



REPUBLIC OF KENYA

High Court at Malindi

Civil Appeal 45 of 2012

1. Leave to file appeal out of time.

REUBEN MWANGI KABUTHIA

IRUNGU MWANGI KABUTHIA.....APPELLANTS/APPLICANTS

VERSUS

JAMES G. MOUKO.....RESPONDENTS

RULING

1. What is before the court is the Appellant's application dated 18th December 2012 and filed on the same day. The application seeks for the following orders:

1. **That for the reasons to be recorded in writing, the Application herein be certified as urgent and service in the first instance be dispensed with owing to the urgency.**

2. **That pending the hearing and determination of this Application, there be a stay of execution of the Judgement and Decree herein delivered by the Resident Magistrates Court on the 24th September, 2012 on such terms as appears just and proper; and**

3. **That the time within which the Appellants were required to have filed and served the Appeal be enlarged and the Memorandum of Appeal already filed be deemed as duly filed within the requisite period of time.**

4. **That the costs of this Application be provided for.**

1A. The application is Supported by the Affidavit of Irungu Mwangi Kabutha, the 1st Appellant and on the ground that, firstly, that the Appellants are likely to suffer grave prejudice and loss and secondly that the Appellants' appeal will be rendered nugatory should execution against them issue and lastly that the delay in filing the Memorandum of Appeal was rendered out of delay in the preparation of typed and /or certified proceedings and judgement of the trial court.

2. The Main deposition by the Applicants is that on 24th September 2012, the Resident Magistrate awarded the Respondent a declaration deeming him the owner of the subject property together with an order requiring that the Applicant yield vacant possession of the same by the 19th December 2012. The court also awarded the Respondent's general damages amounting to kshs. 50,000/=.

3. The Applicants deponed that on 12th October 2012, their advocates promptly paid a deposit for the typing and certification of the proceedings and judgement. It is the Appellants averment that it was imperative that their advocate obtain the copies of the typed proceedings and judgement to enable them prepare and file the Memorandum of Appeal, that the advocate has now obtained copies of the proceedings and judgement of the lower court which enabled him to prepare the Memorandum of Appeal that is before the court.
4. The Applicants finally deponed that the delay in filing the Memorandum of Appeal is excusable and prayed that the court should enlarge time so that they can file the appeal out of the prescribed time; that unless a stay of execution of the Decree is granted they shall suffer substantial loss by rendering the Appellants destitute.
5. The Respondent filed a Replying Affidavit sworn on 5th February 2013 in response to the application. The Respondent averred that the current application is an abuse of the court process and its sole intention is to delay the course of justice and to prevent him from enjoying the fruits of his judgement in good time.
6. The Respondent further deponed that the Appellants did not require the proceedings to file the present application or the Memorandum of Appeal and that in any event they have filed the present application before obtaining the proceedings of the lower court; that the Appellants have delayed in bringing this application.
7. The Respondent averred that the Appellants do not reside on the suit plot though they have constructed a small Makuti hut which is not occupied and that they have their residences on neighbouring plots next to the Respondent's plot; that the Appellants have since 2008 harassed, intimidated and restrained him physically from settling on the plot notwithstanding the fact that he is the registered owner of the same.
8. The Respondent averred that the intended appeal has no chances of success because the Appellants do not have a grant of letters of administration to the estate of their father and that the lower court did not have jurisdiction to cancel his titles.
9. The Respondent finally averred that Maisha Self Help Group were the registered owners of the property and that with the instructions from the beneficiary they transferred it to the Respondent upon payment of the purchase price and the Appellants are mere busy bodies; that the Appellants are jua kali artisans occupying seven plots allocated to their late father of which they have not been able to pay for fully and that further delay of this suit will cost him a lot because the building materials and labour keep on escalating.
10. When the parties appeared before me on 12th February 2013, they agreed to dispose of the application by way of written submissions. The written submissions were filed by the Applicants and the Respondent on 15th February 2013 and 21st February 2013 respectively.
11. The Appellants' advocate submitted that he could not frame credible grounds of Appeal before understanding the issues which were raised in the lower court. It is for that reasons that he applied to the court to be supplied with copies of the proceedings and the Judgement of the lower court. The said proceedings and judgement were paid for on 12th October 2012.
12. The Appellants' counsel further submitted that it was taking too long to obtain the typed proceedings and judgement whereupon he decided to peruse the court file which enabled him to file skeleton grounds of appeal. Counsel urged the court to allow the filing of the appeal out of time pursuant to the proviso of section 79 G of the Civil Procedure Act.
13. On the issue as to why the Appellant should be granted a stay of execution pending the hearing and determination of the intended appeal, the Appellants' counsel submitted that Appellants stand to

suffer loss and damage if the Respondent is allowed to execute the judgement appealed against because the Appellants will be rendered homeless and that they have an arguable appeal with high chances of success.

14. On the other hand, the Respondent submitted that the Appellants do not have an arguable appeal because, according to counsel, they do not have the *locus standi* to lay claim over the suit property. The Respondent's main ground in support of this argument is that the Appellants admitted in their defence that the suit property belonged to their deceased father and yet they were not holders of letters of administration of the estate of their late father.

