



**REPUBLIC OF KENYA**

**High Court at Malindi**

**Environmental & Land Case 1 of 2012**

**GILBERT SAFARI CHUYE.....APPLICANT**

**VERSUS**

**NGUMBAO MWANZOYA GATSI.....RESPONDENT**

**RULING**

1. The Applicant moved this court by way of a Miscellaneous

Application dated 29<sup>th</sup> November, 2012 in which he sought for the following orders:

1. **That this application be certified as urgent due to its nature and circumstances of urgency and direct the same to be heard ex parte in the first instance.**
2. **That the Honourable Court do grant and admit the Appellant's Petition of Appeal notwithstanding that the time provided and/or stipulated in law has lapsed.**
3. **That the Honourable Court be pleased to stay execution of the decree given on 28<sup>th</sup> August, 2009 pending inter partes hearing of this application.**
4. **That pending inter partes hearing of this application, this Hon. Court do order stay of execution of the order made on 29<sup>th</sup> November, 2011 and decree.**
5. **That the Honourable court be pleased to stay execution of the decree pending hearing and determination of the appeal.**
6. **That the Hon. Court do make any orders it deems fit and just in the circumstances.**

1. The said application was filed under a certificate of urgency but this court declined to certify it as urgent. I directed the Applicant to take a hearing date in the registry. The main grounds of the application are that, firstly, the failure by the Applicant to file the appeal in time was occasioned by his inability to obtain proceedings and judgement within a reasonable time having applied for them. Secondly, that the proposed appeal has overwhelming chances of success and lastly that unless execution of the decree is stayed the Respondent shall proceed to execute and the Appellant's appeal shall be rendered nugatory.

2. The application is supported by the affidavit of the Applicant whose main deposition is that the Respondent instituted a case in the Lands Disputes Tribunal against the appellant. The Tribunal ruled

in favour of the Respondent and the award was duly adopted by the Magistrate's court as the order of the court.

3. The Applicant has averred that the Magistrate court, while adopting the award by the Tribunal directed that the Applicant should file his appeal against the Tribunal's award within 30 days. The Applicant states that he was unable to comply with the requirement of filing an appeal with the Provincial Lands Dispute Committee within 30 days because of his ill health.

4. Upon recovery from his ill health, the Applicant depones that he could not file the said appeal because the Provincial Lands Dispute Committee had been abolished by the operation of the law. By this time, the Respondent's advocate had put in motion the processes of having him evicted from the suit property.

5. The Applicant avers that when the Application for eviction came up for hearing, he recorded a consent in which he agreed to move out of the suit property. However, around the same period, he obtained letters from the Ministry of Lands in respect to the Respondents' title deed confirming that the said title deed had been obtained fraudulently. On the strength of the said letters, the Applicant depones that he instructed his advocates to file an application in the Magistrate's court for review of the consent order. The said application was dismissed by the Honourable Magistrate.

6. The Applicant finally depones that the delay to lodge his appeal is not inordinate because he has been litigating over the matter in the lower court, that the issues raised in his appeal are weighty and that it is only fair and just that they be handled by a court of competent jurisdiction, and that the intended appeal has high chances of success and unless the orders being sought are granted, the appeal shall be rendered nugatory.

7. In response to the application, the Respondent filed his Replying Affidavit sworn on 24<sup>th</sup> December 2012 and filed on the same day. The Respondent gave a chronology of events of what had transpired in PMCC No. 18 of 2009 in which the Applicant in the current suit was the objector while the Respondent was the claimant.

8. The Respondent averred that the Land Disputes Tribunal made its decision on 6<sup>th</sup> March 2009 and the award was adopted by the Magistrate in PMCC No. 18 of 2009 as an order of the court on 28<sup>th</sup> August 2009 in the presence of both parties. The Respondent extracted the Decree pursuant to the Order of the court and filed an application dated 10<sup>th</sup> November 2009. In essence, the application sought to have the Applicant evicted from the suit property.

