



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

MISCELLANEOUS APPLICATION 23 OF 2021

JOHN MUTHIA KATHUNZI.....APPLICANT

VERSUS

CHRISTINE SOFIA PETER.....RESPONDENT

RULING

1. This ruling relates to the application by way of Notice of Motion dated 22nd September 2020. The same is brought under Article 23 and 40 of the Constitution of Kenya 2010, Order 50 Rule 6 and Order 51 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The application is supported by the affidavit of the Appellant/Applicant John Mutia Kathunzi and seeks the following orders;

i. Spent

ii. Spent

iii. THAT the Honorable court do issue conservatory orders restraining the Respondent herein by her servants, agents, employees and/or whoever else claiming the suit property being PLOT NO. 24 Kyume market, Mui location from destroying, evicting the appellant/ applicant from the said plot and interfering with the applicants continued occupation and possession of the suit land pending the hearing and determination of the Appeal.

iv. THAT the Honorable court be pleased to grant leave to the Appellant/Applicant to file his appeal out of time.

v. THAT costs of the application be in the Cause

2. The application is opposed and the respondent filed a replying affidavit sworn by herself on 2nd November 2020 and Grounds of Opposition dated the same date. The Respondent also filed written submissions dated 7th August 2021.

3. The Applicant claims that he was the defendant in Senior Principal Magistrate's Court in Mwingi in ELC NO. 7 of 2018 whereas the Respondent herein was the Plaintiff. After a full trial, Judgement was entered in favour of the Respondent on 27th February 2020. The decree that is the subject of the intended appeal states as follows: -

a. THAT a declaration be and is hereby issued that the Plaintiff is the registered and/or *bonafide* owner of land parcel Plot No.24 in Kome Market, Mui Location.

b. THAT an eviction Order be and is hereby issued against the Defendant and the same be effected by the OCS Nguni Police Station.

c. THAT the Defendants Counter-Claim is dismissed with costs to the Plaintiff.

4. The Applicant applied for a certified copy of the Judgment by a letter dated 27th February 2020 but which was received by the Court on 5th March 2020. The Applicant further states that a decree was issued and that the eviction orders against him were in the process of being executed at the time of filing the application in court. He further claims that he resides on the suit property Plot NO. 24 Kyome Market and has resided therein since the year 2002. He has developed on the property a permanent house and will be left with no dwelling place if evicted. He further claims that the Respondent will suffer no prejudice since she has never resided on the property.

5. In support of the prayer for extension of time for filing an appeal the Applicant states that judgment in the lower court was delivered on

27th February 2020. Being dissatisfied with the judgement, the Applicant applied and was granted stay of execution of the decree for thirty days. He applied for a copy of the judgement and paid for the same on 5th March 2020.

6. The Applicant claims that due to the outbreak of Covid -19 in early 2020, he could not gain access to the court in order to obtain the judgment or for any services and was only able to obtain the judgment on 20th July, 2020. That the period granted for stay of execution thus lapsed before he could lodge the appeal. The Applicant further states that the property subject matter of the suit was purchased by himself but registered in his estranged wife's name who transferred the same fraudulently to the Respondent. He claims that the suit before the Magistrates Court proceeded in the absence of his advocates and thus he was prejudiced. He claims that the application has been brought without unreasonable delay.

The Respondent's Case:

7. The Respondent states that the application herein is an abuse of the court process. The orders sought have been overtaken by events since eviction has already been effected. That the eviction orders were executed on 11th July 2020 and a copy of a letter from the OCS Kathonzi Police Post 3rd October 2020 is attached dated. The Respondent claims that after evicting the Applicant she renovated the house and constructed a new toilet at a cost of ksh.60,000/= and the applicant did not raise any objection.

8. The Respondent further denies the claim by the Applicant that due to Covid -19 he was not able to access court services. She states that Mwingi Law Courts were never closed and services were available to all litigants. Further that the judgment herein was already typed at the time when it was delivered and her advocate was able to access it.

9. The Respondent further claims that the appeal has no chances of success since the same is filed out of time without leave of court.

The Applicant's submissions:

10. The Applicant's Counsel formulated 2 issues for determination by the court

- a. Whether stay of execution of judgment should be issued pending the hearing and determination of the intended appeal.
- b. Whether the Applicant herein ought to be allowed to file appeal out of time.

11. The Applicant relies on Section 75G of the Civil Procedure Act to state that the period allowed to file an appeal from the Subordinate Court is 30 days

“Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

12. The Applicant further relies on the case of **Paul Musili Wambua –vs- Attorney General and 2 others for (2015) eKLR** for the submissions that in an application for extension of time the court exercises unfettered discretion the exercise of which the court must act upon reason(s) not based on whims or caprice. The Court takes into account the length of delay the reason for the delay, the chances of the appeal succeeding, the degree of prejudice to the Respondent if the application is granted.

