



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KITALE

ELC MISC. APPL. NO. 25 OF 2021

(Being an application for leave to appeal out of time from the Decision of Hon. C. M. Kesse (Senior Resident Magistrate) delivered on 28/05/2019)

DINA NAKHUMICHA WAFULA (Suing as the legal and personal representative of the estate of the late PATRICK MAPANGO WAFULA.....)APPLICANT

VERSUS

SIMIYU WEBULE.....1ST RESPONDENT

FRANK ANDIVA BUTICHI.....2ND RESPONDENT

RULING

The Application

1. The Applicant moved the Court by the instant Motion on Notice dated **07/12/2021** and filed on **14/12/2021**. It invokes **Sections 3, 3A, 3B, 63 (e), 79G and 95** of the **Civil Procedure Act** and **Order 50 Rule 5** of the **Civil Procedure Rules**. It seeks the following reliefs:

a) ...spent.

b) THAT the Applicant be granted leave to appeal from the decision of HON. C. M. KESSE SRM in KITALE CMC SUIT NO. 158 OF 1993 delivered on 28/05/2019.

c) THAT costs of the Application be provided for.

2. The Application was supported by the grounds on the face of it and further Affidavit of one **Dinah Nakhumicha Wafula**. The Applicant contended that the deceased, **Patrick Mapango Wafula**, was embroiled in a land dispute pitting him and the Respondents over land parcel number **KWANZA/KOSPRIN/111** the subject matter in **KITALE CMCC NO. 158** of **1993**. She stated that in the suit, she testified on his behalf. She averred that neither she nor her former learned counsel was notified of the judgment date. In support of this assertion, the Application annexed and marked as **DWN 3 'a'** and **'b'**, copies of the proceedings and judgment in the lower Court matter, as evidence that her learned counsel and herself were absent on the date of judgment.

3. The Applicant stated that she was only made aware of the judgment in **October 2020** when she was served with a Notice to Show Cause annexed **DWN 2**. She further averred that she was never aware of the assessment of Respondents' Bill of costs. She contended that she would have sought more time to settle the taxed Bill since she lacked sustenance. She lamented that her affliction, coupled with the **COVID-19** Pandemic, rendered her unable to source for funds.

4. In fortification of statement on her ill health, the Applicant annexed **DWN 4**, her medical report showing Stage **Three (3)** Hypertension diagnosis. She narrated that she was arrested on **13/5/2021** and committed to civil jail for failing to make good the judgment sum. She was later released on **3/6/2021** when she deposited the sum of **Kshs. 100,000.00** and was left with a balance of **Kshs. 82,754.00** to be paid within **sixty (60)** days thereafter. In support, the Applicant annexed **DNW 5 'a'** and **'b'**, a copy of the consent and receipt thereof. Subsequently on **19/06/2021**, the Applicant was served with an eviction order a copy of which she annexed and marked as **DNW 6**. That was aimed at being in satisfaction of the trial court's decree. The Applicant was apprehensive that execution could issue at any time.

5. The Applicant averred that she was out of time in lodging this appeal hence the present application. It is prayed that it is in the interest of justice that the Application be allowed as presented. She explained that the failure to lodge the appeal on time was based on a multiplicity of

reasons as given above, including senility thus countermanding any allegation of deliberate indolence.

6. The Applicant attached a draft Memorandum of Appeal and marked it is **DNW 7** as a show of *bona fide* intent. The Applicant further deposed that she filed an application dated **06/07/2021** seeking orders of stay of execution and leave to appeal out of time and the court directed that the application be canvassed by way of written submissions as evidenced through annexure **DNW 8**, being the directions of the Court. A ruling date was reserved for **02/09/2021**. However, it was not delivered. She then argued that her Advocates were informed at the registry that since the judge was on the transfer, they would be informed once the ruling was forwarded.

7. When the trial court placed the matter before it on **05/10/2021** for directions on execution in view of the directions issued on **09/08/2021**, the Applicant's Counsel was informed that the ruling had been delivered on **09/08/2021**, with a copy of the same being served upon her outgoing advocate and the Respondents' Counsel by mail, a copy of which she annexed to her Affidavit and marked it as **DNW 9**.

8. Consequently, she argued that neither she nor her learned Counsel were informed of the ruling date or when it was sent to her Counsel on record. The Applicant averred that as such she was condemned unfairly, was prejudiced hence there was a miscarriage of justice. She stated that her previous application dated **06/07/2021** for leave was not allowed because, as per the Court's finding, she lacked *locus standi*, yet the Court noted that she had genuine reasons for being granted leave to appeal out of time.

