



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 25 OF 2020

JOHN OKAYANA SABATIA..APPELLANT/APPLICANT

VERSUS

BARNABAS GITARI MUGAMBI..... 1ST RESPONDENT

KAARI GITARI MUGAMBI.....2ND RESPONDENT

(Being an Appeal against the Ruling and Order of Hon. Ekhubi B.M (P.M) delivered at Thika on the 30th day of April 2020 via Email)

In_

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT

AT THIKA

CIVIL CASE NO. 12 OF 2019

BARNABAS GITARI MUGAMBI.....1ST PLAINTIFF

KAARI GITARI MUGAMBI.....2ND PLAINTIFF

VERSUS

JOHN OKAYANA SABATIA.....DEFENDANT

RULING

The matter for determination is the Notice of Motion Application dated **5th June 2020**, by the Appellant/Applicant seeking for orders against the Respondents for;

- 1. That Pending the hearing and determination of this Appeal, there be a stay of Proceedings in Thika CMELC Case No. 12 of 2019 Barnabas Gitari Mugambi & Anor ...Vs... John Okayana Sabatia.**
- 2. That the Memorandum of Appeal filed on 5th June 2020 be deemed as properly filed within time.**
- 3. Strictly in the alternative and without prejudice to prayer 4, leave be granted to the Appellant to file the Memorandum of Appeal out of time.**
- 4. Costs of this Application be in the cause.**
- 5. Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.**

The Application is premised on the grounds that if stay orders are not granted, there is a real likelihood that the Respondents will proceed

with the hearing and determination of **Thika CMELC Case No. 12 of 2019** and that if the both the said suit and the instant Appeal proceed concurrently, there is a possibility of two Courts coming up with two different determinations thereby embarrassing the administration of justice.

That the Appellant's/Applicant's Memorandum of Appeal raises serious questions of law regarding the trial magistrates jurisdiction to hear and determine **Thika CMELC Case No. 12 of 2019** and it is in the interest of justice that the suit be stayed pending the outcome of the present Appeal so that this Court can pronounce itself on whether or not the trial Court in **Thika CMELC Case No. 12 of 2019** had jurisdiction to hear and determine the suit. Further that if stay orders are not granted, the instant Application will be rendered nugatory and a mere academic exercise .

That the Appellant/ Applicant stands to suffer substantial loss if stay pending the hearing of the Appeal is not granted as the Respondents are seeking eviction orders both in their Notice of Motion Application and in the Plaint dated **28th November 2018**. That the Appellant/ Applicant had challenged the jurisdiction of the trial Court to hear and determine the suit by way of a Notice of Preliminary Objection dated and filed on **15th August 2019**, and the Notice of Preliminary objection was argued orally on **7th November 2019**. That the Ruling for the Notice of Preliminary Objection was slated for **16th January 2020**.

However, the Ruling was subsequently deferred to **23rd January 2020**, **27th February 2020** and **26th March 2020**. That on **26th March 2020**, the Ruling was never delivered due to the prevailing **Corona Virus Pandemic** and parties were thus awaiting for notification by the Court on when the Ruling would be delivered. That the Ruling was eventually delivered without notice to parties on **30th April 2020**, via email and the same was emailed to parties on **4th June 2020**. The Appellant/ Applicant has approached the Court at the earliest opportune moment as soon as he became aware of the Court's determination and the delay in the Appellant filing his Memorandum of Appeal is not inordinate as the same is explainable and excusable .

In his Supporting Affidavit, **John Okayana Sabatia**, the Appellant/ Applicant averred that he had written to the trial Court requesting for certified copies of the proceedings, certified copy of the Ruling as well as a certified copy of the Order emanating from the Ruling of the Court . Further that he had written to the trial Court indicating that the Ruling was delivered via email on **4th June 2020** and not **20th April 2020**, as indicated in the Ruling. He further averred that he has sought the Court to find that his Memorandum of Appeal was filed on time out of abundance of caution and should the Court find that the Memorandum of Appeal was filed out of time , the Court to grant leave to file it out of time.

The Application is opposed and the 1st Respondent, **Barnabas Gitari Mugambi** swore a Replying Affidavit on **11th June 2020**, and averred that the Application is frivolous, vexatious , a delaying tactic and an utter abuse of the Court's process. He averred that he has been advised by his Advocate whose advice he believes to be true that no interim orders were issued at the exparte stage because the Court found no urgency and merit in awarding the orders because the Application is ill advised and bad in law.

