



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 40 of 2012

CHARO KARISA.....PLAINTIFF

VERSUS

FRANCIS WAGANGA WANJOHI.....DEFENDANTS

RULING

1. The application before me is the Notice of Motion dated 8th November 2012. The same is brought under the provisions of Order 42 Rule 6(1), (2) and (3) and Order 50 Rule 6 of the Civil Procedure Rules 2010. The application seeks the following orders:

1. **THAT this application be certified urgent and service of the same be dispensed with in the first instant.**
2. **THAT this Honourable court be pleased to grant leave to the applicant to file appeal out of time.**
3. **THAT this Honourable court be pleased to grant orders of stay of execution of judgement delivered on 28th July 2011 and all consequential orders issued pursuant thereto and the proceedings of the 3rd October 2012 in Kilifi PMCC No.709 of 2011 FRANCIS WAGANGA WANJOHI -VS- CHARO KARISA pending hearing and determination of this application.**
4. **THAT this Honourable court be pleased to grant orders of stay of execution of judgement delivered on 28th July 2011 and all consequential orders issued pursuant thereto and the proceedings of the 3rd October 2012 pending hearing and determination of the intended appeal.**
5. **THAT this Honourable court be pleased to set aside the ex-parte judgement and proceedings in PMCC No. 70 of 2011.**
6. **THAT the Memorandum of Appeal annexed herein to be deemed to be properly filed upon payment of the requisite filing fees.**
7. **THAT the cost of this application be provided for.**

1. The grounds in support of the application are as follows:

- i. **THAT the plaintiff herein instituted a suit against the defendant on the 4th May 2011.**
- ii. **THAT the defendant was not served with summons to enter appearance and plead**

and therefore the interlocutory judgement is irregular.

- iii. THAT judgement was delivered on 28th July 2011 and the time for filing Appeal has lapsed.**
- iv. The defendant filed an application dated 28th September 2011 to set aside the judgement and consequential orders.**
- v. THAT the court made a ruling dismissing our application on the 23rd day of March 2012.**
- vi. THAT the ruling was delivered in the absence of the defendant's advocates.**
- vii. THAT the defendant's advocates tried in vain to read the ruling since the file was either misplaced and or missing.**
- viii. The applicant was not aware of the position of the file.**
- ix. THAT the defendant's advocates' mistakes should not be visited upon the innocent litigant/party.**
- x. THAT the defendant's stands to suffer substantial loss if stay of execution against judgement herein is not granted.**
- xi. The defendant intends to appeal against the entire judgement in Kilifi PMCC No. 70 of 2011 and he had filed a notice of Appeal and the Appeal has high chances of success and the same would be rendered nugatory if the application herein is not heard and orders granted as prayed.**
- xii. THAT the plaintiff intends to proceed with execution and eviction of the applicant imminent as he was given 45 days to vacate the premises.**
- xiii. There is no prejudice on the respondent if the orders sought are granted.**
- xiv. That it is in the interest of justice that the applicant should not be condemned unheard.**

3. The application is supported by the applicant's affidavit which is a reproduction of the grounds which I have stated above. The main depositions of the applicant, in a nut shell, are that on or about 8th September, 2011, he was served with an order issued by the court in Kilifi PMCC No. 70 of 2011 pursuant to the Judgement that was delivered on 28th July 2011. Upon perusal of the court file, he discovered that he had not been served with Summons to Enter Appearance and Plaint as required by law nor was he aware of any suit against him.

4. The applicant has further deposed that his advocates filed an application dated 28th September 2011 for orders of stay of execution of Judgement delivered on 28th July 2011 and for leave to be granted to the Defendant to file his defence. The said application was argued before the Honourable Magistrate who dismissed it on 22nd March 2012.

5. The applicant was subsequently arrested and arraigned in court on 3rd October 2012 and charged with the offence of forcible detainer in Kilifi Criminal Case. No. 811 of 2012. The criminal case is still pending in court.

6. On the same day the applicant was arraigned in the Criminal court, he was also summoned to attend the civil court to show cause why execution cannot issue against him and after hearing him, the court directed that the eviction orders against the applicant should be issued within 45 days.

