



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. MISC. APPLICATION NO. E029 OF 2021**

**GRACE BIBLE CHURCH-MACHAKOS...1<sup>ST</sup> APPLICANT**

**CHRISTOPHER MUSEMBI MUTISO.....2<sup>ND</sup> APPLICANT**

**JACKSON MUNYAO KYALO.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**RICHARD MUMO KIOKO.....RESPONDENT**

**RULING**

What is before Court for determination is the Applicants' Notice of Motion application dated the 5<sup>th</sup> May, 2021 where they seek the following orders:

- 1. Spent**
- 2. That an order of the Court do issue for the stay of execution of the judgement dated 12<sup>th</sup> June, 2019 and the Decree extracted in pursuance thereof in Chief Magistrate's Civil Suit No. 1139 of 2010.**
- 3. That an order of the Court do issue for the enlargement of time within which to file a Memorandum of Appeal in respect of the judgement dated 12<sup>th</sup> June, 2019 in CMCC No. 1139 of 2010.**
- 4. That an order of the Court do issue permitting the firm of Koki Mbulu & Co. Advocates to come on record for the Applicants.**
- 5. That an order that the costs of this Application be in the cause.**

The application is premised on the grounds on the face of it and the supporting affidavit of CHRISTOPHER MUSEMBI MUTISO, the 2<sup>nd</sup> Applicant who deposes that the judgement in CMCC No. 1139 of 2010 is void ab initio for lack of jurisdiction of the court as the suit land Muputi/Kiima Kimwe/3227 was curved out of Muputi/Kiima Kimwe/651 which borders Muputi/Kiima Kimwe/216. He contends that the boundary dispute for registered land Muputi/Kiima Kimwe/651 and 216 with the resultant titles curved out of Muputi/Kiima Kimwe/3132, 3133 and 3134 as well as parcel numbers Muputi/Kiima Kimwe/3227, 3228 including 3229 could only be heard and adjudicated by the Registrar of Lands. He claims he was not properly advised when the lower court matter was proceeding and timelines for filing a Memorandum of Appeal in the ELC Court, which was 30 days from 12<sup>th</sup> June, 2019. He hence seeks for orders of stay of execution of the invalid judgement.

The application is opposed by the Respondent RICHARD MUMO KIOKO who filed a replying affidavit where he deposes that the instant application is frivolous, and afterthought, vexatious and an abuse of the court process. He explains that the judgement was delivered on 12<sup>th</sup> June, 2019 and the Applicants had 30 days to Appeal. He contends that by an application dated the 29<sup>th</sup> August, 2019 the Applicants sought for stay of execution of the judgement and for leave to appeal out of time. Further, that the said application was canvassed by way of written submissions and was dismissed on 30<sup>th</sup> October, 2019 but the Applicants never appealed against the said dismissal order nor apply for its review. He avers that the instant application is res judicata as it seeks similar orders to the application dated the 29<sup>th</sup> August, 2019 which was heard and determined by a court of competent jurisdiction involving the same parties. Further, the costs of the suit were assessed at KShs. 142, 250/= which the said Applicant paid upon execution. He states that after the judgement, the 1<sup>st</sup> Applicant demolished the temporary church structure made of corrugated iron sheets and vacated. He insists the 2<sup>nd</sup> Applicant has continued to trespass into the plot and fenced it round with iron sheets, which prompted him to file the application dated the 26<sup>th</sup> January, 2021 citing him for contempt of the judgement. Further, the said application was compromised by consent of the parties who agreed to have a surveyor erect the beacons between his plot

and that of the 2<sup>nd</sup> Applicant's as well as demolition of the structures in or encroaching on the boundary of his plot. He confirms that after the survey exercise was carried out on 16<sup>th</sup> April, 2021, the 2<sup>nd</sup> Applicant requested for more time to remove the structures encroaching on the Respondent's plot but failed to do so and on 29<sup>th</sup> April, 2021, the same were demolished by Faith Agencies Auctioneers. He reiterates that currently his plot is vacant and the judgment in CMCC No. 1139 of 2010 has been effected. He reaffirms that the suit before the subordinate court was not a boundary dispute but based on the fact that the 2<sup>nd</sup> Applicant had trespassed into land parcel number Muputi/Kiima Kimwe/3227 and refused to render vacant possession despite the title deed of the same being in the Respondent's name hence the orders of eviction were sought. Further, at no time during the proceedings before the subordinate court did the Applicants' raise the issue of court's lack of jurisdiction and they are estopped from doing so as a ground of their intended appeal. He further insists the consent of the 1<sup>st</sup> and 3<sup>rd</sup> Applicants authorizing the 2<sup>nd</sup> Applicant to swear affidavits is a forgery as the 3<sup>rd</sup> Applicant died before CMCC 1139 of 2010 was concluded. Further, the 1<sup>st</sup> Applicant has never participated in other court proceedings after the conclusion of the lower court matter as he voluntarily vacated from suit plot after the judgement and the authorities filed have no signatures but only initials.

