REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPL. NO. 77 OF 2012

STANLEY K. KETTER …….....….. APPLICANT

VERSUS

HENRY KESSIO …….. RESPONDENT

RULING

Before the court is an application by way of a Notice of Motion dated 24th September, 2012 in which the Applicant ***Stanley K. Ketter*** seeks the following main orders:-

i. That the court be pleased to enlarge time for lodging an appeal arising out of the judgment in Eldoret CMCC No. 1255 of 2004 delivered on 9th June, 2010.
ii. That the draft memorandum of appeal be deemed as duly filed subject to payment of requisite court fees.
iii. That there be stay of execution pending the determination of the appeal.

2. The application is supported by an affidavit sworn by the Applicant on 24th September, 2012. In his affidavit, the applicant replicated the grounds stated on the face of the application. He deposed that he was aggrieved by a judgment delivered by the lower court on 9th July 2010 in which the Respondent was awarded Kshs. 11,200/- being ploughing costs, costs of the suit and interest; that he immediately instructed his advocates ***M/s Kipchumba Kitur & Co. Advocates*** to file an appeal against the decision but the said advocates wound up their business in year 2011 without having filed the appeal; that on contacting his advocates on phone, he was advised to wait for them to allocate his file to other advocates.

3. The Applicant further deposed that on 24th July, 2012, the Respondent instructed a firm of auctioneers who proclaimed his properties in execution of the decretal amount which then stood at Kshs.54,911/- owing to accumulated interest. He then instructed the firm of ***Gicheru & Company Advocates*** who temporarily stayed execution of the decree in the lower court. It is the Applicant's case that the delay in filing his intended appeal was solely caused by his previous advocates who failed to adhere to his instructions to lodge the appeal soon after the judgment was delivered or before they wound up their business.

The Applicant also claimed that his intended appeal had overwhelming chances of success and that execution of the decree ought to be stayed pending the hearing of his appeal.

4. The application is opposed. In his replying affidavit sworn on 7th December, 2012, the

Respondent contended that no good reason had been advanced by the Applicant to explain the inordinate delay in filing his intended appeal considering that the judgment sought to be appealed against was delivered on 9th June, 2010.

The Respondent also averred that the application was an afterthought as on 20th December, 2010 their respective counsels ***(Kipchumba Kitur & Co. Advocates*** representing the Applicant) had recorded a consent on costs which he annexed as ***HKI***; that the application was made in bad faith and was an abuse of the court process as a similar application for stay had been filed before the lower court and was pending ruling. He urged the court to dismiss the application with costs.

5. The application was prosecuted by way of written submissions. The Applicants written submissions were filed on 11th November, 2014 while those of the Respondent were filed on 18th November, 2014.

On behalf of the Applicant, it was submitted that the court should exercise its discretion and enlarge time within which the applicant could file his intended appeal as he was not to blame for the delay in filing the appeal; that the guilty party was his previous advocates andthat the mistakes of an advocate should not be visited on a litigant.

It was further submitted that the applicant's intended appeal had high chances of success and that his application should be allowed so that the dispute between the parties can be decided on merit.

6. In his submissions, the Respondent re-iterated the averments in his Replying affidavit and emphasized that the instant application had been filed as an afterthought with the intention of denying the Respondent the fruits of a justly obtained judgment. The Respondent's counsel wondered why the memorandum of appeal was not filed from 9th June 2010 to May 2011 when the parties consent on costs was recorded or even thereafter if the applicant genuinely intended to challenge the lower court's decision on appeal.

7. On the prayer for stay of execution, the Respondent relying on the case of ***Juma Ali Mbwana & Another vs Lemi Omar Musa (2014) eKLR*** submitted that the Applicant had failed to satisfy the requirements set out in ***Order 42 Rule 6 of the Civil Procedure Rules*** which provides,inter alia, that an applicant seeking stay of execution must demonstrate that the application was made without unreasonable delay and that if not granted, he or she was likely to suffer substantial loss. It was therefore the Respondent's view that the instant applicationlacked merit and ought to be dismissed.

8. I have carefully considered the application, therival submissions made by the parties and the authorities cited. It is not clear what the actual nature of the dispute between the parties was in the lower court since neither the pleadings nor the proceedings or judgment of the lower court wereavailed to this court. Butfrom what I can discern from the affidavits and the submissions filed herein,it would appear that the Applicant had bought some four acres of land in which the Respondent claimed some leasehold interest.

The Respondent sued the Applicant in Eldoret CMCC NO. 1255 of 2004 claiming refund of lease fees and ploughing charges. The claim resulted into the judgmentwhich awarded the Respondent Kshs. 11,200/- together with costs and interest which is the subject of the intended appeal.

9. Having summarized the parties respective cases, I now turn to a consideration of the issues raised in this application. I find that the first issue which this court must resolve is whether the Applicant's prayer for enlargement of time within which to file his intended appeal is merited because a determination of thisprayer is what will determine whether or not itwill be necessary for this court to deal with the other prayer for stay of execution pending the intended appeal.

10. That said, I choose to start by outlining the law governing the filing of appeals to the High Court

against decisions made by the subordinate courts. The law is contained in ***Section 79G of the Civil Procedure Act*** (*the Act*) which states as follows:-

"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".

