



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KISUMU

MISC APPLI 120 OF 2007

NABIL HASSAN APPLICANT

VERSUS

DANIEL ODINDO WAGA. RESPONDENT

RULING

The applicant in the Notice of Motion dated 10th August 2007 seeks orders of this court that:

- 1. The applicant be granted leave to appeal against a Ruling of the Lower Court in CMCC number 738 of 1998, delivered on 8th December 2006.**
- 2. The time for lodging the intended appeal be extended**
- 3. There be a stay of all orders, rulings and decisions of the lower court in relation to the sale and transfer of and any dealings with and in respect of land parcel number KISUMU/MUNICIPALITY/**

BLOCK 6/103 pending the hearing and determination of the intended appeal.

The motion is said to have been brought under Sections 3A, 75(1) and 79G of the Civil Procedure Act and Orders XXI rules 22 and 54, LXIX rule 5 and L rule 1 of the Civil Procedure Rules. I must say at this early stage that the application, both in the manner in which it was presented and argued struck me as one where the applicant was unsure of his legal standing and/or as regards his real interest in the property in dispute. In his submissions, counsel for the applicant Mr. Ocharo began by stating that he was not sure if leave was required but that the same was hereby sought “ **just in case the court is of the view that leave should have been sought**”. No wonder therefore that several provisions of the Civil procedure Act and Rules are cited, including Rule 54 of Order XXI which is, in my view, spent and quite irrelevant at this stage. Several grounds in support of the application have been raised, the bulk of which, in my

considered view, go to the appeal itself. I do not consider myself bound to consider or make findings in regard to those grounds and submissions in regard thereto. I have, in this ruling, restricted myself to the salient issues arising in the application and the orders sought, being, leave to appeal, extension of time to lodge the appeal and a stay of execution.

The background to this application is that the suit property was attached in execution of a decree obtained by the Respondent against one Hassan Mohamed in CMCC Number 738 of 1998 wherein the Respondent was the Plaintiff. The applicant was not a party to those proceedings but did file an application to set aside the sale vide a Notice of Motion dated 25th November 2004 which was dismissed in the ruling sought to be appealed against.

I have considered it crucial that I deal with the issue of whether leave to appeal is required in the circumstances of this case. Counsel for the applicant referred the court, albeit at a very late stage (in reply to the Respondent’s submission), to the provisions of order XLII as regards appeals from orders made pursuant to order XXI. It is clear from my perusal of Order XLII in particular rule 1 (1) (n) that leave to appeal is not necessary. The rule provides as follows:-

“ 1. (1) An appeal shall lie as of right from the following orders and rules under the provisions of Section 75 (1) (h) of the Act –

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)
- (h)
- (i)
- (j)
- (k)
- (l)
- (m)
- (n) **Order XXI, rules 25, 57, 65 (3) and 81 (orders in execution).**

The applicant having made an application under Order XXI rule 79 which application was dismissed, then clearly rule 81 (1) applies herein since it states inter alia, that

“ 81 (1) Where no application is made under rule 78, 79 or 80 or where such application is made and is disallowed, the court shall make an order confirming the sale and thereupon the sale shall become absolute in so far as the interest of the judgment – debtor and the interest sold is concerned”(emphasis added)

In addition to the above, this court notes that the applicant did obtain leave to appeal in the lower court as was required of him under Order XLII rule 1 (3). Clearly therefore, leave of this court is not required and the prayer for such leave is nothing but superfluous.

Turning now to the prayer for extension of time within which to file the appeal, under Order XLIX rule 5, the applicant has set out, in paragraph 11 of his supporting affidavit, 6 reasons for the delay. These range from, the applicant's own illness and that of his father, whom he claims, in these proceedings, to be the registered owner of the suit premises. The applicant says this notwithstanding the fact that in the proceedings before the lower court, he represented himself as the owner of the suit premises to the extent of swearing (in the supporting affidavit of 25th November 2004) that

“ I am the objector/applicant.....

“ I know of my own knowledge that when the Plaintiff /Decree Holder put up a notice of sale of my property comprised in all that parcel of land known as Kisumu/ Municipality/Block 6/103 I instructed the firm of Onsongo & Company Advocates to file and serve a Notice of objection”

and “ That the sale of the said property deprives me of my constitutional right to own and manage private property to the exclusion of all other persons” (underlining provided)

No wonder, therefore, that Mr. P. J. Otieno for the Respondent herein has submitted that the applicant is a perjurer and deserves no sympathy or any order from this court as prayed or all. Among other reasons tendered for the delay in filing the appeal and which are related to the above are that the applicant was so involved in securing medical treatment for his father that he had no time to pursue the appeal process and that his father, who the applicant says had been ill since 2002, eventually died in January 2007 thereby necessitating the filing of a petition for letters of administration intestate in which a limited grant of letters of administration ad litem was obtained by the applicant on 3rd August 2007. The applicant also blames the court for not supplying him with copies of proceedings and Ruling of 8th December 2006 expeditiously.

None of the above reasons are supported by documentary evidence save for the death of the applicant's father and that he did infact obtain a limited Grant ad litem on 3rd August 2007. The applicant having instructed his former advocate, Mr. Onsongo to prefer an appeal against the lower court's ruling and it being clear from the annexed proceedings “NH-7” that Mr. Onsongo did apply and obtain leave to appeal immediately the ruling was delivered, can the applicant be said to have had any other reason not to file the appeal, save, perhaps, for the obvious reason that he doubted his chances of maintaining a successful appeal or application for stay of execution having neither a legal nor a beneficial interest in the suit property, and worse still, not being the judgment debtor?.

It being clear, as earlier stated herein, that leave is not required and that, even if it was, the same was granted to the applicant on 8th December 2006 but he chose not to move the court, I find that the delay in not filing the appeal is inexcusable and that the reasons given for not filing an appeal within the time prescribed are an afterthought. Prayer 2 of the application is therefore refused.

Turning now to the prayer for stay I am of the considered view that the applicant, not being the judgment debtor cannot benefit from the relief available to a judgment debtor under Order XXI Rule 22. Accordingly, I refuse to grant prayer 3 of the application.

In the premises, having considered the application in its entirety, the submissions by counsel together with the authorities cited in support of their respective arguments and being guided by the applicable law, I find that this application fails for the reasons stated. Accordingly the same is hereby dismissed with costs to the Respondents.

Dated and delivered at Kisumu this 13th day of December 2007.

M.G. MUGO

JUDGE

Ruling delivered in the presence of:

For Applicant:

For Respondent:

MGM/aao