9. It is the Respondent's case that the Applicant duly appointed an advocate who filed a Preliminary Objection in opposition to the Respondent's application dated 10<sup>th</sup> November 2009. The Preliminary Objection was dismissed and the Respondent's application to have the Applicant evicted from the suit property was allowed. The Pressure to have the Applicant evicted from the suit property amounted to the recording of a consent in which the Applicant agreed to vacate the suit property within 2 months.

10. The Respondent finally depones that the Applicant filed in the Magistrate's court an application similar to the present one which he withdrew without giving any reasons and thereafter filed another application dated 1<sup>st</sup> August 2012 seeking for orders of review in respect to the consent made on 29<sup>th</sup> November 2011 which was dismissed by the court; that the Applicant has not been ill and incapable of filing an appeal as alleged in his application, and that the appeal has no chances of success since the Respondent is the registered owner of the suit property and the Tribunal had jurisdiction to entertain a claim involving trespass.

11. The parties appeared before me on 11<sup>th</sup> February, 2013 and made oral submissions which I have carefully considered.

12. The Applicant is seeking for two substantive orders, that is, that the court do grant leave and admit the Applicant's appeal notwithstanding that the stipulated time has lapsed and secondly that the court do stay execution of the decree pending the hearing and determination of the appeal. The Applicant does not state the decree that he intends to stay, though, it would appear that he intended to stay the Decree of the Magistrate's court which adopted the Tribunal's order. The said decree is the Applicant's annexure "GS.2" and the same is dated 28<sup>th</sup> August 2009 and issued on 4<sup>th</sup> November, 2009.

13. Invariably, the second prayer for stay of execution of the Decree can only be issued after the first prayer for leave to appeal out of time has been granted. Even where a party is granted leave to file an appeal out of time, the said leave cannot operate as a stay of execution and a party is obliged to meet the conditions which have been set under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010.

14. I have painstakingly perused the lower court file being Malindi PMCC No. 18 of 2009 and ascertained that on 28<sup>th</sup> August 2009, the Honourable Magistrate adopted the Ruling of the Magarini Land Dispute Tribunal as an order of the court. The said Ruling was adopted in the presence of the claimant and the objector and the court informed the objector that he had 30 days to file an appeal against the said order.

15. The record shows that on 1<sup>st</sup> September 2009, the Applicant moved the lower court under a certificate of urgency *vide* an application of the same date in which he sought for an order of stay of execution pending appeal. The Applicant was granted a stay of execution *ex-parte* on the said date and when the matter came up for *inter-partes* hearing on 15/09/2009. The record shows that the application for "***stay of execution pending the hearing and the determination of the appeal***" was allowed. Of course, no appeal had been preferred by the Applicant by the time the order was made by the lower court.

16. It appears that the Respondent herein realised that the Applicant had no intention of filing the appeal after obtaining the order of stay of execution because on 11<sup>th</sup> November 2009, the Respondent herein filed an application in the lower court and sought for the eviction of the Applicant from the suit property. When the matter was placed before the Magistrate on 24<sup>th</sup> November 2009, counsel for the objector, now the Applicant, informed the court that he had filed a Preliminary Objection which he wanted to argue first. The Preliminary Objection was argued *inter-partes* and the same was dismissed on 4<sup>th</sup> May, 2010 by the learned Magistrate in following words:-

***"The appeal period started running on 28.08.2009. The objector having been granted stay of execution orders on 15.09.2009 ought to have shown some good faith on his part by lodging an appeal. Instead he has slept on the stay orders which cannot of course survive for an indefinite period. The order staying execution was for a specific period allowed by law which ordinarily is 30 days....."***

18. The Respondent's application for eviction orders was thus fixed for hearing on 9<sup>th</sup> November 2010 and the same was allowed on 14<sup>th</sup> December 2010. In allowing the application for eviction the learned Magistrate noted that the Respondent had been given ample time to file an appeal which he had not done even as at the time the Ruling was being delivered.

19. The matter went into a lull until 29<sup>th</sup> November 2011 when parties appeared before the learned Magistrate for the claimant's application dated 26<sup>th</sup> October 2011 which sought to have the objector (Respondent) to be committed to civil jail for resisting and obstructing the claimant from executing the Judgement and Decree.