The 2<sup>nd</sup> Applicant filed a supplementary affidavit reiterating his averments and explaining that the Application for Stay, coupled with the Notice of Motion seeking leave to appeal out of time should have been filed in the ELC not the Magistrate's Court. He is not privy to the decision dated the 30<sup>th</sup> October, 2019 as his Counsel never informed him. He avers that no proper application seeking extension of time to Appeal the decision of 12<sup>th</sup> June, 2019 has been determined on merit and hence the argument that the matter is *res judicata* is invalid. He contends that the ELC Court should scrutinize the process that led to issuance of title for Muputi/ Kiima Kimwe/3227 and other revisions. Further, the Respondent will suffer no prejudice if he is allowed to appeal out of time.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the Applicant's Notice of Motion dated the 5<sup>th</sup> May, 2021 including the respective parties' affidavits and rivalling submissions, the following are the issues for determination:

- ***Whether the firm of messrs Koki Mbulu & Co. Advocates, should be allowed to come on record for the Applicants.***
- ***Whether there should be a stay of execution of the Judgement delivered on 12<sup>th</sup> June, 2019.***
- ***Whether the Applicants should be granted leave to file an Appeal out of time.***

As to whether the firm of Koki Mbulu & Co. Advocates, should be allowed to come on record for the Applicants. I note the said firm has applied to come on record for the Applicants after the matter had been concluded in the lower court and Judgement delivered. Further, the Respondent's advocate has indeed been notified. Order 9 Rule 9 of the Civil Procedure Rules provides that:

***'When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—***

***(a) upon an application with notice to all the parties; or***

***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.'***

Based on the facts as presented while relying on the provisions of Order 9 Rule 9 of the Civil Procedure Rules, I will proceed and allow the firm of Koki Mbulu & Co. Advocates, to come on record for the Applicants herein.

As to whether there should be a stay of execution of the Judgement delivered on 12<sup>th</sup> June, 2019. The Applicants have sought for a stay of execution of the Judgment and Decree pending an intended appeal, which application is opposed by the Respondent. The Applicants blame their failure to file an Appeal within time on their erstwhile Advocates who failed to give them proper legal guidance.

Order 42 Rule 6(2) provides that:

***'No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.'***

In the case of ***Butt v Rent Restriction Tribunal [1982] KLR 417*** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:

***"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.”**

From the averments in the supporting affidavit, I note the Applicants seek a stay of execution of the Judgement after the period of Appeal had long lapsed. The Respondent has explained that the 1<sup>st</sup> Applicant demolished his structures and vacated suit plot while the 2<sup>nd</sup> Applicant was evicted therefrom after a consent of the parties. Further, that the suit plot is currently vacant. The Respondent has disputed that the 2<sup>nd</sup> Applicant is representing the Applicants since the 3<sup>rd</sup> Applicant is deceased while the 1<sup>st</sup> Applicant after demolishing his structures stopped participating in other proceedings. I note the 2<sup>nd</sup> Applicant did not controvert these averments. Be that as it may, the 2<sup>nd</sup> Applicant claims the lower court did not have jurisdiction to deal with the matter hence the judgement is void ab initio. However, I note he never raised the issue of jurisdiction when the lower court matter was pending as a requirement to enable the court down its tools. It is my considered view that the 2<sup>nd</sup> Respondent is not being candid as he even entered into a consent to settle the Decree early in 2021. I find that he has come too late in the day after the Decree has been executed. Based on the standards set in the aforementioned decision and in applying them to the circumstances at hand, I find that the Applicants have not met the threshold set for stay of execution and will decline to grant the said orders.

As to whether the Applicants should be granted leave to file an Appeal out of time.

Section 79G of the Civil Procedure Act provides 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.’**

Further, Section 95 of the Civil Procedure Act provides as follows:

**‘Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.’**

While Order 50 Rule 6 of the Civil Procedure Rules stipulates that:

**‘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: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.’**

The 2<sup>nd</sup> Applicant in his supporting affidavit annexed a draft memorandum of Appeal wherein he highlighted his reasons for the intended appeal and contended that he has an arguable appeal. The Respondent insists the Applicants have not demonstrated the arguability of the Appeal and the Decree has been executed. In the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR**, the Learned Judge stated that:

**‘Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:**

- a. The period of delay;**
- b. The reason for the delay;**
- c. The arguability of the appeal;**
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;**
- e. The importance of compliance with time limits to the particular litigation or issue; and**
- f. The effect if any on the administration of justice or public interest if any is involved.....**

**Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.’**

In the instant case, judgment was entered in favour of the Respondent on 12<sup>th</sup> June, 2019. The Applicants have annexed a draft Memorandum of Appeal and not given proper reasons why they delayed in filing the Appeal. Further, except for blaming their erstwhile advocates for failing to update them on the progress and outcome of an application, I note the 2<sup>nd</sup> Applicant participated in the subsequent proceedings after the judgement and even entered into a consent for the Surveyor to confirm the disputed boundaries. Further, the 2<sup>nd</sup> Applicant has not provided any other proper reasons why he failed to lodge an Appeal within the requisite time and only came to seek leave to do so, after his structures had been demolished by an Auctioneer. Insofar as he has enumerated grounds of Appeal in his Memorandum of Appeal and demonstrated that he will suffer irreparable harm, I find the delay inordinate. It is trite that cases do not belong to the Advocates but to the parties who have a duty to follow up on them. If indeed the 2<sup>nd</sup> Applicant participated in subsequent proceedings, then I find the blame on the erstwhile advocate just a mere excuse. Based on my analysis above while associating myself with the cited decision, I will decline to grant this prayer as sought.

It is against the foregoing that I find the Applicants' Notice of Motion dated 12<sup>th</sup> July, 2019 unmerited, except for the prayer allowing the firm of Koki Mbulu & Co. Advocates to come on record for them. I will hence proceed to dismiss prayers Nos. 2, 3 and 5 of the said Notice of Motion, with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24<sup>TH</sup> DAY OF JANUARY, 2022**

**CHRISTINE OCHIENG**

**JUDGE**