



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. APPLICATION NO. 4. OF 2015

OLIVIA WAMUHU KINYANJUI.....APPELLANT/APPLICANT

VERSUS

MARGARET NJERI NDIRANGU (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE

LATE PAUL NDIRANGU MUNGAI).....RESPONDENT

RULING

1. The applicant by her Notice of Motion dated 9th January 2015 and filed on even date seeks the following orders:

1. spent

2. Spent

3. spent

4. That this Honourable Court be pleased to stay the execution of the order arising out of the Ruling delivered on the 29th September 2014 by Hon.V. Ochando in **NYAHURURU SPMCC NO.73 of 2014** pending the hearing and determinations of the appeal to be filed.

5. That this Honourable Court be pleased to grant the Appellant/Applicant leave to file an appeal out of time.

6. That the cost of this application be in the Appeal.

2. The application is brought under the provisions of **Order 42 Rule 6 (1), (2) (3)** and **Order 50 Rule 6 of the Civil Procedure Rules and Section 79G of the Act**. It is supported by the affidavit of the applicant sworn on the 9th January 2015. It is opposed. The Respondent **Margaret Njeri Ndirangu** filed two replying affidavits and a supplementary affidavit in opposition.

3. **The Applicant's submissions** are that the ruling in **Nyahururu SPMCC No. 73 of 2014** was delivered on the 29th September 2014 in the absence of the advocates and their clients and that they only came to know of the said ruling later, and being dissatisfied with the same, instructed her advocates to lodge an appeal to this court. It is stated that following the said ruling, the Respondent, being the administrator of the estate of the late Paul Ndirangu Mungai moved to subdivide the property with a view to disposing off the same being **Parcel No. Nyandarua/Olarangwa/3793** subject matter of the lower court case, which actions, it is stated ,

would render the intended appeal negatory.

The applicant deposes that he is ready to abide by any conditions of stay of execution as the court may impose. On the 19th January 2015, the court granted a temporary stay of execution of the order pending interpartes hearing of the application.

4. The Respondent in opposing the application does not deny that the subject ruling was delivered in the parties absence. He however states that the said order of 29th September 2014 was a dismissal order of the applicant's application for an order of injunction and that the said order is incapable of being enforced or executed and as such no stay of execution can issue.

5. As at 30th January, 2015, the Respondent deposed that she had already subdivided the land subject of these proceeding, and Land Control Board consent for the subdivision had been obtained even before the applicant came to court under this application.

In her supplementary affidavit, the Respondent exhibited the Land Control Board consent issued on the 16th December 2014 by the **Kinangop Land Control Board** and a **Mutation Form** showing the various Sub-divisions of the suit land. It is stated that as subdivision was completed, **Title No. Nyandarua/Ol Arangwa/3793** ceased to exist. The respondent urged the court to find that the applicants application is misconceived and bad in law.

6. I have considered submission by both counsel together with the affidavit evidence on record for and against the application.

To go back to the Ruling of the trial court dated 29th September 2014, it stated:

“(1) that the Applicant's application for injunction fails and the orders sought are hereby denied.”

The ruling arose from the applicants application to the trial court dated 14th March 2014 where she sought in prayer:

(3) that pending the hearing and determination of this suit, the court be pleased to issue a temporary injunction restraining the defendant by herself, her agents or servants from alienating, subdividing and/or disposing off Parcel of Land known as Nyandarua /Olarangwa/3793.

7. There is no dispute that the ruling of 29th September, 2014 was delivered in the absence of parties and their advocates.

This application was filed on the 9th January 2015, slightly over three months after delivery of the said ruling. The applicant has not told the court when she came to learn of the delivery of the ruling, and what actions she took between then and the 9th January 2015 when she approached this court. The Respondent on this issue submitted that the intended appeal will serve no purpose even if allowed to be filed out of time, as the suit property is already subdivided, and therefore application is overtaken by events.

8. In the case **Asma Ali Mohamed -vs- Fatma Mwinyi Juma (2014) KLR** the court held that lapses in form and procedures which do not go into the jurisdiction of the court, or cause prejudice or miscarriage of justice to the opposite party ought not be allowed to deny a party a chance to be heard. It is this prayer that was denied. Immediately thereafter, on the 16th December 2014, the Respondent obtained a consent to subdivide the said land parcel and the process was done and finalised as demonstrated by the mutation where subdivisions were created, and by implication, the title is now non existent. That having been done, it was submitted, there is nothing to stay.

9. Coming to the prayer for leave to file appeal out of time, no grounds were advanced as to why the intended appeal was not filed within the stipulated period. The decision of a court to extend time or not, to file an appeal out of time is discretionary which discretion ought to be exercised in a principled manner with reason and justice by weighing and balancing the rival interests and all relevant factors before it.

Timelines are made to promote expeditious disposal of cases and a party should not be denied adjudication of his claim on merits because of procedural defaults unless they cause prejudice to the opposite party that cannot be compensated with costs. See **Leo Sila Mutiso -vs- rose Hellen Wangari – NAI C.A 225 of 1997**. The applicant took over 90 days to bring this application. I agree with the Respondent that the Applicant and its advocates should have been more proactive and vigilant in following up the delivery of the ruling. In his submissions, the applicant did not urge the court, or even attempt to explain the inordinate delay.

In **Court of Appeal Civil Application No NAI 98 of 2013 – Aviation Cargo Support Limited -vs- St. Mark Freight Services Limited** an application for leave to file appeal out of time was denied on grounds that the applicant did not explain the inordinate delay of over six months to lodge the application. The applicant herein has neither told the court whether she has applied for the lower court proceedings or not. The court cannot be left to guess on what steps the applicant may have taken so as to persuade the court to exercise its discretion in its favour.

10. **Section 1A, 1B, and 3A of the Procedure Act** does not facilitate granting of orders seeking leave to extend time to file appeal out of time where the applicant has not shown to the satisfaction of the court that the delay is not inordinate or it has been sufficiently explained. See case of **Ivita -vs- Kyumbu (1984) KLR and Jaribu Credit Traders Ltd Case HCCC NO. 465 of 2009** where the court held that prolonged delay to taken an action is inexcusable unless the delay is sufficiently explained.

Further, the court finds that it was the duty of the applicant to advise their advocates to follow up with the court's ruling instead of waiting for them to discover, too late, when the property had already been subdivided. The applicant is guilty of inordinate delay for which no explanation has been given.

In lits totality, the courts finds no merit at all in the application for leave to appeal out of time. As the stay of execution is hangered on the grant of leave to appeal out of time, it goes without saying that once the court disallows leave to appeal out of time, then the prayer for stay of execution must be denied too as it would have no legal legs to stand on.

In light of the above, the Notice of motion application dated 9th January 2015 is dismissed with costs to the respondents.

Dated, signed and delivered in open court this 19th day of November 2015.

JANET MULWA

JUDGE