13. The Counsel for the Applicant states that the period of 6 months delay was not inordinate. He relies on the case of **Transport Co. Ltd. & 3 others –vs- N.C. Bank & Another (2014) eKLR** to state that what amounts to inordinate delay differs from case to case depending on circumstances. Counsel stated that the Applicant was always desirous of appealing but due to the Covid -19 outbreak he was unable to file the appeal in time.

14. On the issue of stay of execution the Applicant states that the purposes of stay of execution is to preserve the subject matter of the suit in order not to render the appeal nugatory. He relies on Order 42 Rule 691) of the Civil Procedure Rules and the cases of **Bhatt Vs Rent Restriction Tribunal (1982) KLR 417** and **Civil Appeal No. 107 of 2015, Masisi Mwita –vs- Damaris Wanjiku Njeri (2016) eKLR** cited in the case of **Paul Kamure Kirunge –vs- John Peter Nganga (2019) eKLR** for the submissions that the power to grant stay of execution is a discretionary one. He also relies on the cases of **Guyo Wakal –vs- Straman EA Ltd. (2013) eKLR** and **Stephen Wanjohi –vs- Central Glass Industries Ltd. Nairobi HCC No.6726 of 1991** cited in the case of **Paul Kamura Kamunge –vs- John Peter Nganga (2019) eKLR**.

Analysis & Determination

15. I have considered the application herein, the supporting affidavit, and the attached documents together with the Applicant's submissions. I have also considered the Replying Affidavit and the attached documents, the Grounds of Opposition and the Submissions.

16. I do agree with the Applicant that the issues for determination are as formulated by the Applicant.

Extension of Time

17. The application herein is said to be based on Article 23 and 50 of the Constitution and Order 50(6) and Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Article of the Constitution of Kenya 2010 provides for the Authority of courts to uphold and enforce the Bill of Rights while Article 50 provides for the right to a fair hearing. Order 50 (6) provides for the power to enlarge time where a limited time has been fixed for doing any act or taking any proceedings under the Rules.

18. In submissions the Applicant relies for his application for enlargement of time on Section 75G of the Civil Procedure Act. The section states that;

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

19. As stated earlier judgement in the SPMCC case ELC 7 of 2018 was entered on 27th February 2020. The Applicant applied for a certified copy of the Judgment by a letter dated 27th February 2020 but which was received by the Court on 5th March 2020. The Applicant states that he received a copy of the judgement on 20th July 2020. The present application was filed on 22nd September 2020. The question that arises for consideration is whether the reasons given for failure to file the appeal in time satisfy the requirement of “good and sufficient cause” as required under Section 75G of the Civil Procedure Act.

20. The principles to be considered in exercising the discretion whether or not to enlarge time are set out in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are *(i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.*

21. Following the above criteria, the 1st factor to be considered is *(i) the explanation if any for the delay.* The period between the time Judgment was entered to the time of filing the present application was a period of 207 days almost seven months compared to the period of 30 days allowed by the law. The Applicant claims that he was unable to file the Memorandum of Appeal without first obtaining a copy of the judgment. The Respondent on the other hand claims that the typed judgment was available at the time when the same was read in court. The averment by the Respondent has not been denied or controverted. The same is more tenable since what the Applicant has attached to his affidavit is a certified copy of the judgment. It is thus possible that an uncertified copy was available and would have been used in drafting the Memorandum of Appeal. However, on this issue the Applicant may be given the benefit of doubt and find that the applicant did not have a copy of the judgement and had to wait for the copy to be supplied by the Court to enable him file the Memorandum of Appeal.

22. The Applicant claims that he was not able to obtain the judgement due to the effect of scaling down of Court activities after Covid-19 was declared a pandemic. It is common knowledge that the Chief Justice of the Republic of Kenya announced the scaling down of Court activities after the Covid-19 pandemic effective from 16th March 2020. This was still within the window when the Applicant was allowed by law to file the appeal herein. I therefore agree with the Applicant that even though the uncertified copy of judgment may have been available he would not have been able to access it during part of the period allowed to him due to scaling down of Court activities.

23. The Applicant confirms that he obtained a certified copy of the judgment on 20th July, 2020 which meant that he now had access to the Court. The present application was filed on 22nd September 2020 a period of over two months after obtaining Judgment. The Applicant has not explained or given any reason for failure to file the current application immediately after obtaining the copy of judgement.

Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR the court held that;

“ In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence.”

