



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 27B OF 2020

SIMON NDUNGU NGANGA.....1ST APPELLANT/APPLICANT

JOHN KARIUKI KURIA.....2ND APPELLANT/APPLICANT

PATRICK KANYIRI KARIUKI.....3RD APPELLANT/APPLICANT

DANIEL GIKONYO MWANGI.....4TH APPELLANT/APPLICANT

VERSUS

DANIEL NGANGA NJOROGE (CHAIRMAN).....1ST RESPONDENT

AARON MILLA (SECRETARY).....2ND RESPONDENT

ROSE WAIRIMU KIMANI (TREASURER).....3RD RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated **15th June 2020**, by the Appellants/ Applicants seeking for orders that;

- 1. That the Ruling dated 29th April 2020, and delivered electronically by Honorable J. M Nangea Chief Magistrate, Thika in MCLE No. 155 of 2019 be stayed and or set aside /vacated pending the determination of this Appeal.***
- 2. That the Applicants be granted leave to lodge their Memorandum of Appeal and Record of Appeal out of time against the Ruling dated 29th April 2020 and delivered Electronically by Chief Magistrate Hon. J.M Nangea, Thika in MCLE No. 155 of 2019.***
- 3. That the Memorandum of Appeal annexed at paragraph 12 in the Supporting Affidavit filed herein be admitted at the Environment & land Court at Thika.***
- 4. That costs of this Application be in the cause.***

The Application is premised on the grounds that on **29th April 2020** the court dismissed the Applicants/ Appellants suit in **MCLE 155 of 2019** and due to the Covid 19 outbreak, the Ruling was delivered electronically. That the said Ruling was never sent to the Appellants/ Applicants Advocate's email address and they only became aware of it after time had lapsed for filing of an Appeal. That the Application is in the best interest of justice and will not prejudice the Respondents.

In his Supporting Affidavit, **Mbiyu Kamau Advocate** averred that he is the Appellants/ Applicants Advocate. That on **16th April 2020**, he saw a **Notice** from Thika Law Courts on the Judiciary of Kenya twitter handle which had matters listed for Ruling and Judgments to be delivered electronically and he had conduct of two matters including the instant suit. That he gave his consent to have the Ruling delivered electronically via his email address mbiyuwakili2000@gmail.com and he provided his phone number for further correspondence. That he did not get any response from the court by way of email or a phone call. That due to the Covid 19 pandemic, the Courts were not accessible and it was after numerous phone calls and visits to the Court premises that he got a print out of the Ruling on **12th June 2020**. That time within which to lodge an appeal has lapsed and the Appellants/ Applicants have been aggrieved by the Ruling. He averred that the delay to file the Appeal was occasioned by his inability to know the Ruling was delivered and accessing the Ruling was a challenges.

The Application is opposed and the Respondents swore a Replying Affidavit on **2nd July 2020**, through **Rose Wairimu Kimani** and averred

that the Application is misconceived and a waste of Court's time as it seeks to challenge the decision of the lower Court which decision was made on a pure point of law to the effect that the Respondents who were sued as officials of Murema Estate Residents Association are not suited as they are not officials of the said Association. That **Murema Residents Association** is non-existent or unknown to them as minutes and registration of the same were never produced before Court.

He averred that the appeal lacks any reasonable chance of success as it fails to address what apparent error the trial Court undertook that would ultimately overturn the Ruling. That the reason the Applicants were not able to obtain the ruling on time is neither here nor there as the Courts provided their contacts and emails from Advocates and litigants to follow up on their matter. That no sufficient reason has been given to enlarge the time within which the Applicants ought to have filed their Notice of Appeal and Memorandum of Appeal. That if the Court were to allow the appeal, the Court should order the Applicants to deposit security for costs at **Kshs. 450,000/=**.

The Application was canvassed by way of written submissions which the Court has carefully read and considered together with the Affidavits and the annexure thereto. The Court finds that the issue for determination is ***whether the Application is merited.***

The powers to enlarge time within which an Appeal can be filed is discretionary and the applicant needs to satisfy the Court that he has a valid reason to enable the Court exercise its discretion in his favour. Under the provisions of **Order 50, Rule 6** of the **Civil Procedure Rules**, the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules, notwithstanding the fact that such time has expired. Leave to appeal out of time can only be granted to a party where sufficient cause has been shown **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 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 **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015)eKLR**, the court held that;

“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.”

The principles on whether or not to grant a party leave to appeal out of time were further enumerated in the case of ***Growth Africa (K) Limited & another...Vs... Charles Muange Milu [2018] eKLR***, where the Court cited the case of ***Bagajo ...Vs... Christian Children Funding [2004] 2 KLR 73*** Ringera J (as he then was) gave the following guidelines with regard to exercise of discretion as follows:-

“In exercising its discretion, the court's primary concern should be to do justice to the parties. The court should, inter alia consider:

- a. The length of the delay in lodging the notice and record of appeal;***
- b. Where applicable, the delay in lodging the Application for extension of time as well as the explanation thereof;***
- c. Whether or not the intended appeal is arguable;***
- d. The prejudice to the Respondent if the Application is granted;***
- e. The public importance, if any, of the matter;***
- f. Generally the requirements of the interest of justice in the case;***
- g. It is for the person seeking the favourable exercise of the discretion of the court to place such material as well as adequately inform the court in the exercise of such discretion. The nature of the case before the superior court, the judgement thereon and reasons for desiring to appeal should be outlined if the court is not to exercise its discretion in the dark.”***

From the above principles, the court will need to determine whether the length and reason for the delay have been satisfactorily explained. The Ruling sought to be appealed against was delivered on **25th April 2020**, while the instant Notice of Motion was filed **15th June 2020**, which time is within a period of close to **47 days**. Taking into account the time was during the pandemic period, the Court finds that there was no inordinate delay.

