



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. 10 (E001) OF 2020

EVERLYNE KEMUNTO ONTIRI.....1ST APPELLANT/APPLICANT

AUGUSTINE OIRERE.....2ND APPELLANT/APPLICANT

VERSUS

CHARLES ONSONGO MOCHAMA.....1ST RESPONDENT

FRANCIS ONGERI OMWENGA.....2ND RESPONDENT

RULING

INTRODUCTION

1. By a miscellaneous Notice of Motion dated 24th September, 2020 the Applicants sought an order for stay of proceedings in Kisii ELC Case No. 75 of 2019 as well as leave to appeal out of time against the ruling delivered on 29th May 2019.
2. The background facts of this case are that the 1st Respondent initially moved this court vide case number ELC No. 5 of 2018 in which he sought a declaration that he was the registered owner of land parcel No. **CENTRAL KITUTU/MWABUNDUSI/2882**. He also sought a permanent injunction restraining the Defendants and their agents from trespassing onto, cultivating or dealing with the suit property as well as an eviction order against the Defendants.
3. The matter was later transferred to the lower court and given No. 75 of 2018. Prior to the suit being transferred to the lower court, the Applicants had filed a statement of Defence through the firm of Sagwe & Co Advocates.
4. The Applicants later withdrew their instructions from Sagwe & Co Advocates and amended the statement of Defence in person. After the suit was transferred to the lower court, the Applicants through the firm of M/S Mboga G.G & Co. Advocates filed an application on 10th February, 2020 seeking leave to further amend their Defence.
5. The learned trial Magistrate heard the said application and delivered his ruling on 29th May, 2020 dismissing the application. It is against the said ruling that the Applicant now seeks leave to appeal.
6. In support of their application, the Applicants aver that due to Covid-19 pandemic, they did not attend court when the ruling was delivered since courts were not sitting. They further aver that while courts remained closed, the Honourable Trial Magistrate delivered the said ruling on 29th May, 2020 without notice to the Applicant's Advocates and dismissed their application.
7. It is their contention that owing to their advocate's poor health, he was not able to come before the court immediately. They contended that since the time for appealing has lapsed it is necessary to seek leave of this Honourable Court to appeal out of time.
8. The Applicants complained that the new Electronic Case Management Practice Directions, 2020 (GAZETTE NOTICE NO. 2357) that was introduced during the COVID 19 pandemic proved to be a challenge and adapting to it took some time. They stated that they were unable to access the courts' physical facilities and were not conversant and/or familiar with the new system of communication with the court.
9. It is their averment that they are willing and able to pursue the Appeal to its conclusion and they should therefore be given a chance to do so. They are of the view that the Respondents will not suffer any prejudice that cannot be compensated by way of costs and that the court should strive to attain substantive justice by balancing the interests of the parties without regard to technicalities.

10. The 1st Respondent filed a Replying Affidavit sworn on 28th day of January 2021 opposing the application. He averred that the Applicants had been granted leave of the court to amend their statement of Defence. They contended that the ruling of the trial Magistrate was founded on law and therefore the Applicants' intention to Appeal was baseless.

11. He further deponed the Applicants were trespassers on his property, land **PARCEL NO. CENTRAL KITUTU/MWABUNDUSI/2882** and their sole reason for filing the instant suit was to delay the hearing of the main suit so as to continue their acts of trespass on the suit property. It was also his disposition that the Applicants have not demonstrated that they have a good reason for failing to file their Appeal in time.

12. It is the 1st Respondent contention that the Applicants have not demonstrated their interest in the suit property to warrant the court to grant them leave to file their Amended statement of Defence.

13. The court directed that the said Notice of Motion be argued by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

14. Having considered the history of this case, the pleadings of all parties, the ruling of the lower court as well as the submissions of counsel for both parties, the issues that arise for determination are:

- i) Whether the Applicant has met the requirements for grant of an order for of stay of proceedings in Kisii ELC No.75 of 2019.
- ii) Whether Applicant should be granted leave to appeal out of time against the ruling of the lower court delivered on 29th May 2019.

ANALYSIS AND DETERMINATION

15. The Civil Procedure Rules grant the courts unfettered discretion to enlarge time. Order 50 Rule 6 of the CPR grants the courts powers to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court.

16. With regard to enlargement of time, it is my finding that the Applicants have provided sufficient reasons for their failure to file the appeal within time.

17. The thorny issue is whether the Applicant has met the requirements for grant of stay orders pending Appeal. The principles guiding the grant of stay of execution pending Appeal are well settled. Order 42 Rule 6(2) of the Civil Procedure Rules provides that an Applicant must satisfy the Court that: -

- a) Substantial loss may result to him unless the order is made;
- b) That the Application has been made without unreasonable delay; and
- c) The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

18. The question of stay pending Appeal has been canvassed at length in various authorities. In **Chris Munga N. Bichage –Vs- Richard Nyagaka Tongi & 2 Others eKLR** the Court of Appeal set out the principles to be applied in considering an application for stay of execution thus: -

*“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal **or intended appeal is arguable**, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”*

19. In order to determine whether the Applicants have met the above requirements it will be important to consider the pleadings, ruling of the lower court and the draft Memorandum of Appeal.

20. In their Memorandum of Appeal, the Applicants have argued that the trial Magistrate erred by holding that the amendments to the Defence were time barred and by failing to appreciate the need to place all material facts before him in order to determine the issues at hand.

21. Without going into the merits of the Appeal, I note that the lower court dismissed the application on the grounds that the amendments introduced issues of fraud which were already time barred by virtue of the provisions of the Limitation of Actions Act Cap 22 which provides that the same ought to be raised within 3 years of the commencement of the cause of an action. The Trial Magistrate took judicial notice of the fact that the 1st Respondent was registered as the owner of the suit property, parcel no. **CENTRAL KITUTU/MWABUNDUSI/2882** on 27th February, 2017 and the Application was filed on 10th February, 2020. He also noted that the Applicants had not sought for extension of time and hence the amendments would not serve any purpose as the issue of fraud was time

barred.

22. Another ground that the Trial Magistrate based his decision to dismiss the application was that the counterclaim did not have any prayers and as such even if the court was to grant leave to amend the Defence as it was, it would not have served any purpose as no reliefs could be granted on the counterclaim.

23. From my analysis of the Ruling of the lower court, the proceedings on the application that was before it, the application before me and the draft Memorandum of Appeal, I am not persuaded that the Applicants have an arguable Appeal.

24. First and foremost, I note that during the hearing of the application in the lower court the Applicant did not counter the point of law raised by the Respondent that the issue of fraud raised in the counterclaim was time barred. The Lower court therefore had no option but to dismiss the application on those grounds.

25. Secondly, in the application and the Supporting Affidavit, the Applicant has not demonstrated his interest in the suit property, to enable this court determine whether or not to protect the same pending the hearing and the determination of the intended Appeal.

CONCLUSION

26. In the final result, it is my finding that the application does not meet the requirements for grant of an order of stay of the proceedings in Kisii ELC No.75 of 2019 pending the hearing and determination of the intended Appeal. Consequently, the application is dismissed with costs to the 1st Respondent.

Dated, signed and delivered at Kisii this 27th day of May, 2021.

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J.M ONYANGO

JUDGE