



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 179 OF 2016

MARTIN OOKO OTIENO.....PLAINTIFF

VERSUS

OBARE MAJIWA.....DEFENDANT

RULING

(Application to extend time for filing the memorandum and record of appeal;

power to do so only vested in the Court of Appeal; this court devoid of j

urisdiction to do so; application dismissed with costs)

1. The application before me is that dated 6 October 2021 filed by the defendant. The application is said to be brought pursuant to the provisions of Section 7 of the Appellate Jurisdiction Act, Cap 9, Laws of Kenya, Order 42 Rule 6, Order 22 Rule 22, and Order 51 Rule 1, Laws of Kenya. It seeks the following orders –

(i) That the time limited for filing and serving the record of appeal be appropriately extended.

(ii) That the record of appeal already filed in court be deemed as though properly filed within such extended time.

(iii) That the costs of this application be provided for.

2. The application is opposed.

3. By way of background, the plaintiff/respondent filed this suit on 7 July 2016. He pleaded that he had purchased a Swahili house in Plot No. 23 Sosiani Shopping Centre from the deceased mother of the defendant/applicant on 8 October 2015. He averred that upon her death, the applicant took possession. In the suit he wished to have a declaration that he is the owner of the house, eviction of the applicant, and a permanent injunction to restrain the applicant from the said house. The case was heard by Omollo J who delivered judgment on 29 June 2018 allowing the respondent's case. She gave the applicant 30 days to vacate the house or they be evicted. On 5 July 2018, the applicant lodged a notice to appeal to the Court of Appeal. It appears that so far the appeal has not been filed, which is confirmed in the affidavit of the applicant. He deposes that after filing the notice of appeal, his erstwhile counsel made no other step towards prosecuting the intended appeal. He was disappointed and changed counsel who have now prepared a record of appeal which they filed in court on 15 February 2021. He avers that this was out of time thus the subject application.

4. The respondent has opposed the motion inter alia by asserting that this court has no jurisdiction to deal with such an application and that it offends Section 7 of the Appellate Jurisdiction Act, and Rule 4 of the Court of Appeal Rules.

5. Mr. Akanga, learned counsel for the respondent, submitted that Rule 4 of the Court of Appeal Rules, permits the court to extend time, but reference to "court" in the rule means the Court of Appeal and not the High Court. He referred me to Rule 2 of the same rules which defines court to mean the Court of Appeal. He submitted that the power of the High Court is limited to extending the time to file the notice of intention to appeal under Section 7 of the Appellate Jurisdiction Act.

6. Mr. Gikandi, learned counsel for the applicant, did not address himself on the above, his main submission being that it is fair and proper that the appellant be allowed to exercise his right to appeal.

7. I have considered the matter. I agree with the submissions of Mr. Akanga that this court does not have jurisdiction to extend time for

lodging the appeal in the Court of Appeal. This court's power is limited only to extending time to lodge the Notice of Appeal pursuant to Section 7 of the Appellate Jurisdiction Act, which provides as follows :-

Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

8. Under Rule 82 the Court of Appeal Rules, the appeal is instituted by lodging a memorandum and record of appeal, within 60 days of filing the notice of appeal. Rule 4 of the Court of Appeal Rules gives the court power to extend time. In so far as the rules are concerned, Rule 2 states that court "means the Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone." The power to extend the time provided in the rules, unless specified otherwise in the body of the statute, thus rests with the Court of Appeal.

9. What the applicant wants is an order to extend time to lodge the memorandum and record of appeal. This power is only vested in the Court of Appeal as I have demonstrated above. This court does not therefore have the jurisdiction to entertain this application and it is hereby dismissed with costs.

10. Orders accordingly.

DATED AND DELIVERED THIS 14TH DAY OF APRIL 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA