



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 85 OF 2017

SIMON NDICHU NJOROGE.....PLAINITFF/RESPONDENT

VERSUS

RAHAB WANJIRU MBOGO

(sued as the administrator of the

Estate of Mbogo Njoroge alias Samuel

Mbogo).....DEFENDANT/APPLICANT

RULING

This ruling is with respect to the application by the Defendant/Applicant dated the 4/1/2021 and filed on the 6/1/2021.

The application is brought under Order 9 Rule 9 of the Civil Procedure Rules, section 7 Rule 47, 74, 75 and 85 of the Appellate Jurisdiction Act and section 1A, 1B, 3, 3A, 63 and 95 of the Civil Procedure Act and all enabling provisions of the law.

The Applicant sought the following orders;

Spent.

That the firm of Orwa Seda and Co. Advocates be placed on record in place of M/S P.W Macharia Associates.

That the Applicant be granted leave to file a notice of Appeal in respect of the judgment and orders issued by Justice J.G Kemei on 11/4/2019.

That the Applicant be granted leave to Appeal against the entire decision delivered by Justice J.G Kemei on 11/4/2019.

THAT the notice of Appeal simultaneously filed in this application be deemed as duly filed, lodged and served within time.

THAT in the alternative to prayer (4)? above, the time for filing the notice be extended to 14 days from the date of issuance of the orders sought herein.

THAT the period for applying for certified proceedings, ruling and order be extended to also run from the time the Court will issue its Orders.

THAT the request for certified proceedings, judgment and Order Appeal simultaneously filed in this Application be deemed to have been filed and served within time.

THAT the Court be pleased to stay the execution of judgment and any other consequential orders of the Court and issue an order for stay in respect of its orders emanating from the judgment of 11/4/2019 pending the hearing and determination of this application.

THAT the Court be pleased to stay the execution of the judgement and any other consequential orders of the Court and issue an order of stay in respect of its orders emanating from the judgment of 11/4/2019 pending the hearing and determination of the intended Appeal.

THAT costs of this application be provided for.

The application is supported by the grounds adduced thereto and the affidavit of the Applicant sworn on the 4/1/2021.

Interalia, she avers that she is aggrieved by the judgment of this Court rendered on the 11/4/2019. That the suit land is her matrimonial property and she stands to lose the same rendering her and her children destitute; that the Court interalia disregarded her submissions that the suit land was registered in the name of her husband.

That despite instructing her erstwhile Advocates to file an Appeal, the said Advocates failed to do so and that the mistake of the said Advocates should not be visited upon her. That she has filed a notice of Appeal albeit out of time.

The application is opposed by the Respondent vide his Replying Affidavit dated the 26/1/2021 and filed on the 28/1/2021.

In brief the Respondent contends that the Applicant has not shown any evidence to show that she instructed her Advocate to file an Appeal. That the intended Appeal is aimed at scuttling his chance to enjoy the fruits of judgement. That the application has been brought after 20 months from the date of judgment which in his opinion amounts to inordinate delay given that the judgement was delivered in the presence of the Applicant's Advocates. That the property has already been subdivided pursuant to the orders of the Court and obtained possession. He annexed a copy of the Land Control Board consent dated the 22/9/2020 which shows the suit land was subdivided into 4 portions.

He urged the Court to dismiss the application.

In a further affidavit, the Applicant stated that it is not true that the application is an afterthought as she instructed her former Advocates Messrs. P W Macharia & Associates to file an Appeal but they failed to do so within time. She annexed an email correspondence to that firm by her son dated the 31/12/2020 in support. That she made telephonic follow up with her then Advocates who assured her that all was well. That to her surprise she learnt through a letter dated the 27/12/2020 that the said Appeal had not been filed. The said letter demanding her to vacate and clear the tea bushes on the suit land. That she quickly instructed her current Advocates to file the instant application to remedy the situation.

The parties elected to canvass the application by way of written submissions.

The Applicant submitted that she was frustrated by her then Advocates who failed to file the Appeal on time despite being given instructions and that when it came to her knowledge that the same had not been filed, she timeously made this application. That the application was not filed inordinately as argued by the Respondent. That the mistake of her then Advocates should not be visited upon her. Further she contends that she did not participate in the lower Court succession case in respect to the suit land. That her then Advocates did not inform her of the proceedings either. That she stands to suffer prejudice if the orders are not granted.