9. To this end, she averred that she had regularized that issue by obtaining Letters of Administration. She stated that her appeal is not frivolous and had high chances of success as there was a counter-claim against the Respondents. She further impugned the judgment for being delivered contrary to the provisions of the Civil Procedure Rules. She maintained that the intended appeal raised serious arguable grounds of both fact and law. Finally, she contended that if leave sought is not granted, her right of appeal will abort, she would stand to suffer grave prejudice and be denied a chance to ventilate her right of appeal.

The Response

10. The Application was opposed. In a Replying Affidavit sworn by the 2nd Defendant on **21/12/2021** and filed the same date, it was deposed that the suit was filed in **1993** and only concluded **26** years later. It was suggested that the Applicant was duly represented up to the time the matter was concluded. It was averred that a duly extracted eviction order was issued on **20/09/2021**. He annexed a copy of it to the Affidavit and marked it as **FAB 1**. It was further stated that in **October 2021**, the Applicant's relatives were evicted and their semi-permanent houses pulled down. It was further deposed that he took possession of the land and had since ploughed it to plant maize. It was further added that the Applicant settled the costs of the suit in full. It was contended that the Applicant failed to account for the period between when she was served with Notice to Show Cause and the date of filing an application for leave to file an appeal out of time.

11. Reliance was further placed on their affidavit sworn on **12/07/2021** marked as **FAB 2**. It was the Respondents' argument that the Application had been overtaken by events, lacked merit and a waste of the court's judicial time. It was further averred that the Applicant's counterclaim was properly dismissed by the trial court by dint of **Section 35** of the **Limitation of Actions Act** as it was filed out of time. The Respondents stated that the trial court's found that no fraud was detected on their part. In sum, the Respondents stated that the intended appeal had no chances of success and was instituted to vex them.

Supplementary Affidavit

12. In brief rejoinder sworn on **10/01/2022**, the Applicant maintained that she was not served with a notice of delivery of judgment. She asserted that she was only aware of the judgment when she was served with a Notice to Show Cause sometime in **October 2020** to be effected upon the deceased. She averred that the eviction was illegally effectuated upon her. She argued that the entire eviction process was unlawful, irregular and illegal as the judgment debtor was deceased at the time of execution. She asserted that she was diagnosed with **Stage 3** hypertension and has been on medication since diagnosis. She further maintained that she was unable to retain a new advocate following the collapse of the advocate client relationship she had with her outgoing advocates owing to her lack of source of income. She contended that this court ought to take judicial notice of the prevalent COVID 19 pandemic that condemned senior citizens (**58** years of age and above) to stay at home due to their vulnerability. She deposed that the counter-claim was properly before the trial court hence the need to reverse the trial court's decision. She added that the Respondents' action to take vacant possession of the subject property would not render her appeal an academic exercise.

Submissions

13. Pursuant to the Court's directions issued on **14/12/2021**, parties were directed to dispose of the Application by way of written submissions. The Applicant filed hers on **11/01/2022**. The Respondents filed their submissions on **27/01/2022**.

14. According to the Applicant, **Section 79G** of the **Civil Procedure Act**, justified the filing of her Application, having demonstrated that she has good and sufficient reasons for failing to file the appeal in time. Firstly, she submitted that the trial court's judgment reserved for **23/04/2019** was not delivered on the said date. However, it was subsequently delivered on **28/05/2019** in her absence or that of her Counsel without prior notice. Secondly, she was unable to file the present application in good time owing to her failing health, unavailability of funds and senility. She further submitted that she had an arguable appeal. The grounds have been captured in her draft memorandum of appeal. She stated that since the trial court's decision was adversely against her, her recourse lay in the appellate court. She submitted that she would remain prejudiced if not locked out to exercise her right of appeal. She submitted that if the appeal fails, the Respondents would be compensated by an award for costs hence stood to suffer no prejudice if the Applicant is granted leave to appeal.

