



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 656 OF 2010

PETER GITHIU KOMU.....APPLICANT

VERSUS

SULEIMAN NDUKIA KIARIE & 3 OTHERSRESPONDENT

RULING

The Application

The Notice of Motion for consideration is dated 19th June 2000 and is brought by the Applicant under sections 3A and 79 of the Civil Procedure Act and Orders XLIV Rule 1 as well as Order XXXIX Rule 1 of the repealed Civil Procedure Rules. The application seeks the following orders:-

- a. The Applicant be allowed to file an appeal out of time.
- b. The Respondent be refrained from interfering with the Land Reference Number Kiganjo/Gatei/50 until the determination of this matter.
- c. That an order of status quo be maintained.

The application is supported by an affidavit sworn by the Applicant on 16th June 2000 wherein he stated that the Respondent was his step father and also the Plaintiff in Thika Senior Resident Magistrate's Court case No. 247/94. He averred that the subject matter of the said suit is Land Reference No.Kiganjo/Gatei/50 in which an ex-parte judgment was issued in favour of the Respondent. The Applicant contended that he had been in adverse possession of the suit parcel for a period of more than 22 years whereon he had planted approximately 1,200 yielding coffee plants. Further, the Applicant stated that there are houses and other structures on the suit parcel and contended that upon title been taken away from him, the Respondent proceeded to transfer the suit properly to his sons.

It is the Applicant's case that the Respondent's actions amount to land grabbing and further, that he was being evicted verbally by the Respondent's sons as well as the area assistant chief. While stating that he was not properly served in the case before the subordinate court, the Applicant contended that the judgment delivered was in respect to case no. 2447 of 1994 instead of 247 of 1994 and was therefore an erroneous document. The Applicant annexed as an exhibit a copy a judgment in Thika SPMCC No. 2447 of 1994 and averred that the judgment was not certified and dated. The Applicant also stated that he was unable to appeal the matter to the High court for reasons that he had no money as he had a large family which he was supporting at home and at school.

The application was canvassed by way of written submissions, and the Applicant in submissions dated 22nd May 2014 stated that his claim involved ancestral land which was initially registered in the name of his grandfather Kiarie Githu "B" in 1957. The Applicant reiterated that the Respondent filed Thika

SPMCC No. 247 of 1994 claiming from him a return and re-conveyance of 3 acres out of the suit property, in addition to an order authorizing the Executive Officer to sign the necessary documents to effect the same.

The Applicant submitted that the dispute had been earlier determined by a court which directed that the Respondent gets 4.10 acres out of the suit property while the Applicant and his brother were to get 1.5 acres each and a joint title dated 14th October 1993 was exhibited. It is the Applicant's submission that the Respondent was dissatisfied with the outcome of the case and he appealed to the High Court in Nairobi HCCA No. 42 of 1992 which appeal was dismissed. According to the Applicant, the Respondent thereafter filed Thika SPMCC No. 247 of 1994 which was determined ex-parte and he contended that this constitutes an abuse of the court process as the matter had been determined by another court.

In further submission, the Applicant stated that he was never given a chance to defend himself in Thika SPMCC No. 247 of 1994 which resulted into an ex-parte judgment. The Applicant contends that he was dissatisfied with the ex-parte judgment and applied for typed copies of the judgment and the proceedings to enable him lodge an appeal. It is the Applicant's submission that due to the pressure of work at the typing pool, he could not file the appeal within the stipulated time and he obtained a certificate of delay dated 20th July 2000. He averred that his appeal has great chances of success.

The Response

The application was opposed by the Respondent who filed grounds of opposition dated 27th June 2000, wherein he contended that there was inordinate delay and further, that the memorandum of appeal had not been attached. Further, The Respondent stated that there was no letter requesting for proceedings and according to him, the appeal has no chances of success.

The Respondent also filed a replying affidavit sworn on 16th March 2010 where he stated that the judgment in the lower court was delivered on 21st August 1997, after the Applicant failed to give his defence despite being given an opportunity to do so. According to the Respondent, the Applicant failed to disclose to the court that the suit property does not exist having been subdivided into L.R.Kiganjo/Gatei/2139, 2140, 2141 whose copies of certificate of official search dated 2nd September 2009 were exhibited. It is the Respondent's case that the application before court has been overtaken by events, and ownership of the suit property has changed hands from the registered owner who is now deceased.