The Respondent opposed the application and submitted that the delay in filing the application is 20 months which is inordinate. That the execution of the decree of this Court has been substantially been done. For example, the consent of the Land Control Board to subdivide the suit land in 4 portions has been obtained. The Court also ordered the Land Registrar to execute the transfer on behalf of the Applicant in Succession cause No 72 of 1994 between the parties. These orders were issued on the 19/5/2020. That the Respondent has taken over possession of the portion of his share of the land.

With respect to the prayer for stay of execution, the Respondent submitted that the delay in filing the application is inordinate and no good reason has been given by the Applicant to warrant exercise of discretion in her favour.

I have read and considered the application, the rival affidavits, the written submissions of the parties and the issues for determination are; whether the Court should allow prayer No. b ; is the Applicant entitled to leave to file Appeal out of time; is the Applicant entitled to orders of stay of execution; who meets the costs of the application.

From the pleadings and the evidence of the parties on record it is evident that the Respondent is not opposed to the prayer No b which is to allow the firm of Orwa Seda & Company Advocates to come on record in place of P W Macharia Associates. Prayer No b of the application is not opposed and it is therefore granted as prayed.

The considerations for grant or denial of an application for extension of time was well expressed in **Nicholas Kiptoo Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others Application No. 16 of 2014 and Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others SC Application No. 15 of 2014**; where the Court stated that in determining such an application, the Court has to consider;

“The discretion to extend time is unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there were any extenuating circumstances that could enable the Court to exercise its discretion in favour of the Applicant. The following were the underlying principles that a Court should consider in exercising such discretion; extension of time was not a right of a party, it was an equitable remedy that was only available to a deserving party, at the discretion of the Court; a party who sought extension of time had the burden of laying a basis, to the satisfaction of the Court; whether the Court should exercise the discretion to extend time, was a consideration to be made on a case- to- case basis; where there was a reasonable cause for the delay, the same should be expressed to the satisfaction of the Court; whether there would be any prejudice suffered by the Respondents, if extension was granted; whether the application was brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.

Similarly, in the case of **Njagi Wanjeru & Company Advocates v Ben Momanyi t/a Momanyi & Associates** the Court of Appeal established that:

“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 or not to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chance of the Appeal succeeding if the application is not granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted (emphasis mine).”

In this case the judgement of the Court was rendered on the 11/4/2019 in the presence of the Advocate for the Applicant.

It is trite that a party proffering an Appeal from the decision of the superior Court has 15 days from the date of judgment to file a notice of Appeal. The said Appeal is filed in the superior Court with a counterpart in the Court of Appeal.

In this case the Applicant annexed a notice of Appeal dated the 4/1/2021 and filed on the 6/1/2021.

The Applicant has attributed the delay in filing the Appeal within the stipulated time to her then Advocates. She has annexed an email correspondence dated the 27/6/2019. I can deduce from the email that the Applicant’s representative is following up on the status of the case. Another such email dated the 31/12/2020 to the current Advocate seeks to know the progress of the Appeal, if any. I can conclude that the Applicant was aware as early as 27/06/2019 that the Appeal had not been filed. Even as at 27/06/2019 the time for filing Appeal was already spent. It is also undisputed that the Applicant took another one year and six months to bring the current application making the total period of delay to be over 20 months.

For the Court to exercise discretion in favour of the Applicant the reason for the delay is key in unlocking its discretionary power. The unfettered discretion of the Court must as of necessity be exercised within the law and reasons and not based on whims or caprice. The Applicant failed to annex instructions to his then lawyers to file the Appeal within time. If the correspondence of 27/06/2019 is anything to go by, the same was already out of time.

In conclusion the Applicant has not given reasons for the delay to the satisfaction of the Court.

Though the Court cannot sit on Appeal on its decisions, the Applicant failed to annex a draft memorandum of Appeal and therefore the Court is unable to determine whether the Appeal has chances of success.

The Applicant has averred that she stands to be prejudiced if the extension of time is not granted. She has not explained the nature of the prejudice she envisages in the event that the application is declined.

Order 42, Rule 6 (2) of the Civil Procedure Rules provide as follows;

(2) 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.

The Court has already made a finding that the application suffers from inordinate delay which has not been explained and supported to the satisfaction of the Court.

In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated: -

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

The Applicant has not explained the substantial loss that she stands to suffer if the application is declined.

Lastly, the Applicant did not proffer any security for Appeal in the event that the Court was inclined to find that stay of execution was warranted. As a matter of record the Applicant failed to prosecute this prayer completely and only focused on the extension of time to file an Appeal.

In conclusion the application has no merit.

It is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED & DELIVERED ONLINE THIS 26th DAY OF MAY, 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms. Kanja HB for Karanja for the Respondent

Applicant: Absent

Court Assistants: Kuyiki/Alex