



Oduor (Suing as a legal representative of the Estate of Charles Evans Omondi - Deceased) v Ogone & 3 others (Environment and Land Civil Miscellaneous Application E025 of 2023) [2024] KEELC 5236 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5236 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E025 OF 2023
SO OKONG'O, J
JULY 11, 2024

BETWEEN

JANET ADHIAMBO ODUOR (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF CHARLES EVANS OMONDI - DECEASED) APPLICANT

AND

ROBERT OBARA OGONE 1ST RESPONDENT
SETTLEMENT OFFICER, KISUMU 2ND RESPONDENT
COUNTY LAND REGISTRAR, KISUMU 3RD RESPONDENT
THE HON ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The applicant filed a suit in the Chief Magistrate's Court at Kisumu against the Respondents namely, Kisumu CMELC No. 70 of 2019 seeking; a declaration that all that property known as Title No. Kisumu/Manyatta "A"/ 1331 (hereinafter referred to only as "the suit property") belonged to her son, Charles Evans Omondi, deceased (hereinafter referred to only as "the deceased"), a permanent injunction restraining the 1st respondent from trespassing, selling, advertising for sale, offering for sale, constructing on, cutting down trees on, or in any other way interfering with the deceased's interest in the suit property, and an order cancelling the registration of the 1st respondent as the proprietor of the suit property and replacing him with the deceased. The 1st respondent filed a defence and a counter-claim against the applicant in the lower court seeking the eviction of the applicant from the suit property.
2. The applicant's case in the lower court was that the suit property was initially registered in the name of her deceased husband who died in 1982. The applicant averred that before his death, her deceased husband gave the property to their son, Charles Evans Omondi, deceased to hold in trust for the other



family members. The applicant averred that when she visited the land registry, she was shocked to learn that the suit property was registered in the name of one, Robert Obiero Ojal. The applicant averred that from the information she obtained at the land registry, the said Robert Obiero Ojal was registered as the owner of the suit property pursuant to some proceedings that took place before the District Land Adjudication and Settlement Officer, Kisumu on 13th June 1990 in which a decision was made that the name of the deceased be deleted as the owner of the suit property and replaced with the name of Robert Obiero Ojal.

3. The applicant averred that at the time the suit property was registered in the name of Robert Obiero Ojal on 23rd November 1995 her son, Charles Evans Omondi was already deceased having died on 24th September 1994 and succession in respect of his estate had not been undertaken. The applicant averred that the 1st respondent acquired the suit property fraudulently.
4. The 1st respondent's case was that he purchased the suit property from Robert Obiero Ojal who was the first registered owner thereof in 1997 after undertaking due diligence and confirming that Robert Obiero Ojal was the owner of the suit property.
5. The lower court heard the applicant's claim and the 1st respondent's counter-claim and delivered a judgment on 21st February 2023. The lower court dismissed the applicant's suit and entered judgment for the 1st respondent in his counter-claim. The lower court found that the applicant had failed to prove that the 1st respondent acquired the suit property fraudulently. The lower court found that although fraud was pleaded and particularised, the same was not proved. The court observed that although the applicant's plea of fraud was anchored on the proceedings of Kisumu Land Adjudication and Settlement Officer of 13th June 1990, the same was not produced in evidence.
6. The lower court found that the 1st respondent was an innocent purchaser of the suit property for value. The lower court found the explanation given by the 1st respondent of how he acquired the suit property satisfactory. The court found that there was no evidence that 1st respondent engaged in any act of fraud while acquiring the suit property. The lower court found that the 1st respondent had demonstrated that he was an innocent purchaser of the suit property for value without notice. The lower court held that the 1st respondent held a valid title to the suit property.
7. What is now before me is the applicant's application brought by way of a Notice of Motion dated 5th December 2023 filed on 6th December 2023 in which the applicant has sought leave of the court to file an appeal out of time against the said judgment of the lower court which was delivered on 21st February 2023 and a stay of execution of the said judgment pending the filing, hearing, and determination of the intended appeal.
8. The application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the applicant's advocate Linda Agatha on 6th November 2023. In summary, the applicant contended that the delay in the filing of the appeal within the prescribed period was occasioned by a breakdown of communication between the applicant and her advocates. The applicant averred that her advocates did not have her telephone contact and as such communicated the outcome of the lower court suit through a letter that was dispatched by post. The applicant contended that she had no access to her postal address and as such was not aware of the outcome of the lower court suit until she visited the office of her advocates in November 2023. The applicant averred that it was in November 2023 after the lapse of the 30 days within which the appeal should have been filed that she gave instructions to her advocates to appeal against the lower court judgment. The applicant averred that she had a statutory right of appeal against the lower court decision. The applicant averred that she risked being evicted



from the suit property together with her family unless the execution of the lower court judgment was stayed.