11. It is clear from the above provisions of the law in particular the proviso to ***Section 79 G*** of the Act that this court has a very wide discretion in deciding whether to enlarge time for the filing of an intended appeal or to admit one filed out of time provided that the Applicantis able to demonstrate to the satisfaction of the court that he had good and sufficient cause for not filing the appeal on time.

See:***Peter Githiu Komu V Suleiman Ndua Kiarie & Three Others [2014]eKLR; Susan Chekatam Limaris V Susan Kipturu H.C (Eldoret) Misc Application No 77 of 2013 (Unreported).***

12. The Supreme Court in ***Nicholas Kiptoo Arap Korir Salat –v- IEBC & 7 Others, Supreme Court Application No. 16 of 2014*** laid down the principles which should guide courts inthe exercise of their discretion in deciding whether or not to enlarge time to file an appeal in a particular case. Those principles were enunciated as follows;

a. ***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;***
b. ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
c. ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
d. ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
e. ***Whether there will be any prejudice suffered by the respondents if the extension is granted;***
f. ***Whether the application has been brought without undue delay; and***
g. ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

13. Inorder for the court to apply the above principles to the present case, it is important to set out the reasons advanced by the Applicant to support his application. The Applicant simply blamed his erstwhile Advocates who he claimed failed to file his appeal within time as instructed and that he should not be punished for the mistakes of his advocates.

14. However, the Applicant failed to tell the court why he did not pursue his previous advocates to ensure that they filed his intended appeal within time or after discovering that they had closed shop, why he did not take the initiative of engaging another firm of advocates to pursue his intended appeal if he was really aggrieved by the decision of the lower court instead of just sitting back and waiting for his former advocates to engage another counsel on his behalf. This was his case not that of his advocates. The Applicant should have taken a personal interest in the pursuit of his intended appeal.

15. It is important to note that the judgment sought to be appealed against was delivered on 9th June 2010 and the Applicant only woke up to engage the current firm of advocates after he was threatened with execution on 24th July, 2012 slightly over two years later. Another two months lapsed before the instant application was filed. Again no explanation was given for this further delay.The Applicant's lack of diligence in this matter has been totally unexplained. This gives

credence to the Respondent's claim that the application may have been filed as an afterthought to defeat the execution process which had been commenced by the Respondent.

16. I have also considered the averment in the Respondent's Replying affidavit and submissions that on 20th December 2010, the parties entered into consent on costs payable by the Applicant to the Respondent following the decision of the lower court. This fact was not contested by the Applicant as no supplementary affidavit was filed to controvert this claim. It would therefore be reasonable to conclude that this was indeed the factual position. And if this was the position, one wonders why the Applicant would have consented to payment of costs in the suit in the lower court if he was as a matter of fact aggrieved by the court's decision and intended to appeal against it.

17. Regarding the submission that the Applicant should not be punished for the mistakes of his former advocates, with due respect, I do not find any substance in this argument because in the first place, the Applicants explanation points to inaction on the part of his previous advocates and not any action which amounted to a mistake. The celebrated dicta by Madan, J.A. in ***Murai v. Wainaina (No. 4) (1982) KLR 38*** to the effect that

> ***"A mistake is a mistake. It is not a less mistake because it is unfortunate slip. It is no less pardonable because it is by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but is ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate"*** is not applicable in this case. The Applicant herein only complained of inaction on the part of his advocates not errors of commission.

I wholly agree with Waki JA in ***Habo Agencies Limited v Wilfred Odhiambo Musingo Civil Appeal (Application) No. 124 of 2004 (2015) eKLR*** when in deciding an application similar to the one before the court stated as follows;-

> ***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel".***

The learned judge also adopted with approval the decision of the Court of Appeal in ***Rajesh Rughan vs Fifty Investments Ltd* & Another (2005) eKLR** where the court expressed itself thus;

> ***"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy"***
>
> I need not say more on this point.

18. In view of the foregoing, it is my finding that no good basis has been laid before me upon which I can exercise my discretion in favour of the Applicant. The Applicant in my view has failed todemonstrate that the delay in filing his intended appeal within time or in seeking extension of time to enable him file the said appeal was occasioned by good or sufficient cause. I find that the delay of over two years which is the period it took for the Applicant to file the instant application is inordinate and inexcusable. In my view, it would be unjust and prejudicial to the Respondent to allow the Applicant to benefit from his own indolence. Consequently, I decline the Applicant's prayer for enlargement of time to lodge his intended appeal.

19. Having declined to grant prayer (c) of the application, the prayer seeking stay of execution pending determination of the Applicant's intended appeal automatically collapses since it was

predicated upon the success of the prayer for enlargement of time.

20. For all the foregoing reasons, I have come to the conclusion that the application dated 29th September, 2012 lacks merit and it is hereby dismissed with costs to the Respondent.

Orders accordingly.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17th DAY OF FEBRUARY 2015.

In the presence of:-

Mr. Mathai for Gicheru and Company Advocates for the Applicant.

Mr. Paul Ekitela Court Clerk.

No Appearance for the Respondent.