24. It is the Courts view that the applicant was not diligent in pursuing his intended appeal and indeed he seems to have gone to sleep and was prompted into action by the Respondent when she executed the decree and evicted him from the suit premises on 7th July 2020. It is subsequent to his eviction that the applicant obtained the copy of judgement on 20th July 2020. Indeed, even after obtaining the certified copy of judgement it took him another two months to file the present application.

25. The Applicant has submitted that the period of six months between the time the judgement was delivered to the time when the present application is not inordinate and the court should exercise discretion in his favour and extend time.

26. What amounts to inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case.....”As *per the findings in Utalii Transport Co.Ltd and 3 Others –vs- NIC Bank and Another (2014) eKLR.* The Supreme Court in the case of **Nicholas KiptooArapKorir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR,** aptly captured the circumstances to be considered in an application for extension of time. The Court stated:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if 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” [emphasis supplied].

27. The second factor for consideration is ii). *the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice.* I have read the judgement delivered in the suit before the Principle Magistrates Court ELC 7 of 2018, the affidavit of the Applicant in support of the application herein and the draft Memorandum of Appeal, I find that the intended appeal cannot be said to be frivolous. The Applicant claims that the suit property was matrimonial property that was sold to the Respondent by his estranged wife without his consent. He further claims that the Court failed to consider the evidence that he adduced during trial and further failed to allow the Applicant to cross-examine witnesses. On this consideration I would give the Applicant a chance to ventilate his issues before the appellate Court for the reason that the issues raised are not frivolous.

28. The 3rd factor to be considered is (iii). *Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.*

29. I have considered that the Respondent has a judgement in her favour and she has a right to enjoy the benefit and fruits of the said judgement. As stated in the case of **Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co. [1957] EA 438**, it was held that:

“In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”

30. I have considered the fact that the decree has already been executed and the Applicant has been evicted from the suit premises and the Respondent put in possession. I therefore find that the Respondent will not be prejudiced if the Applicant is allowed to pursue the appeal since she has the benefit of possession of the suit property pending the hearing and determination of the intended appeal.

31. For the reasons given above I will exercised the courts discretion in favour of the Applicant and find that the period of two months though unexplained is not inordinate,.

Stay of Execution pending appeal

32. The prayers in Notice of Motion dated 22nd September, 2020, are in the form of conservatory orders. The Applicant has thus not made any prayer for stay of execution as submitted in his written submissions. The Application reads as follows:

“THAT the Honorable court do issue conservatory orders restraining the Respondent herein by her servants, agents, employees and/or whoever else claiming the suit property being PLOT NO. 24 Kyume market, Mui location from destroying, evicting the appellants/ applicant from the said plot and interfering with the applicants continued occupation and possession of the suit land pending the hearing and determination of the Appeal.”

33. In the Replying Affidavit, the Respondent depones to the fact that the Orders made in SPMCC Mwingi Case No.ELC 7 of 2018 have already been executed. By a letter dated 31st October 2020 the OCS Kathonzwani Police Post confirmed having executed the orders of the court on 11th July 2020. The said averment is not denied by the Applicant. I therefore find that the entire decree has been executed and nothing is left to stay.

34. With regard to the specific prayers made in the application I do find that the Applicant has not shown that the same are supported by any legal provisions. It is the courts view that the Respondent claims the suit property Plot No. 24 Kyome Market Mui Location by virtue of a valid court decree which has not been overturned on appeal or by any legally recognized process. The said decree has further not been set aside or stayed. An application for stay of execution has not been made and the same may not be sustainable due to the fact that the decree has already been executed. The Court cannot therefore by way of an application restrain the Respondent from claiming a property that has been decreed to belong to her. The court can further not make an order restraining the Respondent from evicting the Applicant from the same property while a Court order has been issued authorizing eviction and the eviction carried out. As was declared by the court in the case of **Florence Nyaboke Macharu –vs- Mogere Amosi Ombui and 2 Others (2014) eKLR.**

“..... It is trite law that a valid judgment of court unless overturned by an Appellate Court remains a Judgment of Court and is enforceable, the issue of jurisdiction not withstanding.”

35. In the end I do find that the application dated 22nd September 2020 partly succeeds in the following terms: -

- A. The applicant be and is granted leave to appeal out of time, the said appeal to be filed within 14 days from the date hereof.
- B. Prayer 2 of the application dated 22nd September is hereby dismissed.
- C. Costs are hereby awarded to the Respondent.

DATED, SIGNED AND DELIVERED AT KITUI THIS 27TH DAY OF JANUARY, 2022

HON L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

In the presence of:

C/A C Nzioka

No attendance for the Applicant

Mbaluka holding brief for Munyoki for Respondent