



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL (APPLICATION) NO. E 045 OF 2020

REVIVAL AND RESTORATION

INTERNATIONAL CHURCH.....APPLICANT

VERSUS

GEOFREY THIONG'O.....1ST RESPONDENT

REUBEN KIBUE THIONG'O.....2ND RESPONDENT

CHARITY NJOROGE NJOKI.....3RD RESPONDENT

(Being an Application for extension of time for lodging an appeal against the Judgment of the Chief Magistrate at Milimani Commercial Courts Nairobi, Honourable L L Gicheha (Mrs) rendered on 28th August 2020 in Milimani Civil Suit No 8958 of 2018)

RULING

1. Before me for determination is a notice of motion dated 26/10/2020 through which the applicant, Revival & Restoration International Church, seeks leave to lodge an appeal out of time, against a judgment rendered on 28/8/2020 by Honourable L. L Gicheha (Chief Magistrate) in **Nairobi (Milimani Commercial Courts) CMCCC No 8959/2018; Geoffrey Mungai Thiong'o & another v Revival & Restoration International Church**. Further, the applicant seeks an order of stay of execution of the judgment, pending the hearing and determination of the intended appeal.
2. The application was supported by an affidavit sworn by Mr Kiprop Chepersgeron, an advocate acting for the applicant in this application. He deposed that the applicant instructed its former advocates, M/s Mbiriri Ngugi & Co Advocates, to file an appeal but the said advocates failed to do so within 30 days. He added that the mistake of counsel should not be visited on the applicant.
3. The 1st and 2nd respondents opposed the application through a replying affidavit sworn on 11/2/2021 by Geoffrey Mungai Thiongo. He deposed that the impugned judgment was delivered on 28/8/2020 in the presence of all parties, hence the applicant was all along aware. He added that no evidence had been presented to suggest that the applicant gave instructions to its former advocates to file an appeal within 30 days from 28/8/2020. He further deposed that the likelihood of substantial loss had not been demonstrated by the applicant. On the first ground of appeal, he deposed that the issue of pecuniary jurisdiction of the Magistrate Court was never raised in the trial court and cannot be raised at this stage on the basis of a post-judgment valuation report. On the second ground of appeal, he deposed that the trial court had addressed and determined the issue of the lease held by the applicant and had found that it had been issued by imposters/fraudsters.
4. The application was canvassed through written submissions filed through the firms of M/s Chesikaw & Kiprop Advocates. Counsel identified the following as the two key issues falling for determination in the application: (i) whether this court should grant the appellant leave to file an appeal out of time; and (ii) whether this court should stay the execution of the judgment and orders of the Honourable L L Gicheha (CM) of 28/8/2020 made in **Milimani CMCC 8958 of 2018**.
5. On the first issue, counsel cited the Court of Appeal decision in **Thuita Mwangi v Kenya Airways Ltd (2003) eKLR** and argued that the delay was not inordinate and had been explained as a mistake of counsel. Counsel added that the intended appeal stood high chances of success because the trial court did not have pecuniary jurisdiction to try the suit. Lastly, on the first issue, counsel submitted that the applicant stood to suffer prejudice because they had built a church on the suit property.
6. On the second issue, counsel submitted that the 3rd respondent, Charity Njoki Njoroge, had filed an appeal against the impugned judgment and in the event that execution takes place and the 3rd respondent's appeal is subsequently adjudged successful, the appellant would suffer great prejudice. Counsel urged the court to grant the prayers sought in the application.
7. The 1st and 2nd respondent filed written submissions dated 11/2/2021 through the firm of Muturi Kamande & Company Advocates.

Counsel submitted that nothing had been presented by the applicant to show that it instructed its former advocates to file an appeal. Counsel added that the applicant was guilty of inordinate and unexplained delay.

8. On whether the intended appeal had any chances of success, counsel submitted jurisdiction was never raised as an issue in the trial court. Counsel added that the trial court had properly made findings on the lease held by the applicant by finding that the same had not been issued by the 1st and 2nd respondents who were the lawful title holders of the suit property. Counsel further argued that for the trial court to establish the validity of the applicant's lease, it had to establish the question of ownership of the suit property. On the question of likelihood of loss, counsel submitted that the applicant occupied the suit property on the basis of a lease and any loss suffered would be computed and compensated.

9. Lastly counsel urged the court to disregard the affidavit sworn by the applicant's current advocate because the advocate lacked capacity to depone to contentious matters to which he was not privy.

10. I have considered the application; the response thereto; the parties' respective submissions; the relevant legal frameworks; and the applicable jurisprudence. The following three questions fall for determination in the application: (i) whether the supporting affidavit sworn by Kiprop Chepserson, advocate, should be disregarded for non-compliance with the requirements of the law; (ii) whether the applicant has satisfied the criteria upon which this court exercises jurisdiction to extend time within which to file an appeal in this court; and (iii) whether the applicant has satisfied the criteria within which this court exercises jurisdiction to grant an order of stay of execution pending the filing, hearing and determination of an appeal in this court. I will make brief sequential pronouncements on the three questions.

11. What is clear from the materials placed before court is that the applicant is not a natural person. It is, however, not clear under what legal framework the applicant exists. Secondly, from the supporting affidavit sworn by Kiprop Chepserson, he described himself as an advocate of the High Court of Kenya practising under the name Chesikaw & Kiprop Advocates. He did not disclose the authority under which he was swearing the affidavit. Similarly, he did not disclose the source of the information contained in the affidavit, given that he is not a party to this application and he was not on record at all material times. Further, he did not disclose the identity of the person or persons who instructed the previous advocates to file an appeal within the prescribed time. Similarly, he did not exhibit any such instructions.

12. **Order 19 rule 3(1)** of the **Civil Procedure Rules** requires that an affidavit be confined to such facts as the deponent is able of his own knowledge to prove. An exception to that mandatory requirement is when the affidavit relates to interlocutory proceedings, in which case, statements of information and belief are admissible provided the sources of information and the grounds of belief are shown or disclosed.

13. The affidavit of Kiprop Chepserson violates the mandatory requirements of **Order 19 rule 3 (1) of the Civil Procedure Rules** in all aspects. In the circumstances, the court agrees with the 1st and 2nd respondents that the said affidavit should be disregarded for non-compliance with the mandatory requirements of the law [see the Court of Appeal decision in **Gerphas Alphonse Odhiambo v Felix Adiego [2006] eKLR**]. That is my finding on the first issue.

14. Without a proper supporting affidavit, the application dated 26/10/2020 is not supported by proper admissible evidence and the applicant cannot, in the circumstances, be said to have attempted to satisfy the criteria upon which this court exercises jurisdiction to extend time for lodging an appeal in this court. Similarly, the applicant cannot be said to have satisfied the criteria upon which this court exercises jurisdiction to grant an order of stay pending the filing, hearing and determination of an appeal in this court. My findings on the second and third questions are therefore in the negative.

15. In the end, the notice of motion dated 26/10/2020 is dismissed for lack of merit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF MARCH 2021.

B M EBOSO

JUDGE

In the Presence of: -

Ms Shikali for the Applicant

Mr Muturi for the 1st and 2nd Respondent

Mr Wokabi for the 3rd Respondent

Court Assistant: June Nafula