That the Appellant/ Applicant has always sought to block the continuity of the suit at the lower Court as a delaying tactic which he is continuing to do in form of his intended Appeal which is grossly out of time. That as a successful litigant, he is entitled to enjoy the fruits of his ruling at the lower Court and proceed with the hearing of the suit in **Thika CMELC 12 of 2019** to its conclusion on merit. Further that Application after Application only serve to waste precious judicial time. When the Application was brought to Court, it was not certified urgent nor **no interim orders** were granted, a clear indication that the said Application lacks merit and the time spent by the Court dealing with the instant Application could have been put to good use.

That his advocate has further advised him that the matter can be heard substantively and on merit at the lower court and from the said Judgment the Appellant/ Applicant would still have his right of Appeal and so would he. That the Appellant/ Applicant is well aware that he raises issues in his Defence that can only be adjudicated by a formal hearing. However, he is aware that he has no right over the land he is currently living in and does not want to deal with the issues on merit. That this approach is intended to strip the Respondent off his rights. Further there was a **Notice on the Facebook page** of the **Kenya Judiciary** sometime in **April**, indicating that the Ruling at the lower Court was ready and the parties listed thereon were to give their consents. That his Advocates on record wrote various emails to **thikacourt@court.go.ke** giving their consent on his behalf to get the ruling via email. Further, that the Application dated **5th June 2020**, is etched on falsehoods and it ought not to be entertained further.

That he continues to suffer extreme prejudice as a litigant in the suit as since its inception in **2019**, they have only dealt with unmerited Applications by the Appellant/ Applicant and the substantive suit remains unadjudicated, he is deprived of his right to own property. That if the instant Application is dismissed, the Appellant/ Applicant suffers no prejudice since all the issues raised in their pleadings can be articulated on merit by way of a formal hearing at the lower court . That the draft **Memorandum of Appeal**, rises no triable issues and has no high chances of success. Further that the draft Memorandum of Appeal is pegged on technicalities and justice cannot be defeated on grounds of technicalities. That the Appellant/ Applicant does not deny the substance of the suit at **Thika CMELC 12 of 2019**, and the applicant has not denied that he is trespassing on the suit property.

The Appellant/ Applicant swore a Supplementary Affidavit on **15th July 2020**, and denied that the Application was a delaying tactic. He contended that he has a right to Appeal against the decision of the Lower Court. That he had been advised by his Advocates that the trial Court cannot proceed to determine the matter as it does not have jurisdiction to proceed over a matter filed after the lapse of **12 years** since the cause of action. That the Court fell in error by considering factual issues in the pleadings yet it was to confine itself to the legal issues raised in the Preliminary Objection. Further that he is not on **Facebook** nor is he aware of any Notice on the **Facebook page** and the consent referred to by the Respondents is by his Advocates. That the emails referred to by the Respondents were never copied to his Advocates and a careful reading of the emails annexed to the Replying Affidavit indicates that as at **28th May 2020**, the Respondents were still seeking the Court to deliver the Ruling to them. That though the Ruling is dated **30th April 2020**, it was emailed to the parties on **4th June 2020**.

That the Ruling having been delivered on **4th June 2020**, and the **Memorandum of Appeal** having been filed on **5th June 2020**, he urged the Court to find that he filed his Appeal on time. That he is suffering extreme prejudice and he has incurred a lot of costs to participate in these proceedings, yet the proper defendant at the Court is the Minister of Lands and the Honorable Attorney General. He contended that his Memorandum of Appeal raises arguable and weighty questions of law including whether the trial Court is vested with competent jurisdiction, if the trial Magistrate was justified in scrutinizing the Defence and departing from the **Notice of Preliminary Objection**. That a question of whether an action is time barred is not a technicality as it is a question of substance that goes to the root of the matter.

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 Memorandum of Appeal is properly on record

2. Whether the Appellant/ Applicant is entitled to stay of Proceedings Orders sought

1. Whether the Memorandum of Appeal is properly on record

It is the Appellant/ Applicant contention that though the Judgment from the Lower Court is dated **30th April 2020**, the parties did not receive the Judgment until **4th June 2020**. To this effect, the Applicant has produced a copy of an email. Though the Respondents have tried to dispute this fact, the Court has seen copies of emails from the Respondents as recent as **28th May 2020**, seeking to have the Ruling supplied to them. Though the Applicant has sought the Court's intervention to declare that the Ruling was not delivered on **30th April 2020**, the Court's finds that it can not make such a declaration as there is no evidence availed for the Court to authoritatively make such a finding. Therefore, this Court finds and holds that there is no basis to which it can find that the Ruling was not delivered on **30th April 2020**.

