



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

CIVIL MISC APP NO. 19 OF 2020

JOSEPH MATIPE SANKOK.....1ST APPLICANT

CAREN URETO NAIRI.....2ND APPLICANT

VERSUS

TERESA WANJIRU MWANGI.....RESPONDENT

RULING

What is before Court for determination is the Applicants' Notice of Motion application dated the 27th July, 2020 brought pursuant to sections 13(1) & (2), 16A (1) & (2) and 19(1) & (2) of the Environment and Land Court Act; Sections 1A, 1B, 3A, 63 (e) & 95 of the Civil Procedure Act, Rules 42 (6) (2) & 51 (1) of the Civil Procedure Rules as well as Article 48, 50 and 159 (2) (d) of the Constitution. The Applicants seek for stay of execution of the judgement dated 12th May, 2020 and Decree including all consequential orders in Kajiado Magistrates Court Civil Case No. 413 of 2018 pending hearing as well as determination of the intended Appeal. They also seek for an extension of time to lodge and serve a Memorandum of Appeal against the entire judgement and decree of the Chief Magistrates' Court at Kajiado (the Hon. M. Kasera, SPM) dated and delivered on 12th May, 2020 in Civil Suit No. 413 of 2018.

The application is premised on the grounds on the face of it and the supporting affidavit of JOSEPH MATIPE SANKOK where he deposes that on 29th August, 2013, they entered into a written Agreement of Sale of land known as Kajiado/ Kaputiei North/ 21054 wherein the Respondent was the purchaser of the said parcel at a consideration of Kenya Shillings One million (Kshs. 1, 100,000). Further, the Respondent only paid Kshs. 100,000 but declined to pay the rest. He explains that on 14th December, 2018, the Respondent filed Civil Suit No. 413 of 2018 against them and on 12th May, 2020 the trial court delivered its judgment dismissing their Defence and Counterclaim with costs. Further, they instructed their Advocates to Appeal against the said Judgment. He explains that before their advocates were supplied with proceedings, the Courts countrywide were closed due to COVID – 19 pandemic which led to the restriction of movements He confirms that his Advocates were supplied with the certified copies of proceedings on the 23rd July, 2020. He contends that they are apprehensive that the disputed property Kajiado/ Kaputiei North/ 21054 can be transferred into the names of the Respondent any minute from now. He reiterates that they have a plausible Appeal with high chances of success. Further, the delay in filing the Appeal was inordinate and they stand to suffer breach of their constitutional right to own the disputed property. He avers that their prayer for extension of time to file their Appeal will not prejudice the Respondent and their intended Appeal raises bona fide arguable grounds. Further, no prejudice will be suffered which cannot be compensated by way of costs.

The Respondent TERESA WANJIRU MWANGI opposed the application by filing a replying affidavit where she deposes that the Learned Magistrate, Hon. M Kasera accurately considered all fact and law in Kajiado CMCC 413 of 2018 before arriving at the decision/ judgment delivered on 12th May, 2020. She contends that the intended appeal is frivolous and has no chances of success. She explains that the time to lodge the intended appeal against the judgment in Kajiado CMCC No. 413 of 2018 lapsed on 12th June, 2020. Further, the Applicants have not adduced any good and sufficient cause for not filing their intended appeal within the statutory stipulated time. She insists the reasons given by the Applicants of their inability to obtain certified copies of proceedings and judgement is untenable as the said documents are only required during preparation of record of appeal and not filing memorandum of appeal. Further, the letter dated 4th June, 2020 which was annexed to the affidavit of Joseph Matipe Sankok has no indication that it was presented to court but in any event it demonstrates inexcusable indolence by the Applicants to lodge the intended Appeal within the stipulated period.

The instant application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 27th July, 2020 including the rivaling affidavits and submissions, the following are the issues for determination:

- Whether the Court should extent time to allow the Applicants file a Memorandum of Appeal Out of time.
- Whether the Court should grant a stay of execution pending the intended Appeal.

As to whether the Court should extent time to allow the Applicants file a Memorandum of Appeal Out of time.

The Applicants have sought for extension of time to file their Memorandum of Appeal against Hon. M Kasera’s judgment delivered on 12th May, 2020 Kajiado CMCC 413 of 2018. They have explained that the delay in lodging the Memorandum of Appeal is inordinate and inexcusable. Further, that the Appeal has high chances of success. The Respondents opposed the Application and insist the Applicants have not satisfied the conditions for grant of leave to file an appeal out of time. Further, there are no circumstances for grant of stay of execution.