7. The applicant further depones that he has been living on the suit property all his life and he has done substantial development thereon; that he is dissatisfied with the Judgement by the Honourable Magistrate and has consequently filed a Memorandum of Appeal challenging the Judgement and that his appeal has high chances of success. The applicant finally depones that execution of the Judgement by the lower court should be stayed pending the hearing and determination of his appeal in the High Court.

8. The application was filed under a certificate of urgency and the same was heard *ex-parte* by Hon. Lady Justice Meoli on 8th November 2012. The learned Judge, after hearing the application *ex-parte* certified the application as urgent and ordered for a stay of execution of the Judgement pending the hearing of the application *inter-partes*. The application was fixed for hearing on 23rd November 2012.

9. On 23rd November, 2012, the applicant's counsel was not in court. The Respondent's advocate informed the court that she had just filed her Replying Affidavit in response to the applicant that morning and informed the court that she was ready to proceed with the hearing of the application. Due to the absence of the applicant's advocate, I vacated the interim orders that had been granted by Justice Meoli and stood over the application generally. However, on the same day at 10.30 am, the applicant's counsel walked into the court room and informed me that she had all along been waiting in court number 1 and was not aware that the matter had been listed before me. She prayed that I reinstate the orders which I had set aside that morning. I exercised my inherent jurisdiction and reinstated the *ex parte* orders after the applicant filed an application under a certificate of urgency dated 23rd November, 2012 and argued it before me on the same day and fixed the application dated 8th November 2012 for hearing on 11th December 2012.

10. When the application dated 8th November, 2012 came up for *inter-partes* hearing, counsels agreed to argue the application by way of written submissions.

11. In response to the applicant's application dated 8th November, 2012, the Respondent filed a lengthy Replying Affidavit giving a chronology of what had transpired in Kilifi PMCC number 70 of 2011. It is the Respondent's case that Gordon Odhiambo, a licenced process server made several attempts to effect personal service on the applicant with the pleadings in PMCC No.70 of 2011 but the applicant and her agents became violent and slapped the person who was accompanying the said process server. The Respondent has annexed an affidavit of non-service which was sworn by the process-server. The said affidavit of non-service gives the details of what happened on 6th May 2011 when the process server attempted to serve the applicant with the pleadings in Kilifi PMCC NO. 70 of 2011.

12. The Respondent has further deponed that his advocate subsequently filed an application seeking for the orders of the court to serve the applicant with the pleadings by posting them in a conspicuous place in the court premises. The application to serve the applicant by way of substituted service was allowed.

13. The Respondent has stated the chronology of events from the time the applicant is purported to have been served by way of substituted service until when the Judgment was entered in favour of the Plaintiff in PMCC NO. 70 of 2011 on 28th July 2011 and the efforts he has put in place to execute the said Judgement.

14. I have carefully considered the Appellant's application, the Supporting Affidavit, the Respondent's Replying Affidavit and the rival written submissions. The applicant is seeking for three substantive orders which are **1) an order for leave to file the appeal out of time; 2) a stay of execution of Judgement delivered on 28th July 2011 pending the hearing and determination of the intended appeal and 3) the court to set aside the ex-parte Judgement and proceedings in PMCC. No. 70 of 2011.**

15. The 2nd prayer enumerated in the preceding paragraph can only be granted after the court grants the 1st prayer, that is leave to file the appeal out of time. I have taken this view because if the application for leave to file the appeal out of time against the Judgement of the Subordinate court in PMCC No. 70 of 2011 is not granted by this court, the applicant will not have a basis of staying the execution of the same

judgment that he intends to appeal against. This does not however mean that if leave to appeal out of time is granted, it will automatically operate as a stay of execution. The applicant would still have to meet the requirements of order 42 Rule 6 (2) of the Civil Procedure Rules 2010 to stay the execution of the Judgement of the lower court pending the hearing of the intended appeal.

16. The applicant has deponed that he learnt about the decision in PMCC No. 70 of 2011 on 8th September 2011 when he was served with an order dated 28th July 2011. The order of 28th July 2011 was extracted pursuant to the Judgement of the Magistrate delivered on 18th July 2011.

17. After learning about the existence of the suit, the applicant moved the lower court on 4th October 2011 for orders of stay of execution and for the setting aside of the *ex-parte* Judgement and the proceedings. The applicant's application dated 28th September 2011 and filed on 4th October 2011 has been annexed on the supporting Affidavit and marked as "CKI".