The Respondent did not file any submissions despite having been served with a mention notice where directions to this effect were given.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issues for determination are firstly, whether the Applicant has satisfied the conditions for granting leave to appeal out of time, and secondly if so, whether the Applicant has met the threshold for grant of the injunction and or *status quo* orders sought. The time within which an appeal from an order or a decree from a subordinate court can be made is set out in section 79G of the Civil Procedure Act. The section provides 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 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"

Under the proviso to the section, an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time. The Supreme Court in **Nicholas Kiptoo arap Korir Salat –v – IEBC & 7 Others, Supreme Court Application No. 16 of**

2014 laid down the following as the under-lying principles that a Court should consider in exercise of discretion to extend time:

- **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;**
- **A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- **Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- **Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- **Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- **Whether the application has been brought without undue delay; and**
- **Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

The question therefore is whether the Applicant has shown good and sufficient cause for not filing the appeal in time. The Applicant annexed to his submissions a copy of certificate of delay issued by the Magistrate, Thika Magistrates Court dated 20th July 2000. The certificate of delay shows that certified copies of proceedings and judgement applied for on 27th July 1997 were supplied on 12th July 2000. I have also perused the court record and note that his application for leave to file his appeal out of time was filed on 19th June 2000, and when his application came up for hearing on 29th June 2000 the Applicant was asked to take out dates for hearing once he had obtained the certificate of delay.

While certified copies of of the judgement and proceedings are not a requirement when filing an appeal, they are necessary in order for an appellant to draft the memorandum of appeal required to be filed. This Court also notes in this regard that the judgment appealed from was given *ex parte*, and that the Applicant is unrepresented and would therefore of necessity needed the proceedings and judgment. It is therefore evident that the delay in the filing of his appeal was contributed to by the Thika Law Courts registry which did not avail the certified copies of the proceedings and judgment until 12th July 2000, despite an application for the same having been made on 27th July 1997. This shortcoming on the part of the court registry should not be visited on the Applicant.

This finding notwithstanding, there has also been a delay in prosecuting the application for leave which may cause prejudice to the Respondents. The Respondents claim in this respect that the subject land has since been subdivided, and changed hands from the Respondent who is now deceased. However, the Court notes from the certificates of official search attached to the Respondent's replying affidavit that the said subdivisions are in the names of the Respondent's sons who are also his administrators, and who have since been substituted as Respondents in this application. The registered owners will therefore be able to protect both their and the Respondent's interests in the event that leave to appeal out of time is granted.

In this regard this Court also notes that the subject property had been the subject of an appeal before the High Court in Nairobi Civil Appeal No. 42 of 1992 in which judgment was delivered by Mbitio J. (as he then was) on 25th May 1993. A certified copy of the judgement was attached by the Applicant, and the said Appeal had been filed by the Respondent herein and was dismissed. It is unclear therefore in what circumstances another suit was subsequently filed by the same Respondent and over the same property in the Thika SPMCC No. 247 of 1994.

There is a duty that is now imposed on this Court under Article 159(2)(d) of the Constitution to ensure

that disputes are heard and determined on their merit and substance, and without undue regard to the technicalities. It is thus my holding that the Applicant has shown sufficient cause for extension of time, and I am inclined to exercise my discretion in his favour in this regard and also in the interests of justice.

As regards the outstanding issue as to whether the Applicant has met the threshold for the grant of injunction orders and *status quo* orders, the applicable law is Order 42 Rule 6(6) of the Civil Procedure Rules which provides that this Court can grant an injunction pending an appeal from a subordinate court, in the exercise of its appellate jurisdiction. The purpose of granting an injunction pending appeal is to preserve the *status quo* and to prevent the appeal, if successful, from being rendered nugatory as held in **Madhupaper International Limited vs Kerr (1985) KLR 840** and in **Charterhouse Bank Ltd vs Central Bank of Kenya & Another, Civil Application No. 200 of 2006.**

In this regard, the principles that apply are that the Applicant must show that he or she has an arguable appeal, or an appeal that is not frivolous and secondly, that if the order of injunction sought is not granted, the intended appeal will be rendered nugatory if it eventually succeeds. In the present application there is no memorandum and grounds of appeal that have been filed by the Applicant that would ordinarily be the basis on which this Court would reach such a determination, and the prayers sought by the Applicant are to this extent premature.

The upshot of the foregoing is that the Applicant's Notice of Motion dated 19th June 2000 is hereby allowed only with respect to the prayer to be allowed to file an appeal out of time. The Applicant is at liberty to apply for the other prayers upon filing of his appeal. The Applicant shall have 30 days from the date hereof to file and serve the memorandum and record of appeal. The cost of this application shall abide by the outcome of the intended appeal.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____31st____ day of ____July____, 2014.

P. NYAMWEYA

JUDGE