



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. E002 OF 2021

GAKUYA KIBATHI (Being the administrator of the

estate of JOSEPH KIBATHI KARIUKI.....APPLICANT

VERSUS

NICHOLAS KARANI GICHOHI.....1ST RESPONDENT

MATHEW NDAU KIAMBATI.....2NDRESPONDENT

RULING

What is before the court is the Applicant's Notice of Motion application dated 18th January 2021 seeking the following orders;

1. That this honourable court be pleased to stay the entire judgement and consequential orders of Hon. P. NGARE GESORA (MR) made on 30th April 2020 in Milimani Commercial Court CMCC No. 4922 of 2019 pending the hearing and determination of the intended appeal against the same.
2. That this honourable court be pleased to grant the Applicant leave to appeal out of time against the entire judgement and consequential orders of Hon. P. NGARE GESORA (MR) made on 30th April 2020 in Milimani Commercial Court CMCC No. 4922 of 2019(hereinafter referred to as "the lower court").
3. That this honourable Court be pleased to allow the annexed draft memorandum of appeal to be deemed as being properly filed upon the assessment and the payment of the requisite fees within the time the court deems appropriate.
4. Costs be provided for.
5. Any other order or relief that this Honourable Court deems fit and just to grant in the circumstances.

The application has been brought on the grounds set out on the face thereof and on the affidavit of the Applicant sworn on 18th February 2021. The Applicant has averred that he was sued in the lower as an administrator of the estate of Joseph Kibathi Kariuki, deceased (hereinafter referred to as "the deceased"). The Applicant averred that in the judgment of the lower court, the court found that the 2nd Respondent unlawfully and fraudulently transferred to the deceased a portion of NAIROBI/BLOCK/ 126/32 (hereinafter referred to as "the suit property") measuring 2.7 acres which the 2nd Respondent held in trust for the 1st Respondent. The Applicant has averred that in arriving at the said decision, the lower court failed to consider the fact that the Applicant was a bona fide purchaser of the suit property for value.

The Applicant has averred that he applied for an order of stay of execution of the said judgment in the lower court on 22nd May 2020 and was granted a stay on 25th September 2020. The Applicant has averred that it was however until 6th January 2021 that he obtained certified copies of the proceedings, judgment and ruling on the stay application from the lower court. The Applicant has averred that the delay in the filing of the appeal against the decision of the lower court has not been occasioned by any fault on his part. The Applicant has averred that the delay was occasioned by the effects of COVID 19 pandemic that hindered the expeditious disposal of the stay application that took approximately six months to be determined. The Applicant has averred that in addition to the delay in the disposal of the stay application, certified copies of the judgement and proceedings of the lower court also took approximately eight months to be ready and accessible to the Applicant.

The Applicant has averred that his Advocates on record had their hands tied for the period that the application for stay was pending in the lower court. The Applicant has averred that the Applicant could not file the memorandum of appeal before this Court since his advocates on record had not obtained leave pursuant to Order 9 rule 9 of the Civil Procedure Rules to come on record for the Applicant who was represented by another firm of advocates at the time of the delivery of judgement. The Applicant has averred that the said leave was not

granted until 25th September 2020 when the ruling on stay application was delivered. The Applicant has averred that he is apprehensive that if the orders sought are not granted, the 1st Respondent may proceed with the execution of the said decree of the lower court since the stay order that was granted by the lower court has since expired as it was for 30 days only.

The application is opposed by 1st Respondent through a replying affidavit sworn on 11th February 2021. The 1st Respondent has contended that the lower court considered the position of the Applicant as a purchaser of the suit property and rightly found that the title held by the Applicant was tainted with fraud. The 1st Respondent has averred that the Applicant was granted 30 days stay by the lower court that lapsed on 24th October 2020 without the Applicant taking any steps towards the prosecution of the intended appeal. The 1st Respondent has averred that there is no reasonable explanation why the Applicant failed to file an appeal for over 9 months from the time judgment of the lower court was delivered. The 1st Respondent has contended that the Applicant had a typed copy of the judgment as at the time he filed the application for stay in the lower court. The 1st Respondent has averred that the Applicant did not need any other document to file an appeal to this court.

The application was argued by way of written submissions. The Applicant filed his submissions dated 9th July 2021 while the 1st Respondent filed submissions dated 21st July 2021. The Applicant has submitted that he has made out a case for the grant of the orders sought in his application. The Applicant has submitted further that the 1st Respondent has not demonstrated the manner in which the orders sought in the application will prejudice him if granted. The Applicant has cited a number of authorities in support of his submissions. In reply, the 1st Respondent has submitted that the Applicant has not given a good explanation for the delay in the filing the intended appeal which delay the 1st Respondent submitted is inordinate. In support of his submission on this point, the 1st Respondent cited Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR.

Determination:

Section 79G of the Civil Procedure Act Cap. 21 Laws of Kenya provides as follows:

“79G. 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.”