19. The Application for stay of execution and the setting aside of the *ex-parte* Judgement was heard and dismissed by the lower vide a Ruling dated 22nd March 2012. The Ruling was however delivered by Hon. Obura on 10th May 2012 after the trial Magistrate was transferred.

20. The proceedings which have been annexed on the applicants supporting affidavit shows that the matter was then listed for mention on 19th September 2012 by the Plaintiff (the Respondent in the current application) seeking for directions on how to deal with the public officers who had not executed the Judgement of the lower court. The applicant's advocate was present on this particular day though the record shows that the applicant's counsel was absent when the Ruling dismissing his application for stay of execution was read on 10th May 2012.

21. The matter was adjourned in the lower court until 3rd October 2012 and the court issued summons as against the Defendant, now the applicant, to show cause why execution should not issue against him.

22. On 3rd October 2012, the applicant appeared in person before Hon. Obura and informed the court had he had filed an appeal. Of course no appeal had been filed by this date and that position was confirmed by the applicant's counsel, Ms Chilango. The applicant then informed the court that he was ready to move out of the suit property though he needed more time to do so. This fact was confirmed by Ms. Chilango, the applicant's advocate. Consequently, the court directed the applicant to comply with the Judgement within 45 days. The applicant then filed the current application on 8th November 2012.

23. The applicant now seeks for leave to file his Memorandum of Appeal against the Judgement of Honorable Obura delivered on 28th July 2011 out of time. However, the grounds in the annexed Memorandum of Appeal shows that the applicant is seeking to appeal against the Judgement of the lower court which was delivered on 28th July 2011 and the Ruling of the same court dismissing his application for a stay of execution and the setting aside of the *ex parte* Judgement that was read in open court on 10th May 2012. The applicant has not explained in his affidavit how he intends to appeal against the Judgement of the lower court and the Ruling of the same court simultaneously in the event that the court grants him leave to file the appeal out of time.

24. I have read the filed Memorandum of Appeal and I have taken the view that the same is a non-starter. The applicant cannot appeal against the Judgement of the lower court of 29th July 2011 as indicated in the heading of the "draft" Memorandum of Appeal considering that he did not participate in the trial. The only option available to the applicant is to file an appeal against the Ruling of the lower court dated 22nd March, 2012 and delivered on 10th May 2012. Having filed the application to stay the execution of the Judgement of the lower court and to set aside the *ex-parte* Judgement of 28th July 2011 which was refused by the lower, the applicant should have filed a memorandum of appeal as against the said Ruling within 30 days from the date of the order.

25. Indeed the applicant may file an amended Memorandum of Appeal so as to indicate that the appeal is against the Ruling of the lower court dated 22nd March, 2012 and read in court on 10th May 2012. It was the duty of the applicant, having lost his application for a stay of execution and setting aside of the *ex-parte* judgement to move with speed and alacrity to put in motion the necessary measures that would result in the filing of the Memorandum of Appeal against the Ruling without undue delay.

26. I have carefully gone through the applicant's supporting Affidavit which was sworn on 8th November, 2012. The same does not indicate the reason why the applicant did not file his appeal within time after the Ruling dismissing his application was read on 10th May 2012. Even the applicant was not aware of the Ruling that was delivered on 10th May, 2012, the applicant, who was represented all along, does not state why he did not file the current application immediately after the matter was mentioned in the lower court on 19th September 2012.

27. 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 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 he discovered the existence of the Judgement in PMCC No. 70 of 2011 and after his application to stay execution and to set aside *ex parte* Judgement was dismissed by the lower court.

29. 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.”

30. For the above reasons, I hold and find that in the absence of an explanation by the applicant for the delay in filing the Memorandum of appeal from the time when the lower court delivered its Ruling refusing to grant the stay of execution and to set aside the *ex-parte* Judgement, I decline to grant the applicant leave to file the annexed Memorandum of Appeal out of time.

31. In the absence of the leave of this court to file the Memorandum of Appeal out of time, the prayers for stay of execution of the Judgement delivered on 28th July 2011 and setting aside of the *ex-parte* Judgement and proceedings in PMCC No. 70 of 2011 fall by the way side. I therefore dismiss the application dated 8th November 2012 with costs.

Dated and Delivered at Malindi on this 8th day of **March** 2013.

O. A. Angote,

Judge