that the Applicant had not demonstrated any prejudice he would suffer if stay was declined. They contended further that suit No. **16** of **2021** was consolidated with No. **19** of **2021** and the Applicant withheld material facts by pursuing suit No. **16** of **2021** alone leaving out Civil Suit No. **19/2021** as if the instant suit was independent. They stated that the Applicant had not offered security for costs as required by **Order 42 Rule 6** of the **Civil Procedure Rules**. In addition, the Respondents argued that the Applicant had not annexed a draft Memorandum of Appeal to the Application to enable the court determine the case on its merits and the chances of success, if any. Finally, he stated that the motion amounted to an abuse of the Court process and ought to be refused with costs.

Submissions

7. On **15/12/2021**, this court directed that the Application be resolved by way of written submissions. The Applicant filed his dated **22/12/2021** on **23/12/2021**. However, by the time I wrote this ruling, the Respondents had not filed any. Nonetheless, this Court is alive to its role in determining a matter on its merits with or without submissions since they do not constitute pleadings.

Analysis, Issues and Determination

8. I have carefully considered the Application, the Affidavit in support together with its annexures, the grounds of opposition and the submissions filed as well as the case law cited and the relevant law. Three issues stand out for determination in it. They are, one, whether the Applicant satisfied the principles for the grant of a temporary injunction pending Appeal, two, whether he met the conditions for extension of time, and three, who was to bear the costs of this Application.

9. On the first issue, it is worthy of note that this Court was called upon to consider the grant of an injunction while it would be exercising its appellate jurisdiction. The relevant **Rule** in the **Civil Procedure Rules** on the matter is **Order 42 Rule 6(6)**. It provides thus, “*Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.*” The point on whether the Courts of Equal Status as the High Court are bound by the Civil Procedure Rules therefore making the Environment and Land Court (ELC Court) obligated to apply the rule, is now settled. It should not raise any question. Therefore, I will get to the provision straight away.

10. The determining point in considering whether or not to grant an injunction at the appellate stage is that the procedure for instituting an appeal from a subordinate Court has been complied with by the party seeking the equitable remedy. In the instant case, the Applicant sought extension of time to file an appeal from the decision of the lower Court. It would be thus important to consider the merits of the issue on extension of time before reverting to the issue of the success or otherwise of the prayer for injunction in this Application. As I do so, I will refer to the decision of ***Stella Wambui Muthoni v Njeri w/o Wangaruro & 15 others [2019] eKLR*** where my brother Eboso J. was of the same opinion that any court of Equal Status and the High Court while exercising appellate jurisdiction can consider whether or not to grant an injunction at that stage. This moves me to the next issue.

11. In determining an application for extension of time, the Court exercises discretion. The discretion has to be exercised judiciously and not in a capricious manner. Of course it should not be lost to anyone that the discretion is wide but the Applicant has the onus of explaining to the satisfaction of the Court the reasons for the delay. In order for an Applicant to succeed in an Application for extension of time to file an Appeal from a judgment or ruling of the Court, he has to fulfil a number of conditions as was summarized by the Supreme Court in the case of ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR***. In the case, the Court stated that the following are “*under-lying principles that a Court should consider in exercise of such discretion:*”

(1) 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;

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

(3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

(4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

(5) Whether there will be any prejudice suffered by the respondents if the extension is granted;

(6) Whether the application has been brought without undue delay; and

(7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

12. The principles stated above are clear and do not deserve any further interpretation, exposition, extrapolation or explanation. They only call for their application to the present case or circumstances. Extension of time is not a right for a party. One has to demonstrate that he/she deserves of such an equitable remedy. Thus, many factors come into play when that is sought to be demonstrated. For instance, vigilance, good faith, clean hands, absence of indolence, and many others. In essence the Court would ask itself on whether the Applicant had any part

to play in the delay. Where the delay is not on the part of the Applicant, for instance, where the Court delays in giving the Applicant typed proceedings or judgment or ruling or certified decree that is a reasonable excuse for the delay which must afford the Applicant an opportunity to proceed to the next stage in prosecuting his intended Appeal by being granted an extension. In the instant case, the Applicant stated that the reason for the delay in lodging the Appeal in time was that although judgment was delivered in the presence of his lawyer, it took time to obtain a copy of it. He then went home to read it and by the time he came back to instruct his counsel to appeal, time had elapsed. What I understood the Applicant to have been intending to do by stating the above was to bring himself within the parameters given but he failed miserably to do so.

13. The explanation for the delay needs to be properly analyzed vis-à-vis the conduct of the Applicant. First, judgment was delivered on **13/10/2021**. An appeal therefrom should have been preferred within thirty (**30**) days which should have been by **13/11/2021**. However, the Application was brought on **8/12/2021**, which was about 25 days after the expiry of time. Whereas the delay of less than a month would be considered not inordinate, the Applicant has to give clear and cogent explanation for the delay, even if it would be of a day. As the Supreme Court stated in the *Nicholas Salat* case cited above extension of time is not a right for a party: it has to be properly explained. In the instant case, the Applicant explained that there was delay in the Court giving him the copy of the judgment. Well, that may be true. But he did not clearly show when he applied for the judgment and when he was given a copy thereof by the Court. Moreover, assuming that the Applicant was serious in applying for the extension of time, there is no explanation whatsoever as to why he drew the instant Application by **23/11/2021**, when it was dated, and then he delayed to file it up to **08/12/2021**. This is a manifestation of a party who is indolent who takes his time to take steps and then moves the Court in a sauntering posturing manner while knowing that time is of essence. Such conduct does not merit the exercise of the discretion of the Court.

14. The final issue to consider is what orders to issue and who to bear the costs of the Application. Two findings come forth quickly from the above analysis. One, the Applicant did not explain satisfactorily the reasons for the delay in bringing the Application herein. Second, he did not satisfy the limb on compliance with the procedure on appealing from the lower Court hence the consideration on whether or not to grant an injunction does not warrant discussion. Lastly, I have found that the Application is unmeritorious. The same is hereby dismissed with costs to the Respondent. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 31ST DAY OF JANUARY, 2022.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.