Order 42 Rule 6 provides as follows:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.”

The Applicant’s application has two limbs; the first is seeking extension of time within which to file an appeal and the second is seeking a stay of execution pending the hearing and determination of the intended appeal. Whether to grant the orders sought or not is at the discretion of the court. In Bagajo v Christian Children Fund [2004] 2 KLR 73 the court set out the following as the factors to be considered in an application for extension of time;

- a. Length of the delay.
- b. The explanation for that delay.
- c. Whether the appeal is arguable.
- d. Any prejudice that may be caused to the respondent if the application is granted.
- e. The requirements of justice in the case also bearing in mind the importance of the case.

In Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others [2014] eKLR, the court set out the following as the principles that should guide the court in applications for extension of time within which to file an appeal;

- a. Such extension is not a right but only an equitable remedy available to a deserving party at the court's discretion.
- b. A party seeking extension must lay a basis for the same to the satisfaction of the court.
- c. Where there is delay, the same must be explained to the satisfaction of the court.
- d. Whether any prejudice will be caused to the respondents if extension is allowed.
- e. The circumstances of each case must be considered.

I am satisfied that the Applicant has made out a case for the grant of the order of extension of time sought. Soon after judgment was entered against him on 20th May 2020, the Applicant changed advocates and filed an application in the lower court on 22nd May 2020 for stay of execution pending appeal to this court. He also sought leave to change advocates. The ruling on the application was not delivered by the lower court until 25th September 2020 by which date the time within which the appeal was to be filed had lapsed. I have also noted that the certified copies of the proceedings and judgment were not supplied to the Applicant until 6th January 2021 again after the lapse of the time within which the appeal was to be filed. I am satisfied that the Applicant has explained the delay in the filing of the appeal against the judgment of the lower court. I am also satisfied that the intended appeal is arguable. The 1st Respondent who opposed the application has not persuaded me that he stands to suffer any prejudice if the extension of time sought by the Applicant is granted. Due to the foregoing, I am inclined to exercise my discretion in favour of granting the extension of time sought.

The limb of the application seeking stay of execution was brought under Order 42 Rule 6 of the Civil Procedure Rules that I have reproduced above. In Kenya Shell Limited v Karuga (1982 – 1988) I KAR 1018 the court stated that:

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

I am satisfied that the Applicant is likely to suffer substantial loss if the stay sought is not granted. It is not disputed that the Applicant is the registered owner of the suit property which he claims to have subdivided and sold portions thereof to third parties. In the judgment of the lower court execution of which is sought to be stayed, the court has declared the 1st Respondent to be the lawful owner of a portion of the suit property measuring 2.7 acres and has ordered the Applicant to transfer the same to the 1st Respondent. What this means is that unless the stay sought is granted, the Applicant is likely to lose a portion of the suit property before the hearing of his appeal against the decision of the lower court. Once the said portion of the suit property is transferred to the 1st Respondent pursuant to the said judgment of the lower court, as the owner of the said portion of the suit property, nothing would stop the 1st Respondent from disposing of the property while the intended appeal is pending. I am in agreement with the 1st Respondent that the application for stay has been brought after delay but the delay has been explained. I am satisfied that the Applicant has satisfied the conditions for granting an order for stay pending appeal.

In conclusion, it is my finding that the Applicant's application dated 18th January 2021 has merit. The application is allowed on the following terms;

1. Pending the filing, hearing and determination of the intended appeal by the Applicant to this court, execution of the judgment delivered on 30th April 2020 by Hon. P. Ngare Gesora (Mr.) CM in Milimani Commercial Court Chief Magistrate's Court Civil Case No. 4922 of 2019 and consequential orders are stayed.
2. Pending the filing, hearing and determination of the intended appeal by the Applicant to this court, there shall be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as NAIROBI /BLOCK126 /32 so as to preserve the property for the benefit of both parties.
3. Pending the filing, hearing and determination of the intended appeal by the Applicant to this court, there shall be an injunction restraining the Applicant from subdividing, selling or carrying out any other or further developments on all that parcel of land known as NAIROBI /BLOCK126 /32 so as to preserve the property for the benefit of both parties.
4. The Applicant shall deposit in an interest earning bank account in the joint names of the advocates for the Applicant and the advocates for the 1st Respondent a sum of Kshs. 500,000/= as security within forty-five (45) days from the date hereof in default of which the stay and the order of inhibition granted herein shall lapse automatically without any further reference to the court.
5. The time for filing the intended appeal is extended up to and including 28th February 2022.
6. The appeal shall be filed in a separate appeal file and not in this file.
7. Each party shall bear its own costs of the application.

DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022

S. OKONG'O

JUDGE

RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM IN THE PRESENCE OF:

MS. ODONGO FOR THE APPLICANT

N/A FOR THE 1ST RESPONDENT

N/A FOR THE 2ND RESPONDENT

MS. C.NYOKABI-COURT ASSISTANT