



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC MISC. APPLICATION NO. E013 OF 2021

PAUL MAINA MBURU APPLICANT

-VERSUS-

JOSEPH MAINA WANDIMBE *duly appointed by*

MARGARET WANGECHI KARICHO RESPONDENT

RULING

1. By a Notice of Motion dated 20th September 2021, Paul Maina Mburu (*the Applicant*) prays for orders:

3. That this Honourable Court grants the Applicant leave to file (an) Appeal against the Judgment in Nyeri CM ELC No. 7 of 2020 out of time;

4. That this Honourable Court be pleased to order a stay of execution of (the) Judgment and decree in Nyeri CM ELC No. 7 of 2020 pending the hearing and determination of the intended Appeal; and

5. That the Costs of the application be provided for.

2. The application which is supported by an Affidavit sworn by the Applicant is premised on the grounds that:

(a) The trial Court did state on 31st May, 2021 that it would deliver Judgment “electronically” on 9th June, 2021;

(b) The Applicant’s Counsel genuinely believed that the Judgment would be delivered via electronic mail. Instead, the Judgment was delivered against the Defendant in his absence “on the online platform” on 9th June, 2021 and without notice to his advocate as to the mode of delivery;

(c) The time limited for the Defendant to file an appeal has lapsed. If the Judgment was delivered via email on 9th June, 2021, the Applicant would have timeously filed his appeal against the said Judgment.

(d) There is an impending threat of execution of the Judgment and decree against the Applicant which execution will render the intended appeal nugatory hereby occasioning substantial loss to the Applicant;

(e) The grant of the orders prayed for will not occasion prejudice upon the Respondent as the application only seeks to advance the interest of justice by having an aggrieved party heard on its rights to appeal;

(f) The Applicant is ready to comply with the conditions set by the Court for that opportunity to be heard on appeal; and

(g) This application has been brought without undue delay and should be allowed in the interest of justice.

3. The Respondent is opposed to the application. In a Replying Affidavit sworn by her duly appointed attorney Joseph Maina Wandimbe and filed herein on 10th November, 2021, the Respondent avers that the Judgment date was given in the presence of both parties and that the non-attendance of the Defendant to the online Platform on the date of the Judgment has not been explained.

4. The Respondent further avers that no justifiable reason has been raised in the application to warrant the orders sought as the counsel for

the Applicant was aware of the forum used by the Court in handling matters virtually.

5. The Respondent further avers that regardless of the Applicant's non-attendance to Court on the date of the Judgment, they were aware of the outcome having been informed about the same by the Respondent's Advocate on record.

6. I have carefully perused through the application as well as the response thereto. I have similarly perused through the rival submissions placed before me by the Learned Advocates for the parties.

7. By the application before me, the Applicant prays for extension of time to file an appeal out of time in respect of the Judgment delivered in Nyeri CM ELC No. 7 of 2020 as delivered on 9th June, 2021. In addition, the Applicant prays for a stay of execution of the Judgment and decree emanating from the said case.

8. In respect of an appeal from the subordinate Court to this Court **Section 79 G of the Civil Procedure Act** provides:

“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 delivering 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.”

9. Considering the principles that a Court ought to consider while exercising its discretion to extend time in **Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR**, the Supreme Court of Kenya expressed itself as follows:

“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 by 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 respondent 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.”

10. In the matter before me, the Applicant asserts that he was unaware of the fact that the Judgment had been delivered on 9th June, 2021 as the Court had stated that the Judgment would be delivered “electronically.” According to the Applicant, the word “electronically” was interpreted to him by his advocate to mean that the Judgment would be delivered via electronic mail and not through video conferencing as was the mode through which the Judgment was eventually delivered.

11. While I did not think that that was a good ground to justify the filing of this application some three months after the Judgment was delivered, this Court takes note that there was some modicum of confusion brought about by the now common use of technology during Court proceedings following the advent of the Covid-19 Global pandemic. It was not until recently that the Court came up with regulations for use during such hearings.

12. From a copy of emails annexed to the Applicant's Supporting Affidavit, it would appear they were under the impression that the Judgment would be delivered to them via electronic email and that it was not until 13th September, 2021 when the Respondents served them with a Certificate of Costs that they learnt that the Judgment had been delivered virtually. I am therefore persuaded to grant the Applicant the benefit of doubt and do grant them leave to lodge an appeal out of time.

13. On the question of stay of execution pending appeal, **Order 42 Rule 6(2) of the Civil Procedure Rules** provides as follows:

“No order for stay of execution shall be made under sub rule (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.”

14. According to the Applicant, he stands to suffer substantial loss as the Respondent is keen on dispossessing him of the subject portion of

land currently in the Respondent's occupation. It is his case that unless the orders are granted the Respondent is likely to destroy his buildings on the land.

15. From a perusal of the proceedings annexed to the Applicant's Supporting Affidavit, it is apparent that his claim is in regard to a parcel of land that was sold by the Applicant's mother the late Nduta Mburu Kukiara in the year 1990. Sometime in the year 2019, the Respondent is said to have realized that there was a discrepancy on the parcels of land sold and that retained by the Applicant's mother during the sale.

16. It was apparent from a perusal of the proceedings that the Applicant has been in occupation of the disputed portion of the suit land and that following the Judgment, he now stands to be evicted from the same. Such an eviction prior to the hearing of the Appeal would in my view result to substantial loss to the applicant.

17. I am accordingly satisfied that there is need to preserve the suit property pending the hearing of the Appeal. As at the time of filing this present application the Respondent had obtained a certificate of costs against the Applicant in the sum of Kshs.153,875.

18. In the circumstances herein, I hereby grant a stay of execution of the decree dated 9th June, 2021 on condition that the Applicant deposits the said sum of Kshs.153,875/- in Court within 45 days from the date hereof. In default the application herein dated 20th September, 2021 shall stand dismissed with costs.

19. The Applicant has 14 days from today to file and serve a Memorandum of Appeal.

20. The costs of this application shall otherwise be in the Appeal.

Ruling dated, signed and delivered in open Court at Nyeri this 24th day of March, 2022.

In the presence of:

Mr. Ombongi for the Plaintiff/Respondent

Mr. Mwangi Muthoni for the Applicant

Court assistant – Kendi

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J. O. Olola

JUDGE