



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HIGH COURT CIVIL APPEAL NO. 1 OF 2016

MARY KAARI MICHENI.....APPLICANT

VERSUS

MICHENI MBIUKI.....1ST RESPONDENT

CHARLES POLLY NDERI..... 2ND RESPONDENT

ISAACK NJERU NDERI..... 3RD RESPONDENT

R U L I N G

1. Before me is an Originating Summons dated 6th April, 2016 brought under Order 37 Rule 6 of the Civil Procedure Rules, Sections 3 and 3 A of the Civil Procedure Act and Sections 27 and 28 of the Limitation of Actions Act Cap 22 of the Laws of Kenya. The same seeks an order for leave to be granted to the Applicant, Mary Kaari Micheni, to file an appeal out of time. The application is supported by the Affidavit of Mary Kaari Micheni sworn on the same day.

2. The grounds upon which the application is brought were set out in the body of the Motion as well as the Supporting Affidavit. These were that; the Applicant was aggrieved by a ruling made in favour of the Respondents on 14th July, 2015 in Civil Suit No. 75 of 2015; that the delay in preferring the appeal was caused by the delay in obtaining proceedings which had been applied for; that the volatile relationship between the Applicant, her children and husband had made it difficult for orderly and timely filing of the appeal. She swore that her Advocates had requested for a copy of the ruling sought to be appealed against; that although the time for preferring an appeal against the subject ruling had lapsed this court has power to enlarge the same; that there had been no inordinate delay in making the application and that the Respondents will not suffer any prejudice were the application to be allowed. At the hearing, Mr. Kijaru Learned Counsel for the Applicant reiterate what was contained in his client's Affidavit and further submitted that; the Applicant intended appeal has good chances of succeeding. That the Applicant was wrongly driven from the seat of justice and that she should be given her constitutional right to be heard. Counsel urged that the application be allowed.

3. The application was not opposed by the 1st Respondent. However, the 2nd and 3rd Respondent opposed the application vide the Replying Affidavit of Charles Polly Nderi sworn on 19th April, 2016. The said Respondents contended that; the intended appeal does not have any chances of success and is only intended to deny the Respondents the fruits of their judgments; that the draft memorandum of Appeal does not raise any reasonable ground of appeal; that it was an attempt to delay the Respondents justice; that the Applicant had not disclosed that there were two (2) suits, to wit, PMCC No. 11 of 2011 and 75 of 2015 relating to the same suit land; that the sale of the subject property had been confirmed through a court order in PMCC No. 11 of 2011 and that any issues relating to the suit land should have been raised

in that suit. The 2nd Respondent made submissions on his own and on behalf of the 3rd Respondent. He submitted that PMCC No.11 of 2011 was his claim against the 1st Respondent who is the Applicant's husband; that if the Applicant had any complaint in respect of the suit property, she should have pursued the same through suit No. 11 of 2011 and not to file a fresh suit. He urged that the application be dismissed.

4. I have considered the Affidavits on record and the submissions of the respective parties. This is an application for extension of time within which to file an appeal out of time. The principles applicable in such an application, in my view, are the length of the delay, the reasons for the delay, the prospects of the intended appeal succeeding and the prejudice, if any, to be suffered by the opposite party.

5. Before dealing with the aforesaid principles, I think it is prudent to deal first with the procedural aspects of the application. The application is expressed to have been brought under Order 37 Rule 6 of the Civil Procedure Rules and Sections 27 and 28 of the Limitation of Actions Act Cap 22 Laws of Kenya. Order 37 Rule 6 aforesaid provides:-

“6 (1) Where an application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit.

(2) Any such application made after the filing of a suit shall be made ex parte in that suit.”

6. It is clear from Rule 6 aforesaid that the said rule applies to applications brought under Section 27 of the Limitation Act. Section 27 aforesaid provides:-

“ 27 (1)Section 4 (2) does not afford a defence to an action founded on tort where-

- a. the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and***
- b. the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and***
- c. the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and***
- d. the requirements of subsection (2) are fulfilled in relation to the cause of action.”***

7. From the foregoing, it is quite clear that the provisions relied on by the Applicant apply where one applies for extension of time to lodge a suit for negligence and for purposes of defeating the defences set out in Section 4 (2) of the Limitation of Actions Act. Looking at the application generally, it is clear that the Applicant was not in anyway seeking extension of time to commence any suit in terms of section 27 aforesaid but to extend time for lodging an appeal out of time. The correct provisions should have been section 79 G of the Civil Procedure Act as read with Order 50 Rule 6 of the Civil Procedure Rules. Section 79 G of the Civil Procedure Act provides:-

“79 G Every special appeal from a subordinate court to the High Court shall be filled 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.”