20. Faced with the eminent danger of being sent to jail for disobeying the Decree, the Respondent, through his advocate, recorded a consent in which he agreed to remove the structure which he had placed on the suit property and to vacate the suit property within two months and in default, the application dated 26<sup>th</sup> October 2011 to be deemed to have been allowed as prayed. The consent was adopted as an order of the court.

21. Instead of vacating the suit property as per the consent, the Respondent filed an application dated 28<sup>th</sup> November 2011 in the lower court seeking for leave to file an appeal out of time and for the first time raised the issue of having being ill thus his inability to lodge the appeal within 30 days.
22. The application for leave to file the appeal was withdrawn by the Respondent when the same came up for hearing before the learned Magistrate on 24<sup>th</sup> January 2012. No reasons were given for the withdrawal.
23. When the matter was mentioned again on 28<sup>th</sup> February 2012, the Respondent's counsel informed the court that the Applicant had not complied with the consent order, and consequently, the court allowed the Respondent's application dated 26<sup>th</sup> October 2011. The Applicant's attempt to set aside the consent order was dismissed by the learned Magistrate on 29<sup>th</sup> October 2012. The Applicant has now come to this court for leave to file his appeal out of time and for stay of execution of the decree which was issued on 28<sup>th</sup> August 2009.
24. The only reason preferred by the Applicant for not having filed the appeal within the requisite 30 days from the date when the award by the Tribunal was adopted by the court on 28<sup>th</sup> August 2009 is that he has been ill. The energy which was exhibited by the Applicant in the lower court from 28<sup>th</sup> August 2009 to date cannot be of somebody who has been ill.
25. I have detailed the numerous attempts that the Applicant employed in the lower court to evade execution pursuant to the Judgement of 28<sup>th</sup> August 2009. Those numerous attempts by the Applicant only point to an individual who was not ill at all. The Applicant engaged the Respondent in the lower court from the time the Tribunal's award was adopted in court filing applications and counter applications.
26. Indeed, the Applicant was on 15<sup>th</sup> September 2009 granted a stay of execution pending the hearing and determination of the appeal but did not file the said appeal. The Applicant did not make any application soon thereafter to seek leave to file or appeal out of time. What he did was to sit on the said order of stay of execution and when the Respondent moved the court for execution of the Judgement, the Applicant had the temerity of arguing that the court was *factus officio* having granted him the order of stay of execution. In the Applicant's mind, the order of stay of execution was to remain in force in perpetuity notwithstanding the fact that he had not filed an appeal.
27. Having litigated in the lower court since August 2009 and the lower court having dismissed all his applications, the Applicant now wants to engage the Respondent in this court with an intended appeal. In **Kenya Commercial Finance Company Ltd. Vs. Mulji Lalji Pindoha, Civil Application No. Nairobi 178 of 1997**, the Court of Appeal had this to say:
- “It is up to the Respondent to satisfy us that despite his due diligence in the matter, the court had failed to provide the said proceedings to him, and he although is still interested to file the intended appeal, is unable to do so for no fault of his own. We are far from satisfied that the Respondent has shown proper diligence that this court has come to expect of those who seriously pursue their right of appeal.”***
28. The above statement by the Court of Appeal applies in this case. The Applicant has not shown any diligence in pursuing his appeal especially after the lower got granted him the stay of execution pending the hearing of the appeal. As was stated in the case of **KETTLEMAN -VS- HENSEL PROPERTIES LTD (1988) 1 ALL ER 38**,
- “Courts can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of litigants to fall on their heads.”***
28. For the above reasons, I hold and find that in the absence of a plausible explanation by the

Applicant for the delay in filing the Memorandum of Appeal from the time when the lower court adopted the Tribunal's award, I decline to grant to the Applicant leave to file the appeal out of time.

29. In the absence of the leave of this court to file the Appeal out of time, the prayer for stay of execution of the Decree in PMCC No. 18 of 2009 fall by the way side. I therefore dismiss the application dated 29<sup>th</sup> November 2012 with costs.

Dated and Delivered at Malindi on **15<sup>th</sup>** day of **March**, 2013.

**O. A. Angote**  
**JUDGE**