15. The Respondent further submitted that the appellant or their late father never made any payments to the vendors, Maisha Mapya Self Help group; that the Appellants have just moved the court after the Respondent initiated the execution process and that the Appellants have not been prompt in the filing of the Appeal.

16. At the center of the dispute in this matter is property known as 10719/2078, Malindi, which is presently owned by the Respondent. According to the Plaintiff which was filed in the lower court, the Plaintiff bought the suit property from JCC church through its Pastor Mr. Thomas Kakala who referred the Plaintiff to Maisha Mapya Self Help Group for purposes of Transfer.

17. The Applicants *vide* their defence disputed the claim by the Plaintiff and stated that they have been squatters on the land since 1967 and that their late fathers formed Maisha Mapya Self Help Group to assist the group purchase the land from the previous owners. The 1st and 2nd Defendants' father paid kshs. 25,000 to Maisha Mapya Self Help Group and were allocated 8 plots which included the suit premises.

18. Section 79 G of the Civil Procedure Act provides that every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree appealed against. The proviso to the said section allows a party to file his appeal out of time if he satisfies the court that he had good and sufficient cause for not filing the appeal in time. The proviso does not state that the intended Appellant out to show that he has an arguable appeal before the court can allow him to file his appeal out of time.

19. The applicants in this matter have annexed an official receipt showing that they paid for the proceedings and judgement of the lower court with the intention of filing their appeal on 14th October 2012. The application and the payment for the typed proceedings and Judgement was made 20 days after the Judgement was delivered. It is true, as argued by the Respondent that a party who seeks to file a Memorandum of Appeal does not need typed proceedings and Judgement before he can do so. However, it is also true that one must have a grasp of the evidence that was produced during the trial and the reasons of the Honourable Magistrate in arriving at his decisions to conceptualise the grounds of appeal.

20. In the circumstances, I find that the reasons given by the applicants' advocate that he delayed in filing the Memorandum of Appeal because he was pursuing the typed proceedings and Judgement to enable him frame the grounds for the Memorandum of Appeal to be plausible. The applicants' counsel has admitted that he had to read the handwritten proceedings and judgement when the typed proceedings were not forthcoming, by which time 30 days had lapsed. I also find and hold that a delay of 53 days, that is from the last day the Applicants were supposed to have filed their appeal to 17th December 2012 when they filed the appeal, coupled with the explanation they have given for the delay is excusable. In the circumstances, I allow the Applicants to file their appeal out of time.

21. For the Applicants to succeed for the prayer of stay of execution of the judgment of the subordinate court pending the hearing and determination of the appeal, they must demonstrate to the satisfaction of this court that substantial loss will ensue if the order is not granted, that they have filed their application without delay, and that they are willing and able to give such security as ordered by the court for the due performance of the decree. That is the plain reading of Orders 42 Rules 6(2) of the Civil Procedure Rules, 2010.

22. The Applicants have averred in their affidavit that unless the order of stay of execution is granted, they shall be evicted from the suit property and consequently they shall be destitute. They further claim that if the Respondent is allowed to evict them and develop the property, they will not be able to compensate the Respondent for the developments he would have made in the event the court sets aside the Judgement of the lower court.

23. The Respondent refutes this claim and states that the Applicants do not reside on the suit property other than having a small makuti hut which is not occupied and a small pit latrine. The Respondent admits in his affidavit that the Applicants have restrained him from setting foot on the suit property since 2008. That being the case, the interests of justice would be better served by allowing the *status quo* as at the time of the judgement to be maintained pending the hearing and determination of the appeal

24. The Applicants position that they are in occupation of the suit property is further confirmed by the Respondent's Plea at paragraph 4 where it is averred as follows:

“The Plaintiff states that sometimes in or about the month of September, 2008, the 1st Defendant had put a mud walled and makuti roofed structure on the suit property and rented part of the suit plot to the 3rd Defendant who did commence construction of temporary church structure thereon.”

25. It is the Applicants, in the circumstances of the case who are likely to suffer substantial loss unless the order of stay of execution is granted. The suit property is a commodity whose value will also appreciate and in the circumstances of this case shall be a security which this court finds sufficient for the due performance of the decree in the event the Applicants lose their appeal.

26. The Respondent also claims that the Applicants' Appeal has no chances of success because, firstly, the Applicants have no *locus standi* having failed to show that they are the legal representatives of their fathers' estates and secondly, that the Respondent bought the suit property from the Maisha Mapya Self Help Group and not the Applicants and lastly that the lower court did not have the power to cancel his title.

27. It is not for this court, at this juncture to look into the merits and demerits of the intended appeal suffice to say that the issues raised by the Appellants and the Respondent ought to be ventilated at the hearing of the appeal. I shall therefore not comment on the issues raised by the Respondent on whether the Appellants' appeal is arguable. I do so knowing too well that this court will be called upon to hear and determine the appeal.

28. In the circumstances, and for the reasons given above, I allow the Applicant's application dated 18th December, 2012 as prayed.

Dated and delivered at Malindi this 19th day of April, 2013

O. A. Angote
JUDGE