The Applicant also needs to give the Court sufficient reason as to why there was the delay. It is the Applicant's contention that the Ruling was delivered during the Covid 19 period and that though the Advocate was aware of the date, the said Ruling was delivered via email but the same as never sent to the Advocate through the email, that he had provided to the court. There has been no rebuttal nor contention to that. Further the Court takes Judicial Notice of various happenings during this time and the fact that at times the Courts were not easily accessible to the public. The Court finds no reason to do the explanation by the Applicant and will have no option but believe it. Therefore, the Applicants' explanation is satisfactory and same is sufficient to warrant this Court exercise its discretion in their favour.

The Court is also called upon to determine whether there is an arguable appeal. It is not in doubt that an arguable appeal is one that raises

arguable grounds and need not be one that would be successful. The Court has perused the Memorandum of Appeal and notes that the Ruling is against the order of the trial Court upholding the Preliminary Objection that dismissed the Applicants suit. The Applicants have contended that the Court misdirected itself in failing to hold that the Respondents had been sued as individuals and not officials. It is the Court's considered view that the intended appeal raises arguable grounds which the applicants ought to be given an opportunity to address on merit.

Therefore this Court finds and holds that the Applicant has ably satisfied it to warrant the exercise of its discretion to enlarge the time required for the applicant to file an appeal against the Ruling and Order of the trial court.

The Applicant has also sought for stay of execution pending the hearing and determination of the Appeal. The guiding provisions of law with regard to stay of Execution are to be found in **Order 42, Rule 6 (2)** of the **Civil Procedure Rules** which specifies the principles for consideration in such applications. It provides as follows:-

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 **JMM...Vs....PM [2018] eKLR** it was stated:-

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

On the issue of whether there was inordinate delay, the Court has already held and found that there was no inordinate delay. Whether substantial loss will be suffered, the Court has gone through the Applicants affidavit and their submissions. The Applicant have not enumerated what loss they would suffer if the stay of Execution is not granted. Further bearing in mind that the trial Court dismissed the Applicants suit but did not grant any orders, the Court finds and holds that the prayer for stay of execution is not merited as the trial Court gave a negative order. See the case of **Western College Farts And Applied Sciences ...Vs... Oranga & Others [1976] KLR 63** where the Court held that:-

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

Further In the case of **John Mbuu Muthoni & Another...Vs...Ruth Muthoni Kariuki (2017) eKLR**, the Court held that:-

“33. I have anxiously given thought to this question. I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga's decision in R v The Commissioner for Investigations & Enforcement Ex Parte Wananchi Group of Kenya Limited [2014] eKLR. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the High Court has dismissed an application for judicial review, the Court does not grant any positive order in favour of the Respondents which is capable of execution. As such a stay of execution is not available in such circumstances. 34. I am persuaded that the circumstances here are the same as those in the Wananchi Group Case which I find to be persuasive. It is in accord with the James Hoseah Gitau Mwara Case cited above. The narrow holding in that case is that a stay of execution is not available where the Court has declined to issue judicial review orders since a refusal to issue the orders cannot be “executed.” A broader holding would be that whenever a Court strikes out a suit or refuses to grant the substantive orders sought by the Court, a stay of execution is not available since any such stay would not be directed at a decision against which the intended appeal is not directed.”

Given that the order of the Court dismissing the suit was a negative order, the Court finds that there is no order to be executed and therefore the Court finds and holds that it cannot stay the orders that had been issued, as negative orders are incapable of being stayed.

The Upshot of the foregoing is that the Court finds that the Applicants have satisfactorily argued their case to warrant the Court exercise its discretion and allow them to file an Appeal out of time. However, on the issue of Stay of execution, the Court finds that the said prayer is not merited and the same is dismissed entirely. Consequently, the Court finds the Notice of Motion Application dated 15th June 2020, is partially merited and makes the following orders:-

1. That the Applicants be and are hereby granted leave to lodge their Memorandum of Appeal and Record of Appeal out of time against the Ruling dated 29th April 2020, and delivered Electronically by Chief Magistrate Hon. J.M Nangea, Thika in MCLE No. 155 of 2019.

2. That the Memorandum of Appeal annexed at paragraph 12 in the Supporting Affidavit filed herein be admitted at the Environment & land Court at Thika upon the payment of the requisite Court fees.

3. The Applicant to file and serve the Memorandum of Appeal within 14 days and the Record of Appeal within 30 days from the date hereof.

4. That costs of this Application to abide by the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF APRIL 2021.

L. GACHERU

JUDGE

8/4/2021

Court Assistant - Phyllis

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

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Gachimu for the 1st, 2nd, 3rd and 4th Appellants/Applicants

Mr. Farah for the 1st, 2nd and 3rd Respondents

L. GACHERU

JUDGE

8/4/2021