



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC MISC. APPLICATION NO. E017 OF 2021

DAVID AKONGO OBILO.....APPLICANT

VERSUS

DIPEN HASMUKHLAL FALDU.....RESPONDENT

RULING

A. INTRODUCTION

1. By Notice of Motion dated 21st June, 2021 the Applicant sought for the following orders: -

a. Spent.

b. Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an Interim Order of Stay of proceedings vide MIGORI CMCELC NO. 91 OF 2019.

c. The Honourable Court be pleased to grant Leave to the Applicant herein to file and/or mount an Appeal out of the Statutory period, against the Ruling and/or Order of Hon. Munguti, Senior Principal Magistrate, made on the 24th day of February, 2021 vide MIGORI CMCELC NO. 91 OF 2019, whereby the Honourable Court (sic) dismissed the Applicant's Notice of Motion Application dated 21st January, 2020.

d. Consequent to prayer (3) above being granted, the Applicant do lodge the Intended Appeal within 14 days from the date of the Order of this Honourable Court and/or such other shorter duration as the Honourable Court may deem fit and expedient.

e. The Honourable Court be pleased to grant an Order of Stay of Proceedings vide MIGORI CMCELC NO. 91 OF 2019 pending the hearing and determination of the Intended Appeal.

f. Such further and/or other Orders be made as the court may deem fit and expedient.

2. The application is based on the grounds thereof and the Supporting Affidavit dated 21.06.2021. The applicant avers that he was sued by the Respondent vide MIGORI CMCELC NO. 91 OF 2019 seeking inter alia Declarations and mandatory and permanent injunctions as well as General Damages for Trespass. However, preceding the filing of MIGORI CMCELC NO. 91 OF 2019, he had also filed a suit vide MIGORI ELC CASE NO. 2 OF 2017 between DAVID AKONGO OBILO vs SIMION ONDITI OUMA & 4 OTHERS, where he has sued the defendants for colluding and fraudulently transferring the property L.R. NO. SUNA EAST/ WASWETA I/2119.

3. It is his contention that the said property L.R. NO. SUNA EAST/ WASWETA I/2119 in dispute in MIGORI ELC CASE NO. 2 OF 2017 is also the same property in dispute in MIGORI CMCELC NO. 91 OF 2019 and both suits are pending before the respective courts for determination.

4. He subsequently, he filed an Application seeking the stay of proceedings in MIGORI CMCELC NO. 91 OF 2019 pending the hearing and determination in MIGORI ELC CASE NO. 2 OF 2017; and the same was dismissed on 24.02.2021 hence the instant appeal seeking leave to file an Appeal out of the statutory period.

5. The Applicant attributed the reason for the delay to the trial court; On 7/10/2020, the trial court directed that it would render its ruling in respect to the Application on 11.11.2020, however, on the said date, the court was not sitting as the honourable magistrate was away on official duties and thus a new date of 09.12.2020 was taken at the registry for delivery of the ruling. Further, on 09.12.2020; the trial court

directed that the ruling was not ready for delivery and the same would be delivered on Notice. It is his assertion that despite the court indicating that a Notice on the ruling date would be issued, no notice was ever issued.

6. The Applicant's advocates only came to find out that the ruling had already been delivered on 14.04.2021, when the matter came up for mention, which was about 60 days after the delivery of the said Ruling that was delivered on 24th February, 2021. The statutory timelines of 30 days within which an appeal should be lodged had already lapsed.

7. That during the same time; around April, he had been unwell and due to his illness and the Covid-19 pandemic he was unable to visit his advocates office for purposes of giving them further instructions to lodge the Appeal against the Ruling of 24.02.2021 whose effect was to dismiss his earlier Application.

8. The Applicant also faults the failure to file the Memorandum of Appeal within the statutory timelines on the court whereby the ruling was delivered without notice to the parties. The said omission to issue notice is a sufficient reason for the purposes of enlargement of time to appeal.

9. He is apprehensive that the intended appeal is arguable and has overwhelming chances of success and has attached a draft copy of the memorandum of appeal. Further, he deposed that the Respondent would not suffer any prejudice should the leave be granted to file the intended Appeal.

10. It was deposed that after the discovery of the delivery of the Ruling, he gave an explanation that the further delay to lodge the instant Appeal was due to his frailty condition, that made it impossible for him to promptly issue instructions on the Appeal.

11. The Applicant is also apprehensive that the Respondent is also keen to proceed with the hearing and determination in the matter and which proceedings would no doubt render MIGORI ELC NO. 2 of 2017 an academic process and no orders would be enforceable.

12. The application was opposed. The Respondent filed Grounds of Opposition dated 09.08.2021 in response to the Application dated 05.03.2021. It is the Respondent's assertion that the Application is misconceived, bad in law and an abuse of the court process. That the Applicant was properly served with the court process through his advocate.

13. He further contended that the intended appeal is frivolous and does not lie and the same is merely an afterthought meant to delay and frustrate the Respondent.

14. The Application was canvassed by way of written submissions. The Applicant filed his submissions dated 04.11.2021, leave was granted on the Respondent to file his submissions on 08.11.2021 within 14 days. However, I have not seen any submissions by the Respondent on the court record.

