



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 27 OF 2017

FRANCIS NDUNGU NJUGUNA.....1ST APPELLANT

DANIEL NDUNGU NJAU (*sued as a personal representative*)

Of the estate of NJAU KIBIRII(Deceased).....2ND APPELLANT/APPLICANT

VERSUS

PAULINA GACAMBI KARIUKI.....RESPONDENT

(AN APPLICATION FOR LEAVE TO FILE AN APPEAL OUT OF TIME FROM THE JUDGMENT OF THIS

COURT IN THIKA ELC CASE NO. 27 OF 2017, DATED 28TH JUNE 2019)

BETWEEN

FRANCIS NDUNGU NJUGUNA.....PLAINTIFF

VERSUS

DANIEL NDUNGU NJAU (*sued as a personal representative*)

of the estate of NJAU KIBIRII(Deceased).....DEFENDANT

AND

PAULINA GACAMBI KARIUKI.....RESPONDENT

RULING

The matter for determination is the Notice of Motion Application undated and filed on **6th February 2020** by the Applicant seeking for orders that;

- 1. That there be stay of Execution of the Judgment of her Ladyship Nyambura Gacheru delivered on 28th June 2019, in Thika High Court ELC Case No. 27 of 2017 and all consequential orders and or proceedings therein pending the hearing and determination of this Application inter parties.***
- 2. That the 2nd Appellant/ Applicant be granted leave to file an Appeal out of time against the Judgment in the matter passed on 28th June 2019.***
- 3. That this Honorable Court be pleased to issue such other and or further order that it may deem fit in the interest of justice.***
- 4. That the costs of this Application be provided for.***

The Application is premised on the grounds that on **28th June 2019**, the Court entered Judgment against the Appellant. That the Appellant/ Applicant being dissatisfied with the said Judgment is desirous of appealing against the Judgment which appeal is arguable and has a high chances of success. That the Applicant was never served with a notice of delivery of Judgment delivered on **28th June 2019**, and the period

within which to lodge an appeal has expired. Further that the Applicant leant of the Judgment when its Advocates on record were served with a Notice of Appeal dated **15th July 2019**, but which was served on the Law Firm on **20th September 2019**. That the Application has been brought without delay and the Respondent will suffer no prejudice in the event that the Application is granted.

That the delay in filing the Appeal was occasioned by the fact that the Applicant was not aware that the Judgment had been entered against him. That substantial and irreparable loss will be occasioned to the Applicant unless execution of the said Judgment is stayed. That the intended appeal is merited and raises weight issues and the Applicant is ready and willing to abide by any conditions which may be set.

In his Supporting Affidavit, **Francis Ndungu Njau** averred that prior to issuance of the Judgment, he was never accorded an opportunity to adduce his evidence. That he only became aware of the Judgment when his Advocate informed him of the **Notice of Appeal**. That he resides in Nyahururu County as a peasant farmer and he had to make arrangements and mobilize resources to travel to Githunguri and meet his Advocates. In the meantime, he instructed his Advocate to procure a copy of the Judgment. That the Judgment ordered that he is entitled to 1 acre to be partitioned from **L.R 173** and refund **Kshs. 385,000/=** to the 1st Appellant and pay him General Damages of **kshs. 200,000/=** amongst other orders.

That he is of the considered view that Judgment was erroneous and ought to be appealed. That the time for filing the Notice of Appeal expired on **15th July 2019**, and the delay is not inordinate. Further that the intended appeal is arguable. He averred that he believed that the Respondent is in the process of executing the Judgment and he will suffer irreparably as a result. That there is need to appeal with a view to set aside the Judgment on record and it is a suitable case for the exercise of discretion.

The Application is opposed and **George Kagiri Kariuki** swore a Replying Affidavit on **16th September 2020**, and averred that he is the Administrator of the Estate of **Pauline Gacambi Kariuki**. That the Application is defective as it has been filed by an Advocate not properly on record. That the Judgment was delivered after Notices to all parties and there is no explanation as to why the Applicant and his Advocate failed to attend. That the Applicant was a witness and gave evidence in Court. Further the Applicant has not explained why if he was notified of the Judgment on **20th September 2019**, he failed to take action until **6th February 2020**, a period of 4 and half months.

That the delay is inordinate and the Applicant has not shown any arguable case with high chances of success. That the Judgment reflect the use of the land on the grounds and the execution of the Judgment will not prejudice any party. That the prayer for stay is an abuse of the Court process and the Applicant does not have a pending appeal. That they have not been served with any **Notice of Appeal** including by **Francis Ndungu Njuguna**, and hence purported earlier Notice of appeal is incompetent and has lapsed for want of service.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The issues for determination are;

- 1. Whether the Application is defective for being filed by an Advocate not properly on record***
- 2. Whether the Applicant is entitled to be allowed to appeal out of time***
- 3. Whether the Applicant is entitled to orders of Stay of Execution pending appeal***

1. Whether the Application is defective for being filed by an Advocate not properly on record

In his Replying Affidavit, the Respondent has averred that the Application is defective as the Applicant's Advocate is not properly on record. The provisions of **Order 9 Rule 9** of the **Civil Procedure Act** require that if an Advocate is coming on record after Judgment, then the said Advocate must seek leave of Court. However, from the proceedings the Law Firm of **Kiratu Kamunya & Company Advocates** have been on record before Judgment and therefore the Court finds that the Advocates are properly on record.