However, It is not in doubt that the Appellant/ Applicant received the said Ruling on **4th June 2020**, as evidenced by the email produced in Court.

The Appellant/ Applicant has sought for leave to file an Appeal out of time. The Appeal herein was filed on **5th of June 2020**, after a period of 30 days had lapsed since the Ruling was delivered. Section **75G of the Civil Procedure Act** provides that:

“79G. 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.”

In the case of Nicholas Kiptoo Arap Korir Salat...Vs....The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR, the Court held that:-

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

From the above cited authority and provisions of law, it is clear that the decision on whether or not to allow a party to file an Appeal out of time is discretionary and the Applicant needed to explain whether there is a reasonable cause for the delay. It is the Appellant's/Applicant's contention that he could not file the Appeal out of time within the required 30 days as his Advocates only received the email attaching the Ruling on **4th June 2020**. The Court has seen the said email, also notes that the Respondents had not received the Ruling as at **28th May 2020** as evidenced by the email they sent to Court.

Consequently, this Court finds and holds that there is a reasonable explanation as to why the Appellant/ Applicant had not filed the Appeal on time as there is no way he could have filed an Appeal without the Ruling. The Court also takes cognizance of the fact that the stated period was within the pandemic period, wherein Courts had downscaled their activities. Further the instant Application was filed on **5th June 2020**, right after the Appellant/ Applicant had received the Ruling.

The Court finds that the Applicant has laid a basis as to why it should exercise its discretion to allow him file an Appeal out of time. Further the court notes that the Appellant/ Applicant had sought to have the Memorandum of Appeal filed on **5th June 2020**, declared as duly filed. While the Court has granted the Appellant/ Applicant leave to file the Memorandum of Appeal out of time, the Court notes that the Applicant denotes that he had already filed the said Memorandum of Appeal. If indeed the requisite fees were paid, the Court will deem the Memorandum of Appeal as duly filed and therefore properly on record.

2. Whether the Appellant/ Applicant is entitled to stay of Proceedings Orders sought

The Appellant/ Applicant has sought for stay of proceedings in the Lower Court pending the hearing and determination of the instant Appeal. It is the Applicant's contention that if the Court does not stay the subordinate Court proceedings while the instant Appeal is pending, there is a possibility of two different determinations. The Respondents have submitted that the Applicant wishes to block the continuity of the suit as a delay tactics. However, the Court notes that the Preliminary Objection bordered on whether or not the subordinate Court had jurisdiction to hear and determine the suit as the suit was time barred.

It is not in doubt that jurisdiction is everything and without it, a Court has no option but to down its tools. In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** the Court held that;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”
(emphasis added)

Further the threshold for stay of proceedings in the in ***Halsbury's Law of England, 4th Edition. Vol. 37*** page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

With the above in mind, coupled with the fact that it is the Jurisdiction of the subordinate Court that has been called into question, the Court finds that it would be irresponsible for it to allow the proceedings at the lower Court to continue while there is a question on whether or not the said Court has jurisdiction as the Appeal is still pending. The issue of jurisdiction goes to the core of the matter, and it would be in the interest of justice for the Court to first determine the said issue before the subordinate Court could be allowed to proceed with the matter as precious judicial time will be wasted if the matter would proceed and this Court finds that the lower Court did not have jurisdiction. The Court having held that the Memorandum of Appeal is properly on record, it then finds that the Applicant has further satisfied it why it should exercise its discretion and allow the prayers for stay of proceedings pending Appeal.

The Upshot of the foregoing is that this Court finds that the **Notice of Motion Application** dated **5th June 2020**, is **merited** and the same is allowed in the following terms:-

- 1. That Pending the hearing and determination of this Appeal, there be a stay of Proceedings in Thika CMELC Case No. 12 of 2019; Barnabas Gitari Mugambi & Anor ...Vs... John Okayana Sabatia.**
- 2. That leave is granted to the Appellant to file the Memorandum of Appeal out of time and the Memorandum of Appeal filed on 5th June 2020, is deemed as duly filed.**
- 3. Costs of this Application be in the cause.**

It is so ordered.

Dated, signed and Delivered at Thika this 4th Day of March 2021

L. GACHERU

JUDGE

4/3/2021

Lucy - Court Assistant

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 the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. 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.

By Consent of :

Mr. Mokuia for the Appellant/Applicant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

L. GACHERU

JUDGE

4/3/2021