Nduati v Kinyanjui (Miscellaneous Application E025 of 2022)
[2022] KEELC 12652 (KLR) (20 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12652 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISCELLANEOUS APPLICATION E025 OF 2022

BM EBOSO, J

SEPTEMBER 20, 2022

BETWEEN

JOHN KINGORA NDUATI ..... APPLICANT

AND

DAVID WAWERU KINYANJUI ..... RESPONDENT

RULING

1. What is before court for determination is a notice of motion dated 7/4/2022, brought by John Kingora Nduati [the applicant]. It seeks an order enlarging the time within which to bring an appeal against the Judgment rendered on 9/2/2021 by Hon JA Agonda, Principal Magistrate, in Ruiru SPMC E & L Case No 148 of 2019. It also seeks an order of stay of execution. The application was supported by the applicant's affidavit sworn on 7/4/2022. It was canvassed through brief written submissions dated 16/6/2022, filed by M/s Kimani Kahete and Co Advocates.

2. The applicant deposed that there was new evidence touching on the suit property. He added that despite being advised, his former advocates did not file a memorandum of appeal in time.

3. The respondent opposed the application through his replying affidavit sworn on 2/6/2022 and written submissions dated 27/6/2022, filed by M/s Gachie Mwanza and Co Advocates. The respondent deposed that the suit in the subordinate court was triggered by the applicant's illegal act of taking possession of his [the respondent's] land [the suit property]. He added that upon hearing the case, the trial court established that he was the lawful proprietor of the suit property and gave the applicant a period of 90 days within which to vacate the suit property. The applicant ignored the Judgment of the trial court, prompting him to file an application for eviction.

4. The respondent added that the applicant subsequently filed an application dated 17/5/2021 seeking a review of the judgment of the trial court. The two applications were canvassed by the parties and

determined by the trial court in a ruling rendered in August 2021 through which the applicant's application for review was rejected and his (respondent's) application for eviction orders was granted.

5. Canvasing the application under consideration, counsel for the applicant contended before this court that failure to lodge an appeal on time was a mistake on the part of the applicant's previous advocates and that the mistake of counsel should not be visited on the applicant. Counsel added that the delay involved was not inordinate, considering that they were "observing COVID 19 court's conditions." Counsel urged the court to grant the extension.

6. Opposing the application, counsel for the respondent submitted that the question for determination in the application was whether the applicant should be granted leave to file an appeal out of time. Counsel cited section 97G of the *Civil Procedure Act* and submitted that a delay of fifteen months was inordinate. Counsel added that no proper explanation had been tendered by the applicant to explain the delay. Counsel submitted that the applicant elected to file an application for review which he canvassed before the trial court and lost. It was the position of counsel for the respondent that the applicant having opted to apply for a review of the Judgement of the trial court, he cannot seek to lodge an appeal after losing the plea for review. Citing the provisions of section 80 of the *Civil Procedure Act*, and order 45 rule 1 of the *Civil Procedure Rules*, counsel for the respondent submitted that the applicant having elected to exercise the option of review he cannot exercise the right of appeal against the same Judgment. Counsel urged the court to dismiss the application.

7. I have considered the application, the response to the application, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. Two issues fall for determination in the application. The first issue is whether the applicant has satisfied the criteria for enlargement of time. The second issue is whether the applicant has satisfied the criteria for grant of an order of stay of execution pending the hearing and determination of an appeal. I will make brief sequential pronouncements on the two issues.

8. There is no doubt that section 79G of the *Civil Procedure Act* gives this court discretionary jurisdiction to enlarge the time within which to file an appeal against a decree or an order of a subordinate court. Section 79G of the *Civil Procedure Act* provides thus:

> " 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 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: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time"

9. The court's discretionary jurisdiction to enlarge time is exercised on the basis of well-established principles. The Supreme Court of Kenya outlined the relevant principles in *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 others* [2014] eKLR in the following words:

> " (T)he underlying principles a court should consider in exercise of such discretion include:
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> 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
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> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the respondent if the extension is granted;

6. Whether the application has been brought without undue delay.

10. Koome JA [as she then was] summarized the principles in *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR in the following words:

> " It is now well settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which the court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted."

11. In the application under consideration, the impugned judgment was rendered on 9/2/2021. The application for enlargement of time for lodging an appeal against the judgment was filed in this court on or about 5/5/2022, which was a period of about 15 months after the impugned judgment was rendered. The applicant contends that the above delay was occasioned by his previous advocates' failure to act on his (the applicant's) instructions to lodge an appeal against the judgement. Opposing the application, the respondent contends that there is no satisfactory explanation for the delay. He further contends, without any contradiction by the appellant, that the appellant elected to exercise the right of review under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*, hence he has no right of appeal. Can the applicant be said to have satisfied the criteria for enlargement of time in the above circumstances?

12. My answer to the above question is in the negative. First, section 80 of the *Civil Procedure Act* and order 45 rule 1 are unequivocal that one cannot exercise both the right of appeal and the right of review against the same judgment/decree. Section 80 of the *Civil Procedure Act* provides thus:

> " Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act,
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> may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

13. Order 45 rule 1 provides thus:

> (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

14. Not too long ago, the Court of Appeal pronounced itself on the tenor and import of the above legal framework in *Mary Wambui Njuguna v William Ole Nabala & 9 others* [2018] eKLR in the following words:

> " We agree with the conclusion by the learned Judge that it was not open for the appellant to pursue an appeal and at the same time a review of the same orders. The appeal could only lie on the outcome of the application for review."

15. Without saying more on this, it follows that the applicant having elected to exercise the right to apply for review of the judgment of the trial court, and having lost the application for review, he closed the avenue of appeal. The right of appeal against the impugned judgment was no longer available to him. What was available to him was the right of appeal against the trial court's decision on the application for review.

16. Even if I were to be wrong on my interpretation of the legal ramifications of Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*, I do not think the applicant has given a proper explanation for the delay of 15 months. He is casually blaming his previous advocates for the delay yet he elected to exercise the right of review as opposed to lodging an appeal. He has not demonstrated the exact day he allegedly instructed his previous advocates to lodge an appeal against the judgment. He has not disclosed the form of the alleged instructions.

17. For the above reasons, my finding on the first issue is that the applicant has not satisfied the criteria for enlargement of time.

18. The applicant having failed to satisfy the criteria for enlargement of time, it follows that the criteria for grant of an order of stay of execution pending the hearing and determination of an appeal is not met, because there is no appeal subsisting. Secondly, the intended appeal has not been permitted. Put differently, in the absence of an appeal, there is no proper basis for an order of stay of execution pending the hearing and determination of an appeal.

19. The result is that the notice of motion dated 7/4/2022 is dismissed for lack of merit. The applicant shall bear costs of the application

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 20TH DAY OF SEPTEMBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Kimani for the Applicant

Ms Wanjiku for the Respondent

Court Assistant: Sydney