15. I have read and considered the submissions by the Applicant and the various authorities cited in support of his case and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

16. The issue for determination which arise therefrom are: -

- a) Whether leave can be granted to appeal out of time.
- b) Whether an order for stay of proceedings can issue in MIGORI CMCELC NO. 91 OF 2019.

A. Whether leave can be granted to appeal out of time.

17. Section 79G of the Civil Procedure Act provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.

18. Section 79G of the Civil Procedure Act 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.”

19. Section 95 of the Civil Procedure Act provides thus: -

“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.”

20. The principles to be considered in exercising the court's discretion on whether or not to enlarge time to file appeal were set out in the case of **Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997**, the court, in considering the exercise of discretion to extend time, held 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.”

21. These principles were also reiterated in **First American Bank of Kenya Ltd -vs- Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65** as follows: -

- 1) The explanation if any, for the delay;
- 2) The merits of the contemplated action, whether the appeal is arguable;
- 3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

22. I will therefore proceed to address each of the limbs outlined in the above mentioned cases and establish whether the Applicant has satisfactorily met each of the said principles. **The length of the delay and the explanation if any.** The present Application was filed on the 21st of June, 2021 after the trial court delivered its ruling on the Notice of Motion Application on the 24th of February, 2021. The Applicant has also given an explanation of the 3-months and 21days delay since the delivery of the Ruling on the 24th February, 2021.

23. The Applicant contends that the delay was caused by the court for failure to issue the Notice indicating the Ruling date. He was therefore not aware of the ruling date and only came to find out about the same when the matter was mentioned before the court on 14.04.2021. Further, he has also explained that upon discovery that the ruling had been issued, he had been sick at the time and thus was unable to give instructions on whether to appeal to his advocates on record, on time.

24. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR**.

25. From the delivery of the ruling to the filing of the instant Application is about 3 months' delay. This in my view does not amount to inordinate delay further, the explanation given by the Applicant is sufficient and I therefore find that the Application was filed without undue delay.

26. Chances of success of the intended Appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. Having that in mind, I wish to state that from the Draft Memorandum of Appeal, one of the issues the Applicant intends to raise is on the validity of the title in respect of L.R No. SUNA EAST/WASWETA I/2119 and the proceedings in both CMCELC No. 91 OF 2019 and MIGORI ELC CSE NO. 2 of 2017; where the suit parcel in dispute is the same.

27. This court has taken the unusual liberty to peruse the trial/ lower court file to peruse the Ruling delivered on 29th July 2021 and I have noted that the said Ruling was indeed delivered in the absence of the parties and/or their advocates on record and thus I find the reasons advanced by the Applicant to be true.

28. The third limb is whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative, I find that no prejudice will be caused to the Respondent that cannot be compensated by an award of costs if the Application is allowed.

29. The principles laid down by the Supreme Court in **Nicholas Kiptoo Korir Arap Salat vs. IEBC & 7 Others [2014] eKLR** are pertinent in this case; namely:

“(T)he underlying principles a court should consider in exercise of such discretion include:

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. whether there will be any prejudice suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**

7.”

30. Guided by the above principles, the upshot of the foregoing is that the orders sought by the Applicant; for leave to file the Appeal out of time is merited and for that reason Prayer no. (c) in the Notice of Motion dated 5.03.2021 is allowed.

B. Whether an order for stay of proceedings can issue in MIGORI CMCELC NO. 91 OF 2019

31. The principles to be considered in application for stay of proceedings are well settled. The same was well espoused **In Re Global Tours and Travels Ltd: Winding Up Cause No.43 of 2000** as follows: -

“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 interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, 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 timeously.”

32. Stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interests of justice on a case to case basis and the same ought to be exercised with caution. At this stage, I am careful not to comment on the merits of the draft/intended appeal, however, I am also alive to the fact that should the intended appeal be allowed, without having stayed the proceedings in CMCELC No. 91 of 2019 then the same would amount to a waste of the valuable judicial time.

33. Applying the above considerations, I would say that the applicant’s draft appeal is not a frivolous one. It is one which is arguable and triable. An arguable appeal is not one that, prima facie, has overwhelming chances of success; but one which raises contestable and triable issues. The Applicant also gave a satisfactory explanation as to the almost 4month delay between the period when the ruling was delivered and the filing of the Application. Further, this court is of the considered view that it is in the interest of justice to have the lower court proceedings in CMCELC No. 91 of 2019 stayed, in the spirit of optimum utilization of the scarce judicial time.

34. In the end, I find that the Application for stay of proceedings in Migori CMCELC NO. 91 of 2019 has merit and proceed to stay the proceedings pending hearing and determination of the intended Appeal. I will therefore proceed to allow prayer no. (b) and (e) in the Application.

CONCLUSION

35. In the upshot, I accordingly find that the Application dated 24.06.2021 is merited and I allow it on the following conditions: -

- i. The appeal be filed within (15) fifteen days from the date of this ruling.**
- ii. There be an Interim Stay of Proceedings in MIGORI CMC ELC No. 91 of 2019 pending the hearing and determination of the intended Appeal.**
- iii. The Applicant to file and serve a Record of Appeal within 45 days from the date of this Ruling.**
- iv. The applicant to meet the respondent’s costs of this application.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 8TH DAY OF FEBRUARY, 2022

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Mulisa for the Respondent

Ms. Bosire for the Applicant

Tom Court Assistant