15. The 2nd Respondent clarified that the 1st Respondent is since deceased. He maintained that the application was frivolous. He reiterated that the Applicant and her Counsel were at all material times to the suit well aware of its proceedings from its genesis to the judgment. He dismissed the allegation of improper service of the assessment of costs notice for the reason that her outgoing advocates remained her advocates on record at that time. He submitted that the outgoing advocates' stamp confirmed receipt of the assessment of costs. Be that as it

may and without any prejudice to the foregoing, the Respondent submitted that the Applicant had failed to explain the delay occasioned between **09/09/2019** and **07/12/2021**. He proposed that the Applicant and her previous counsel appeared to have a collapsed relationship marred with lack of communication. He rebutted the COVID 19 pandemic explanation by submitting that court's granted parties virtual services. It was concluded that the reasons for delay are inexcusable. On whether the appeal had arguable grounds, it was submitted that the Respondent held a valid title to the suit property. It was further submitted that the counterclaim was lawfully dismissed for being filed out of time. Finally, it was submitted that the decree had since been fully satisfied. It was contended that no requirement for a grant of representation was required to be made before execution.

16. I have considered the Application and respective Affidavits of parties herein. I have also considered the respective rival written submissions by parties. I now wish to address the Application as hereunder.

Analysis and Determination

17. The application seeks leave to an appeal out of time. This lies in the discretionary power of the Court which is donated pursuant to the provisions of **Section 79G** of the **Civil Procedure Act**. Where good and sufficient cause is demonstrated, a party may be granted leave to appeal out of time. What then is good and sufficient cause?

18. In **Ramlal Motilal and Chhotelal (1962) 2 SCR 762**, the Supreme Court of India held that a *laissez faire* interpretation of sufficient cause to be place in the minds of the court. The Court held:

“The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown, discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in Krishna v. Chattappan (1890) J.L.R. 13 Mad. 269. “s. 5 gives the Court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words ‘sufficient cause’ receiving a liberal construction so as to advance substantial justice when no negligence no inaction nor want of bona fide is imputable to the appellant.”

19. The Court in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others [2002] 1 EA 65** set out the factors to be considered in deciding whether or not to grant such an application as follows:

I. the explanation if any for the delay;

II. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

III. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

20. What is discernable from the above is that good and sufficient cause sustains or breathes life into rather than dismisses suits where it is aptly demonstrated. The conditions precedent as set out in **First American Bank (Supra)** shall guide this court in determining the present Application.

21. On whether an explanation for delay has been proffered, it is clear from the record, and not in dispute as the Applicant stated, that the judgment was delivered in her absence later, on **28/05/2019**, yet it had been reserved earlier for **23/04/2019**. These facts have not been gainsaid. Additionally, the Applicant was not aware when the Respondents' Bill of Costs was assessed. The Applicant further stated that she was only aware of the judgment when an apparent Notice to Show Cause was served upon her. She was committed to civil jail for the failure by the deceased to settle the sums due. She further lamented that she was unable to bring forth the present application earlier as she was unable to source for funds due to her ill health and senility coupled with the **COVID 19** Pandemic and the strict restrictions imposed in the country. The Respondent has failed to counter these assertions. He claimed that the Applicant's Counsel was served with the Bill of Costs. However, no return of service was attached to the Replying Affidavit to evidence this assertion. There was also no notice of delivery of judgment or a return of service on the same in the court record as the **Rules** require. I emphasize that, from the proceedings, in regard to the date of delivery of judgment, all parties were absent. Further, there is no evidence that there was notice of postponement of the delivery of the judgment from **23/04/2019** to another date. All that the record shows is the delivery of the judgment on **28/05/2019**. Furthermore, there is no evidence of a served notice of delivery of judgment by the trial court.

22. That said, again, it is clear that the Applicant moved the Court as soon as she knew of the existence of the judgment and notice to show cause but her application was dismissed on account of the fact that she lacked capacity to bring it. In my view, the Applicant seems to be a person who is more than keen to prosecute the intended appeal. I therefore find that the Applicant has explained the delay in bringing the present application.

23. On whether the Appeal is merited, the Appellant attached a draft Memorandum of Appeal that she intends to rely on if leave is granted. The Applicant impugns the trial court's decision for holding that a **1983** agreement was null and void. She further challenges the manner in which the judgment was delivered bereft of notice thereby rendering her prejudiced. Additionally, she maintains that the deceased was the lawful proprietor of the parcel of land. The Respondent's response was that the decree has already been satisfied hence rendering the Appeal (if any) an academic exercise. I disagree with the proposition advanced by the Respondent. If the Court were to adopt this school of thought, it would mean that all appeals would automatically be rendered moot where no stay orders are granted and the successful parties proceed with execution. The Respondent appears to suggest that the Applicant ought to have avoided the decree so as to grant her an appeal as of right.

