



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC NO. 139 OF 2009

MARY WAIHERA MUIRURI.....PLAINTIFF

VERSUS

KURIA NGANGA.....DEFENDANT

RULING

(Application for stay of execution pending appeal; application filed 1 year 9 months after judgment; no proper explanation given for the delay; application declared to have been filed after substantive delay; application dismissed)

1. The application before me is that dated 25 February 2019 but filed on 4 April 2019 by the defendant. To put matters into context, this suit was originated by way of a plaint which was filed on 24 May 2002. The plaintiff/respondent sought to have the applicant permanently restrained from the land parcels Nyandarua/Tumaini Ngorika Block 1 (Nyandarua)/57 and Nyandarua/Tumaini Ngorika Block 1 (Nyandarua)/67. The applicant on his part filed a counterclaim claiming that he was the rightful owner of the suit properties and sought orders of cancellation of the title of the respondent. I heard the case and delivered judgment on 29 June 2017 vide which I allowed the case of the respondent and gave the applicant 6 months to vacate the suit properties default of which he would be evicted.

2. On 10 December 2008, the respondent filed an application seeking orders of police assistance for eviction. The application came before me on 4 March 2019 when I directed that it be served and be heard inter partes on 21 March 2019. However, before the application could be heard, the applicant on 4 March 2019, filed this application seeking orders of stay of execution of the decree pending appeal. In the same application, the applicant has also sought orders for leave to appeal against the judgment and extension of the time for filing and serving a Notice of Appeal.

3. Among the depositions in the supporting affidavit sworn by the applicant, is that he only came to know of the judgment on 18 February 2019, when he visited the offices of his erstwhile advocates, M/s Ikua Mwangi & Company Advocates. He believes that his erstwhile counsel erred by not lodging an application for leave to appeal and such mistake cannot be visited upon him. He has deposed that his new advocates, M/s Olaly Cheche & Company, have now swung into action and have drafted a Notice of Appeal and a letter requesting for proceedings, all of which he annexed. He believes that he is going to suffer substantial loss if this application is not allowed.

4. The respondent has sworn a replying affidavit to oppose the motion. She has deposed inter alia that the applicant is lying on oath by stating that he was not aware of the judgment. She has pointed out that he must have been aware because his former advocates filed a Notice of Appeal against the judgment on 5 July 2017. She has further pointed out that the applicant was in court when the date for judgment was given and he must have been fully aware of the judgment.

5. I have considered the application.

6. First, in so far as this application seeks orders to file a Notice of Appeal out of time, the same is inconsequential for I have seen for myself that there is indeed a Notice of Appeal filed on 5 July 2017 which notice was filed in time, that is, within 14 days of the judgment as prescribed by Rule 75 (2) of the Appellate Jurisdiction Rules. Nothing therefore arises out of this prayer.

7. Secondly, if the position is that the applicant has not formally lodged his appeal and wishes to have an extension of time to do so, I am afraid that I do not have jurisdiction to grant such order, which can only be granted by the Court of Appeal, through an application filed pursuant to the provisions of Section 4 of the Appellate Jurisdiction Act, Cap 9, Laws of Kenya.

8. The only other prayer left is that of stay pending appeal which is governed by the provisions of Order 42 Rule 6(2) which is drawn 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.

9. From the above, it will be seen that the applicant needs to satisfy three requirements, that is :-

(a) Show that he has filed his application without unreasonable delay;

(b) Show that he stands to suffer substantial loss;

(c) Provide security for the due performance of the decree.

10. Starting with the element of delay, it will be recalled that judgment in this matter was delivered on 29 June 2017. This application was filed on 4 April 2019. It has certainly been filed more than 1 year and 9 months since delivery of judgment. The applicant has tried to claim that he was not aware of the judgment but I do not believe him. As pointed out by the respondent, the applicant cannot feign ignorance of the judgment for a Notice of Appeal was filed and it must have been filed pursuant to his instructions. Even if he did not specifically give instructions for the filing of the Notice of Appeal, I do note that he testified on 16 March 2017, and he was thus aware that the hearing of the matter has closed and that it was just a matter of time before judgment was delivered. If he did not follow up with his advocate to find out when judgment was delivered or the contents of the judgment, then he has nobody to blame but himself. It was his case, and he had a duty to follow up on the same.

11. In my view, this application has been filed after considerable delay, which delay has not been adequately explained, and I do hold that the applicant fails the test of demonstrating that his application has not been filed after undue delay. Having failed that test, it is immaterial that the applicant ticks the other requirements, and I need not consider them.

12. For the above reasons, this application is hereby dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 3RD day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr. Olaly Cheche for the defendant/applicant.

Ms. Sambu holding brief for Mr. Oyugi for the plaintiff /respondent.

Court Assistants: Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU