



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC NO. 95 of 2016

JAMES MURAGE GICHANGI.....PLAINTIFF/APPELLANT

VERSUS

FREDRICK MUNENE MUTHII.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated 29th November 2019 and supported by an affidavit of even date, the Applicant herein approached the court seeking the following orders:

(i) That leave be granted to the Applicant to appeal the judgement herein entered by the court on 4th October 2019 and notice of appeal dated 6th November 2019 be deemed as properly filed;

(ii) That pending the hearing and determination of the application, an order of stay of execution of judgement herein be issued to the Applicant until the appeal is heard and determined;

(iii) That costs of the application be provided for.

2. The Applicant's prayers are grounded on the following premises:

a) That the Plaintiff/Applicant has filed a notice of appeal;

b) That the Plaintiff/Applicant has annexed an intended memorandum of appeal demonstrating that he has an arguable appeal with high chances of success;

c) That the execution of the judgement herein will cause the Plaintiff/Applicant great irreparable loss as it would render the appeal nugatory if successful.

3. The Applicant's application is opposed. Vide a replying affidavit filed on 12th February 2020, the Defendant/Respondent avers that the Plaintiff/Applicant's delay in lodging the notice of appeal is inordinate. That the Plaintiff/Applicant's suit having been dismissed, there is nothing to be stayed. That the Plaintiff/Applicant has a right of appeal and does not require leave of the court to lodge the intended appeal. That the application lacks merit and ought to be dismissed.

4. By consent, the Parties agreed to canvass the application by way of written submissions. The Plaintiff/Applicant filed his submissions on 2nd March 2020. It is his submission that judgement was passed on 7th October 2019 and that the application filed on 29th November 2019 seeks leave to appeal against the said judgement. That he prepared a notice of appeal dated 6th November 2019 and seeks the court's indulgence in deeming the same to have been properly filed. He relies on the decision in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi (Civil Application No. 256 of 1997)** in arguing that the court is vested with power to extend time for the filing of an appeal. He further argues that **Article 159 of the Constitution** requires for justice to be administered without undue regard to technicalities and cites **Susan Wanjiru & Another v Lucy Gathoni & Another 2015 e KLR** in support of the fact that the delay of one and a half months in filing the appeal ought not to prejudice his application. With reference to the prayer for stay of execution, he cites **Order 42 Rule 6 of the Civil Procedure Rules, 2010** and **M/S Port Retz Maternity v James Karanja Kahia Civil Appeal No. 63 of 1997** on the considerations to be taken into account by a court invited to stay execution of a decree. He submits that whereas the Defendant/Respondent herein has built a house on his land, a portion of the house extends to his land and so therefore that his interests ought also to be considered.

The Defendant/Respondent filed his submissions on 03rd June 2021. He submits that pursuant to **Section 66 of the Civil Procedure Act, Cap 21**, appeals lie as a matter of right to an aggrieved litigant and it is therefore unnecessary to seek leave to appeal. That in instances where leave to appeal out of time is sought, an explanation as to the length of the delay and the reason for that delay needs to be given. It is his contention that the Plaintiff/Applicant has not furnished any reason to explain the one-month delay in filing the appeal. On the question of

stay of execution, it is his submission that the judgement having struck out the Plaintiff's/Applicant's case, there is no order capable of being stayed. In addition, that no explanation as to the substantial loss sufferable by the Plaintiff/Applicant absent the orders sought has been provided. It is his conclusion therefore that the application ought to be dismissed with costs.

5. The court has considered the application and the rival affidavits and submissions provided by the Parties. It is important to refer to the judgement precipitating the present application, in order to appreciate the context of the application. In the judgement delivered on 4th October 2019, the following orders were given:

- a) That the suit fails for want of jurisdiction;
- b) That the suit is struck out with costs to the Defendant;
- c) The Defendant statement of defence and counterclaim is equally struck out with no order as to costs.

6. Aggrieved by the decision, the Plaintiff/Applicant elected to lodge her appeal. Now, **Section 79G of the Civil Procedure Act, Cap 21** provides the relevant timelines for the lodging of such an appeal. The section provides as follows:

'79G. Time for filing appeals from subordinate courts

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.' (Underline, mine)

From the foregoing provision, the Plaintiff/Applicant was required to file his appeal within 30 days of the impugned judgement. That was not done. While he asserts that the notice of appeal was already ready on 06th November 2019, the same was not filed. Instead, the Plaintiff/Applicant filed the present application seeking leave to file the same. The court shares the Defendant's/Respondent's concern as to why the Plaintiff/Applicant formed the opinion that he was required to seek leave to appeal. Indeed, appeals to the Court of Appeal lie as of right to a litigant aggrieved by a decision of the High Court save for instances specifically excluded by the Act. See **Section 66 of the Civil Procedure Act, Cap 21**

'66. Appeal from decree of High Court

Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.'

7. Now that the appeal was not filed in time, **Section 79G of the Civil Procedure Act, Cap 21** cited above is clear that appeal can only be allowed out of time where a good and sufficient cause for the failure to file within time is given to the court. No reason for the month long delay has been proffered. On the premises, there is nothing upon which the court can exercise its discretion for the extension of time. Succor is found in the Court of Appeal decision in **Paul Musili Wambua v Attorney General & 2 others [2015] e KLR** where the court stated as follows:

"...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted."

The first prayer therefore fails and cannot be granted.

8. The second prayer is for stay of execution. As already observed, the orders given in the judgement delivered on 04th October 2019 essentially struck out the Plaintiff's/Applicant's suit as well as the Defendant's/Respondent's counterclaim. As opined by the Defendant/Respondent, there is therefore no order capable of being stayed. The following decisions are instructive:

In **Western College of Arts and Applied Science v Oranga & Others [1976 - 80] 1 KLR 63**, the Court of Appeal found as follows:

"In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted." (Underline, mine)

9. In **Kiriinya Mukiira v Middle East Bank Kenya Limited [2021] e KLR** the Court of Appeal held as follows:

“Although we exercise original jurisdiction in applications brought under Rule 5(2) (b) where exercise of discretion is only subject to law we cannot see what can be stayed where the applicant’s suit was struck out. That suit does not exist; there is nothing that can be stayed.”

The second prayer equally fails.

10. On the issue of costs, it is trite law that costs follow the event unless good grounds for departure can be established. See **Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others HC EP No. 6 of 2013:-**

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion.But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

11. In the upshot, the application be and is hereby dismissed with costs. It is so ordered.

JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 21ST DAY OF JANUARY, 2022.

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HON. E. C. CHERONO

ELC JUDGE

IN THE PRESENCE OF:

- 1. MS NDUNGU HOLDING BRIEF FOR MR. KARIUKI FOR THE APPLICANT**
- 2. RESPONDENT/ADVOCATE – ABSENT**
- 3. KABUTA – COURT CLERK.**