24. I must comment on the unfortunate turn of events leading up to the present Application. The Respondent purported to serve the Notice to Show Cause upon the Applicant who, evidently, was unaware of the status of proceedings in this matter. This was all the while, when he was aware that it was the deceased and not the Applicant who was a party to the proceedings in the lower Court, and that he needed to move the Court appropriately against the Estate of the deceased party. Absent of this, all that took place was an illegality and a nullity. The Respondent was by necessity and by law required to follow the right procedures before enforcing the decree. The Respondent stole a march against his adversary: he cannot afford and be rightly heard to stand on the roof top shouting something to the effect, "Hurray, the decree was satisfied. Do nothing more." What was even more unfortunate was that the Respondent was represented in these proceedings by an officer of the court.

25. The lower Court record shows that on **03/03/2020** the decree holder applied to the Court for Notice to Show Cause why the judgment debtor should not be committed to civil jail. Then a Notice for both eviction and committal to civil jail was issued on **20/08/2020** and heard on **27/08/2020** fixed for hearing on **06/10/2020**. On the **06/10/2020** a warrant of arrest was issued. Despite the court being notified by **17/11/2020** that the judgment debtor was deceased, a warrant of arrest was issued against the widow, now applicant. She was committed to civil jail on **13/05/2021**. All these things were done contrary to **Section 37** of the **Civil Procedure Act**, Chapter **21** of the Laws of Kenya. Indeed, the execution was an illegality *ab initio*. It was a travesty of justice for the Respondent to elect to execute the decree in the manner he did. This court cannot and will not cushion him and uphold his illegal actions in the spirit of upholding an executed decree. Justice must at all times be our shield and defender: it should shield and defend the innocent; the weak and the strong.

26. Turning back to whether the Appeal is merited, I find that it raises arguable grounds of Appeal deserving their day in court. The substratum of the suit still exists irrespective of there being no *status quo* orders or stay of execution. I find no frivolous grounds raised as alleged by the Respondent.

27. On whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of the exercise of discretion in favour of the Applicant, it is a balancing act between the prejudice to the Appellant and Respondents, and I agree with the Applicant this time round. If the present application is dismissed, the Applicant will be locked out in trying to ventilate its appeal. However, if the appeal is allowed to proceed and is subsequently found unmerited, the Respondent will be compensated by an award of costs.

28. When my learned brother **Judge** was presented with an Application by the Applicant in her capacity as donee to the deceased, he found that the Applicant's prayer to file an appeal out of time was merited save that she was required to regularize her record. I agree as much. I see no reason to depart from his findings. In fact, I find further fortification in the decision of the Supreme Court sitting at Malawi in ***Kuthawe & Anor. V R [2015] MWSC 471*** that suits should be sustained rather than dismissed where discretionary powers are granted to the court and the Applicant has substantiated his decries. In the matter, the court held:

*"The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to disregard the delay and admit the appeal. As has been observed by this Court in ***Chiume v The Attorney-General [2000-2001] MLR 102*** and ***Mwaungulu v Malawi News and others [1995] 2 MLR 549*** this discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice."*

29. It is for the reasons above that I further find that the Application succeeds and I grant it.

Orders and Disposition

30. I note that the suit is fairly old having been filed in **1993**. I further note that judgment was entered **26** years later. To balance competing interests in the administration of justice, I make the following orders:

(1) The Application dated 7/12/2021 and filed on 14/12/2021 is merited.

(2) The Applicant is hereby granted leave to an appeal out of time against the judgment of Hon. C. M. Kesse, SRM delivered on 28/05/2019 in Kitale CM Civil Suit No. 158 of 1993.

(3) The Appeal shall be filed within twenty-one (21) days from the date of this ruling.

(4) Failure to comply with (3) above will lead to automatic lapse of the orders granted herein.

(5) In the meantime, and in the interest of justice, this Court issues an order staying any further actions, including dealings inconsistent with maintaining the subject parcel of land, namely, Trans- Nzoia/Kosprin/111, subdivisions, selling, transfers, leasing of the subject parcel of land in dispute until further orders are issued as and when they will be sought in the appeal to be filed, but in any event not later than 30 days of filing of the said intended appeal.

(6) The applicant shall have the costs of this Application.

Orders accordingly.

Dated, signed and delivered at **Kitale** via **Electronic Mail** on this **18th** day of **March, 2022**.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