2. Whether the Applicant is entitled to be allowed to appeal out of time

In the case of **Naomi Wambui Gachiengo...Vs...Isaac Maina Kamau & another [2020] eKLR** the Court of Appeal held that;

“Rule 4 of the Court of Appeal Rules does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a ‘just’ decision in the circumstances of each case. The case of Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231 which is the locus classicus, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

The issues I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR where the court rendered itself thus:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path..... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the

application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”

In the instant case, it is not in doubt that Judgment was delivered on **28th June 2019**, in the absence of the Applicant. The Applicant has averred that the reason for failure to appeal on time is because he was not aware of the Judgment and by the time he got to be aware of the Judgment, being a peasant farmer staying in Nyahururu, he had to organize himself and instruct his Advocate.

The Court has seen the Judgment Notice. It is true that though various Advocates were served, the said Applicant's Advocates were not served. The Court has also considered the argument by the Applicant that by the time he learnt of the Judgment, he had to organize himself to enable him instruct his Advocate. The Court takes cognizant of the fact that the lack of money cannot be a valid reason for the delay. See the case of **Naomi Wambui Gachiengo ...Vs...Isaac Maina Kamau & another(supra) where the Court quoted the case of Francis Mwai Karani vs. Robert Mwai Karani Civil Application No. NAI. 246 of 2006** where Omolo, J.A held:

“That lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. Such a situation is already provided for in our laws by way of Rule 112 of this Courts Rules. I do not accept the applicants’ explanation for delay of one year eleven months in filing the appeal on this matter. I reject it.”

In the above case, the delay was of 6 years. In the instant case, the delay is of around 4 months considering the Applicant got to be aware of the Judgment on **20th September 2019**. The Court is inclined to exercise its discretion and allow the Applicant leave to file the Appeal out of time, considering the circumstances that the delay is not inordinate. This is putting into account that for the Applicant to file the Appeal, leave had to be granted. Therefore, the instant Application had to be in place as opposed to if he was present during the Judgment.

Further in the case of **Naomi Wambui Gachiengo v Isaac Maina Kamau & another(supra)** the Court also held that;-

“As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015 this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

The Court therefore finds and holds that the prayer to file an appeal out of time is merited and the same is allowed.

3. Whether the Applicant is entitled to orders stay of Execution pending appeal

Grant of stay of execution pending appeal is provided for under **Order 42 Rule 6 of the Civil Procedure Rules**, which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) ...

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

It is not in doubt that an applicant for stay of execution of a Decree or Order pending appeal is obliged to satisfy the conditions set out in **Order 42 Rule 6(2)**, aforementioned: namely **(a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of**

such decree or order as may ultimately be binding on the applicant has been given.

Further in the case of *RWW ...Vs... EKW [2019] eKLR*, the Court held that;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

The Court has allowed the Applicant to appeal out of time. From the Judgment of the Court, the Court made various orders including the partitioning of the suit property and also ordered the Applicant to pay certain amounts to the 1st Appellant. The 1st Appellant has not opposed the instant Application. The Court held that the Respondent had acquired the suit property by way of Adverse Possession meaning the said Respondent is in possession of the said property and no prejudice would be suffered if there is stay of execution. Further that the Court finds that as the purpose of stay pending Appeal is to preserve the subject property and if the partitioning of the property is allowed to be effected, then it would mean that parties would get their individual titles of their various properties and they would be entitled to deal with the same as they deem fit.

Further if the Applicant is to be successful in his Appeal, there is no doubt that the Appeal would have been rendered nugatory as the persons with various titles would be at liberty to deal with the same in whichever way including disposing off the same. It is therefore prudent that the said suit should be preserved.

Therefore, the Court finds and holds that the Applicant has satisfactorily explained to Court why it should exercise its discretion and grant the stay of execution.

For the above reasons, the Court finds the **Notice of Motion Application** dated **6th February 2020**, is merited and the same is allowed entirely with costs being in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 25TH DAY OF MARCH 2021

L. GACHERU

JUDGE

25/3/2021

Court Assistant - Dominic

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Gachoka Mwangi for the 1st Appellant

Mr. Kamunya for the 2nd Appellant/Applicant

No appearance for the Respondent

L. GACHERU

JUDGE

25/3/2021