Section 79G of the Civil Procedure Act provides that: **‘ 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.’**

Further, section 95 of the Civil Procedure Act provides as follows: **‘ Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.’**

The judgement sought to be appealed from was delivered in 12th May, 2020 during the period when the Courts had downscaled their operations due to the COVID 9 pandemic. The time to lodge the intended appeal against the judgment in Kajiado CMCC No. 413 of 2018 lapsed on 12th June, 2020. The Applicants have confirmed that their Advocates were supplied with the certified copies of proceedings on the 23rd July, 2020. They explain that time for lodging the Appeal lapsed but the delay was inordinate and inexcusable. Further, their Appeal has high chances of success. In the case of **Itute Ngui & Anor vs. Isumail Mwakavi Mwendwa Civil Application No. Nai. 166 of 1997**, Omolo, JA explained that whereas an advocate’s bona fide error is a special reason for extension of time within which to appeal, the nature and quality of the mistake must be considered. In the case of **Kenya Power & Lighting Company Ltd v Rose Anyango & another [2020] eKLR**, the Judge while dealing with an application for extension of time to lodge a Memorandum of Appeal held that: **‘ it is not disputed that the judgment in the lower court was delivered on 19th February 2020 and that this application was filed on 20th April 2020 which was beyond the 30 days stipulated in section 79G of the Civil Procedure Act. The applicant’s counsel has given an explanation that the instructions to appeal were given after the last date of filing an appeal. Albeit the 1st Respondent claims that there is no evidence of instructions to the advocate, there is no legal requirement that instructions to an advocate must be in writing. There is delay which is admitted. However, this court does not find that the delay is inordinate as to deny the applicant an opportunity to ventilate its grievances by way of an appeal to this Court. This court takes judicial Notice that between 16th March 2020 to the date of filing of this application, there has been downscaling of court services owing to Covid 19 pandemic and which threw all persons in a spin of uncertainty as to how services were to be rendered. No doubt, the 30 days fell in the Covid 19 pandemic situation and therefore the delay in filing the intended appeal was not inordinate. On whether the intended appeal has chances of success is not for this court to decide at this stage save that from the draft intended memorandum of appeal annexed, I am satisfied that the intended appeal is not frivolous on the face of it. The applicant will have an opportunity to satisfy the court on the merits of its appeal and the Respondents will have a chance to respond to the merits or demerits of the appeal once filed.’**

In the current scenario, the Judgement was delivered during the period when the Court had downscaled its services due to the COVID – 19 pandemic. I note the instant application has been filed after one and half months. I find that the explanation given by the Applicants are plausible. Further, on perusal of the draft Memorandum of Appeal, which was annexed to the supporting affidavit, without delving into the merits including demerits of the intended Appeal, I find that the intended Appeal is not frivolous. In associating myself with the decision cited above, I am satisfied that the Applicants have met the threshold for extension of time to be allowed to file their Memorandum of Appeal and will allow it.

As to whether the Court should grant a stay of execution pending the intended Appeal.

Order 42 Rule 6(2) provides that: **‘ 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.’**

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:’

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large**

amount of rent in dispute and the appellant had an undoubted right of appeal.’

In the current scenario the Applicants seeks a stay of execution which has been vehemently opposed by the Respondent. It is not disputed that the Applicants are owners of the suit land. The Respondent insist the intended Appeal is frivolous and has no chances of success. I note Order 42 Rule 6 is clear that filing an Appeal alone does not operate as a stay of execution. Further, the Applicants are apprehensive that the Respondent will commence to execute the Decree. I opine that since a right of Appeal is a Constitutional right of an aggrieved party and a right to fair hearing can only be guaranteed if stay pending appeal is granted to the intended Appellants. Further, except for the Respondent’s averments in the replying affidavit challenging the letter seeking for certified proceedings, she has not furnished court with tangible evidence on the injury she stands to suffer if the orders sought are granted. Since it is the Applicants’ who have been on the suit land which they had commenced sell to the Respondent but the sale was not concluded and with the intended Appeal revolving around dispute over specific performance, I opine that the Applicants are indeed the disadvantaged parties herein. Based on the standards set in the above cited case and in applying them to the circumstances at hand, I find that the Applicants have met the threshold for stay of execution and will grant them the same.

It is against the foregoing that I find the Applicants Notice of Motion dated the 27th July, 2020 merited and will allow it. I will proceed to make the following final Orders:

- i. That the Applicants be and are hereby granted leave of fourteen (14) days to file and serve the Memorandum of Appeal against the Judgment and Decree in Chief Magistrates’ Court at Kajiado (the Hon. M. Kasera, SPM) dated and delivered on 12th May, 2020 in Civil Suit No. 413 of 2018,
- ii. That a stay of execution of the Judgment and Decree in Chief Magistrates’ Court at Kajiado (the Hon. M. Kasera, SPM) dated and delivered on 12th May, 2020 in Civil Suit No. 413 of 2018, be and is hereby granted pending the hearing and determination of the intended appeal.
- iii. That the costs of this application are awarded to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12TH DAY OF APRIL 2021.

CHRISTINE OCHIENG

JUDGE