



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELCA NO 46 OF 2020

JOHN NDUNGU MWAURA.....APPELLANT

VERSUS

DOMINIC NJUGUNA GATHU.....RESPONDENT

RULING

The application dated the 25/5/2021

1. The Applicant's Notice of Motion dated the 25/5/2021 and brought under Section 79G of the Civil Procedure Act and Order 42 rule 12, Order 51 Rule 1 of the Civil Procedure Rules seeks orders that the Memorandum of Appeal be struck out.
2. The Application is premised on the grounds that no steps have been taken to prosecute the appeal; the purported appeal was filed out of time without leave and that the appeal is mischievous, frivolous vexatious and an abuse of the process of the Court.
3. In support of the Application, the Applicant swore a Supporting Affidavit on the 25/5/2021 and deponed that the judgment of the lower Court was delivered on the 7/9/2020 and not 7/10/2020 as alleged by the Respondent; the memorandum of appeal was filed and served out of time; that the Respondent has failed to take essential steps in lodging the appeal such as serving the memorandum of appeal and not filing the record of appeal within the prescribed time.
4. In opposing the Application, the Respondent vide his Replying Affidavit filed on the 29/6/2021 stated that upon delivery of the judgment he instructed his advocates, the firm of Okwema & Co Advocates to file the appeal immediately. That he later learnt that the said firm filed the memorandum of appeal in person and did not indicate that it was filed under the said firm on record and instead erroneously indicated that the judgement was delivered on the 7/10/2020 instead of the 7/9/2020. That he later appointed another law firm to come on record and represent him. He contended that the mistake of his previous advocates should not be visited on him.
5. Both parties filed written submissions which I have read and considered. The key issue for determination is whether the application is merited.
6. Section 79G of the Civil Procedure Act 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”.

7. The Judgement of the trial Court having been delivered on the 7/9/2020, any appeal from any aggrieved party ought to be have been filed within 30 days, that is to say the 7/10/2020. In this case the memorandum of appeal was filed on the 2/11/2020, some 25 days out of time. It is therefore clear that the appeal was filed out of time and without the leave of the Court.
8. Section 79G Civil Procedure Act provides for the timeline in which an appeal must be filed in this Court. It also contains a proviso 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 on time.
9. The case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** which is the *locus classicus*, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted.”

10. There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible. In Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

11. The Respondent has urged this Court to dismiss the application and grant him the chance to be heard on his appeal. The explanation given by the Respondent is that he instructed his erstwhile lawyers to lodge the appeal. I have seen the letter dated the 23/9/2020 by the law firm of Okemwa & Company Advocates addressed to the Executive Officer, Gatundu Law Courts requesting for typed proceedings and the certified ruling delivered on the 7/9/2002 for purposes of filing of the appeal. It would appear that the said memorandum of appeal was not filed until the 2/11/2020. It is contended by the Respondent that the delay in filing the appeal was occasioned by his previous advocates and that the same should not be visited on him. It is trite that an advocate should act swiftly to safeguard the rights of his client as was held in the case of Eliud Buku Thuku v Beatrice Wambui Mwangi [2013] eKLR where the Court stated thus:

“The Applicant was represented by Counsel at the High Court when judgment was delivered on 23rd September, 2011. As was stated by Tunoi, JA. (as he then was) in Njoka Muriu & Another vs Evan Githinji Muriu & Another, Civil App. No. NAI 356 of 2003), a notice of appeal is a simply one page formal piece of paper whose lodgment is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client’s interest.”

12. That said I find that the delay in filing the appeal was 25 days and in my view the delay has been explained and the same should not be a ground to disentitle the Respondent the right to ventilate his appeal.

13. This Court has also been invited to strike out the memorandum of appeal on grounds that the Respondent has not complied with the provisions of Order 42 rules 11-13 Civil Procedure Rules.

14. Order 42 rules 11 -13 Civil Procedure Rules, Revised 2020 provides as follows;

“11.Directions under section 79B [Order 42, rule 11.]

A judge of the High Court shall, within thirty days of the filing of an appeal under section 79B of the Act, peruse the appeal and give directions in accordance with the provisions of section 79B of the Act.

12. Service of memorandum [Order 42, rule 12.]

Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every Respondent within seven days of receipt of the notice from the registrar.

13. Directions before hearing [Order 42, rule 13.]

(1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.

(2) Any objection to the jurisdiction of the appellate Court shall be raised before the judge before he gives directions under this rule.

(3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the Court below shall be put before the appellate Court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the Court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the

hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

15. The reason advanced by the Respondent for failing to comply is that there exists an application seeking among other things leave to comply with Order 9 rule 9 of the Civil Procedure Rules. The Applicant contends that the notice of motion dated the 23/2/2021 notwithstanding the Respondent has demonstrated delay in prosecuting the same.

16. The provisions governing dismissal of appeal are provided for under Order 42 rule 35 (1) and (2) CPR as follows;

“Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the Appellant, the Respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

17. It is to be noted that no directions have been given in respect to the appeal to afford the Appellant to proceed as provided under Order 35(1) of the CPR.

18. In the end the Application is for dismissal. I make no orders as to costs.

The application dated the 23/2/2021

19. This Application is brought by the Appellant/Applicant seeking among other things, leave for the firm of Maina Wairimu & Associates to come on record on behalf of the Applicant; stay of execution of the judgement delivered on the 7/10/2020.

20. The Application is supported by the grounds annexed thereto and the Supporting Affidavit of Applicant sworn on the 23/2/2021 where he deponed that the appeal raises triable issues with a high chance of success; denying stay of execution will render the appeal nugatory and the Respondent shall interfere with the suit land; and that he is ready and willing to abide by any condition imposed by the Court.

21. Despite service of the Application on the Respondent/Applicant and the directions of the Court on 29/6/2021 that the Application dated the 23/2/2021 and that of the 25/5/2021 be canvassed together by way of written submissions, I find that the Respondent has not filed any response to the Application. I have anxiously examined the record and I find no opposition to the Application. The same is therefore not opposed.

22. It is granted in terms of prayer 2 and 4 of the Application.

23. The Appellant/Applicant is ordered to fix the appeal for directions within the next 30 days in default the appeal shall stand dismissed with no further orders from this Court.

24. I make no orders as to costs.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF MARCH 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

DELIVERED ONLINE IN THE PRESENCE OF;

APPELLANT / RESPONDENT – MS MUMBI HOLDING BRIEF FOR MAINA

RESPONDENT/APPLICANT – PRESENT IN PERSON