9. The application was opposed by the 1st respondent through a replying affidavit sworn on 16th January 2024. The 1st respondent averred that the applicant's application was brought after an inordinate delay which delay was not sufficiently explained. The 1st respondent averred that the applicant's allegation that she risked being evicted from the suit property was a lie since the applicant was not occupying the suit property. The 1st respondent averred that the applicant had rented out the suit property to a church and there was no homestead on the property. The 1st respondent averred that the application was intended to deny him the fruits of the judgment entered in his favour and that the applicant's intended appeal had no chance of success.

10. The application was argued on 9th July 2024 when Ms. Oduor appeared for the applicant while Mr. Munuang'o appeared for the 1st respondent. I have considered the applicant's application together with the supporting affidavit. I have also considered the 1st respondent's affidavit filed in opposition to the application and the submissions by the advocates for the parties. The applicant's application has two limbs. The first limb is seeking an extension of time within which to file an appeal against the decision of the lower court while the second limb is seeking a stay of execution of the said decision pending the hearing of the intended appeal. The applicant's application was brought principally under Section 79G of the *Civil Procedure Act* which provides as follows:

“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.”

11. Section 16A (1) and (2) of the *Environment and Land Court Act* 2011 provides that:

“(1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in *section 13(2) of the Environment and Land Court Act*, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

(2) An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

12. The court has the discretion to admit an appeal out of time when an appellant shows good and sufficient cause. Sufficient cause was defined in *Attorney General v Law Society of Kenya & another* [2017]eKLR as follows:

“Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See *Black's Law Dictionary, 9th Edition, page 251.*



Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.”

13. A party approaching the court for an extension of time within which to file an appeal must demonstrate to the court that he/she deserves the exercise of the court's discretion. The judgment sought to be appealed was delivered on 21st February 2023. The present application was filed on 6th December 2023 after a lapse of 9 months from the date of the judgment sought to be appealed. I agree with the 1st respondent that the applicant's application was brought after an inordinate delay. I find the explanation given by the applicant for this delay not reasonable. Failure by the applicant's advocates to take down the applicant's telephone contact or physical address, or failure by the applicant to check her post office box regularly resulting in a breakdown in communication between the applicant and her advocates is not a reasonable excuse for not filing an appeal within time. In any event, the lower court suit having been heard and judgment reserved, the applicant had a duty to check on the outcome of the suit with her advocates. Failure by the applicant to make inquiries with her advocates on the outcome of the suit for 9 months after the conclusion of the hearing shows her lack of interest in the matter. This court which is a court of equity cannot come to the aid of an indolent party.
14. I am also not persuaded that the applicant's intended appeal has a good chance of success. The applicant did not place before the lower court any evidence showing that her deceased son, Charles Evans Omondi on behalf of whose estate she brought the lower court suit had any interest in the suit property. Both parties placed before the court a copy of the extract of the register for the suit property (Green Card). The Green Card showed that the register for the suit property was opened on 23rd November 1995 and that the first registered owner of the property was Robert Obiero Ojal who sold the property to the 1st respondent. The 1st respondent was registered as the owner of the suit property on 15th January 1997 and was issued with a title deed on the same date. Although the applicant had claimed that Robert Obiero Ojal had fraudulently acquired the suit property through falsified and fraudulent Land Adjudication proceedings, Robert Obiero Ojal was not made a party to the lower court suit. The alleged falsified and fraudulent Land Adjudication proceedings were also not produced in evidence. In the absence of proof that Robert Obiero Ojal acquired the suit property fraudulently, the fraud pleaded against the 1st respondent that was not even established was unsustainable. In the absence of any evidence on record showing that the applicant's deceased husband and son had an interest in the suit property that was taken away from them illegally and fraudulently by the 1st respondent, it would be an uphill task to overturn the decision of the lower court. The evidential burden of proof could not shift to the 1st respondent to establish how he acquired his title to the suit property since there was no prima facie evidence adduced by the applicant to challenge the title.
15. Due to the foregoing, I am not satisfied that the applicant has shown sufficient cause to warrant the granting of the extension of time sought to file the intended appeal. I therefore find no merit in that limb of the application.
16. Having declined to extend the time to the applicant to file an appeal against the judgment of the lower court delivered on 21st February 2023, the limb of the application seeking a stay of execution of the said judgment pending the hearing of the intended appeal equally fails since a stay of execution order cannot be made in a vacuum. Since the applicant has no appeal or an intended appeal, an order for stay pending appeal is not available to her.
17. In conclusion, I find no merit in the applicant's Notice of Motion application dated 5th December 2023. The application is dismissed with costs to the 1st respondent.



DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF JULY 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Anuro h/b for Ms. Oduor for the Applicant

Mr. Munuang'o for the 1st Respondent

Ms. J. Omondi-Court Assistant

