



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 17 'B' OF 2008 (O.S)

HUDSON ONGECHI MECHA.....PLAINTIFF/RESPONDENT

VERSUS

NELSON NYABUTO MANGERA.....1ST DEFENDANT/APPLICANT

JOSEPH OBADIAH.....2ND DEFENDANT/APPLICANT

VITALIS MOCHAMA.....3RD DEFENDANT/APPLICANT

NYANGARESI MANGERA.....4TH DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. What is before me for determination is the Defendant's Notice of Motion dated 29th October, 2021 seeking the following orders:

a) Spent

b) That this Honourable Court be pleased to allow the Applicants leave to file a Notice of Appeal and appeal against the decree and order of this Honourable Court in HCCC No. 17 of 2008 issued on 1st October 2012 and 5th February, 2018 out of time, which proceedings were ex-parte against the estate of a deceased person.

c) That the Honourable Court be pleased to order a stay of execution of the decree and warrant of arrest against the Applicants issued by this court on the 11th August, 2021 pending the hearing and determination of the intended appeal.

d) That the costs of this application be in the cause.

2. The application is anchored on the grounds stated on the face of the Notice of Motion and the Supporting Affidavit of Nelson Nyabuto Mangera sworn on the 2nd day of November, 2021.

3. Among the grounds raised by the Applicant are that the court was misled into entertaining a claim of Adverse Possession against unregistered Defendants who did not have capacity to be sued. The Applicant also claims that the Defendants were not served and that the court did not have jurisdiction as the dispute involves land that belonged to their deceased parents and is therefore a family matter.

4. The application is contested through the Plaintiff's Replying Affidavit sworn on the 14th January, 2022 in which he contends that the application is devoid of merit whatsoever as the Defendants were served with the pleading and Summons to enter appearance and they were notified of the pleadings, but they chose to ignore the court process.

5. He further depones that the Defendants were served with the Decree but they failed to comply prompting the Plaintiff to move the court for execution of the same. He maintains that the Defendants were notified of the visit by the Land Registrar and Surveyor for purposes of implementing the court decree by a letter dated 13th November, 2013 and they cannot feign ignorance of the proceedings. He accuses the Applicant of indolence and lethargy and states that the reasons given in the Supporting Affidavit are not sufficient to explain the delay in filing the appeal. He asserts that the Applicants were the registered owners of the suit property and the claim of Adverse Possession was properly filed against them and further that the court was satisfied with the evidence that was presented before it.

6. The Respondent avers that the Applicant has not demonstrated that there is an appeal nor has he furnished security for costs to warrant the prayer for stay being granted.

7. In response to the Replying Affidavit, the Applicant filed a Supplementary Affidavit albeit without leave of the court, sworn on the 20th November, 2021 in which he reiterates the contents of his earlier affidavit and makes spurious allegations against counsel for the Plaintiff and the court. Learned counsel for the Plaintiff successfully moved the court to have paragraphs 11-21 of the said affidavit struck out for being scandalous and abusive.

8. The application was disposed of by way of written submissions and both parties filed their submissions.

ISSUES FOR DETERMINATION

9. The issues for determination are twofold:

i. Whether the court should grant the Applicant an extension of time to file an appeal against the judgement and decree issued on 1st October, 2012.

ii. Whether a stay of execution should be granted pending the intended appeal.

ANALYSIS AND DETERMINATION

10. Section 7 of the Appellate Jurisdiction Act (Cap 9) of the Laws of Kenya provides as follows:

Section 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

11. As can be gleaned from the above-mentioned provision of the law and as was held in the cases of **Kenya Airports Authority & Another vs Timothy Nduvi Mutungi, Court of Appeal, Civil Application NO. NAI 165 of 2013 (UR 113/2013) (2014) eKLR** and **Loise Chemutai Ngurule & Another v Winfred Leshwari Kimung'en & 2 Others [2015] eKLR**, both the High Court and the Court of Appeal are vested with the power to extend time.

12. The court's discretion to enlarge time is elaborately discussed in the case of the **County Executive of Kisumu v County Government of Kisumu and 8 Others [2017] eKLR** where the Supreme Court of Kenya held as follows:

*“[23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the **Nicholas Salat case** to which all the parties herein have relied upon. The Court delineated the following as*

“the under-lying principles that a Court should consider in exercise of 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the 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.”

13. In the instant case, the Applicant contends that he was never served with the pleadings, Summons to enter appearance or decree and that he only learnt of the proceedings herein when he was arrested and brought to court on 18th October 2021 pursuant to a Notice to Show Cause why he should not be committed to civil jail.

14. However, from the court record, there are affidavits of service indicating that the Applicant and the other Defendants were served with Summons to enter appearance, the pleadings as well as the Notice of Taxation and Notice to Show Cause. He was also served with the Surveyor's letter dated 13th November, 2013 indicating that the Surveyor would visit the suit property for purposes of implementing the court order. It is therefore not true that the Defendants only learnt of this suit in October 2021.

15. Judgment herein having been entered way back in May 2011, the Applicant has not explained why they failed to file their Notice of Appeal in good time. The period of delay is inordinate and in view of the fact that the judgment which was delivered more than ten years ago has since been implemented and a title deed issued in the name of the Respondent, allowing the Defendants to file an appeal at this late stage would be prejudicial to the Respondent. In the case of **Chairman Kenya National Union of Teachers & Another v Henry Nyangala & 2 Others (2018) eKLR**, the Supreme Court held that a delay of one year and three months was inordinate and that the applicants who sought leave to appeal out of time were guilty of laches.

16. I must point out that in this application, I am not required to delve into the merits of the intended appeal as I cannot sit on appeal against a judgment of a judge of concurrent jurisdiction. I also take great exception to the unsubstantiated claims leveled against the court and counsel for the Respondents by the Applicant in his affidavit and submissions. All that the Applicant was required to do was to satisfy the court that the Defendants have good reasons why they did not file their Notice of Appeal in good time. Accusing the court of siding with the Respondent does not aid their case.

17. All in all, the Applicant has not met the principles on extension of time laid down in the case of **Nicholas Salat v Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR** and I am therefore disinclined to exercise my discretion in his favour.

18. Having refused to grant extension of time to file an appeal, there would be no basis for granting the application for stay of execution pending appeal. In any event the Applicant has not met the conditions laid down in Order 42 Rule 6 of the Civil Procedure Rules which are basically that one must demonstrate that he stands to suffer substantial loss, the application must be filed without undue delay and the Applicant must be willing to furnish security for costs.

19. The upshot is that the application lacks merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF FEBRUARY, 2022.

J. M ONYANGO

JUDGE