While Order 50 Rule 6 of the Civil Procedure Rules provides:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the

time appointed or allowed.”

8. It is the view of this court that the principles applicable in the two scenarios, ie the one under section 27 of the Limitation of Actions Act and section 79 G of the Civil Procedure Act are different. It may be argued that this was only a procedural mistake and therefore a technicality curable under Article 159 of the Constitution of Kenya, but I do not think so. Rules of procedure are handmaidens of justice. Once the jurisdiction of a court has not been properly invoked, that jurisdiction remains dormant and the court cannot purport to bend backwards to exercise it in favour of the errant party. The opposite party would have prepared his/her defence based on the manner in which the court’s jurisdiction has been invoked and may be prejudiced as a result. On that ground alone, the application is for dismissal.

9. Be that as it may, if I am wrong on that note, was the application meritorious? On the length of time, the order sought to be appealed against was made on 14th July, 2015 in what is referred to as Civil Suit No. 75 of 2015. It is not clear from the application whether the said suit is from the Principal Magistrate’s Court, Chuka or Marimanti (being the two Magistrate’s Court which fall under the supervisory jurisdiction of this court). From the draft Memorandum of Appeal annexed to the application, it was indicated that it was ruling of Hon. H.M Mbatia, Resident Magistrate. The parties in that suit were not disclosed either but it is safe to assume the parties to have been the same as those before this court. The period between 14th July, 2015 and 6th April, 2016 when the application was filed is eight (8) months and six (6) days. If thirty (30) days required for filing the appeal are deducted, the delay will be seven (7) months and six (6) days. In my view, a delay of seven (7) months and six (6) days is inordinate that require an explanation.

10. What is the reason for the delay? The Applicant averred that the delay was occasioned by the fact that the Applicant applied for typed proceedings which the court had delayed in supplying. At paragraphs 3 and 4 of her Supporting Affidavit, the Applicant deponed:-

“3. THAT I am informed by our advocates, which information I verity believe to be true, that they immediately requested to obtain a typed copy of the ruling. Annexed hereto at the exhibit marked “MKM” is a true copy of the letter sent to the Chuka Law Courts by Kijaru Njeru & Co. Advocates.

4. THAT I am the one who had requested for the typed ruling to enable me to decide whether or not go file an appeal. I truly believed that we would obtain the typed ruling within a week or two. We have just received the said ruling (annexed and marked MKM is a copy of ruling.)”

11. Although the Applicant indicated that she had annexed the letter by which she applied for the ruling and the copy of the ruling itself in her Affidavit, the said documents were not annexed. The only annexure to the Affidavit which the court saw was the draft Memorandum of Appeal dated 6th April, 2016. In this regard, the Applicant did not show the date when she applied for the ruling, leave alone the proceedings, which she alleges the failure to be supplied with the same had caused the inordinate delay. In this regard, since there was no evidence to show when the proceedings were applied for and any effort made by the Applicant by way of follow up reminders, this court holds that the delay has not been explained.

12. As regards the merit of the intended appeal, a draft Memorandum of Appeal was annexed to the application. The same raises three (3) grounds which seem serious. However, in the absence of a copy of the ruling sought to be appealed against, this court cannot be in a position to gauge whether the said grounds are arguable or not. In normal circumstances, it will be expected that such an application will have annexed thereto the basic pleadings, ie the plaint, the defence, the application that led to the ruling being appealed against and the ruling itself. It is only then that a court can be able to completely exercise its discretion under Section 79 G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. Anything less might result in a court making a decision blindly. In any event, looking at the draft Memorandum of Appeal, it is clear that the proceedings sought to be appealed against related to a claim on land which I doubt if this court will have any jurisdiction to entertain. The proper forum, if that be the case, should be the Environment and Land Court.

13. As regards prejudice, I do not think the Respondents showed that if the application was allowed they will suffer any prejudice. From the Affidavits on record, it was not clear who is in possession of the property. It was also not disclosed whether the Respondents had had their positions drastically altered as a result of the delay so as to presume that allowing the appeal to be lodged at this late stage those positions could be irreversible.

14. Notwithstanding the fact that prejudice to the Respondents was not proved, due to the irregularities pointed above, I find that the application is without merit and is hereby dismissed with costs.

DATED and DELIVERED at Chuka this 9th day of June, 2016

A.MABEYA

JUDGE

Ruling is read and delivered in open court in the presence of all the parties.

A.MABEYA

JUDGE

9/6/2016