



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 23 OF 2013 (O.S.)

LOISE NKATHA MUTHURI.....PLAINTIFF/APPLICANT

VERSUS

SILAS KIOGORA MBURUGU.....1ST DEFENDANT/RESPONDENT

JOSEPH MUTHOMI NGARUTHI.....2ND DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to the Plaintiff/Applicants application dated 4th march 2019 where she seeks the following orders;

i. That pending the hearing and determination of the intended appeal in the Court of Appeal at Nyeri, an order be issued, maintaining and preserving the status quo obtaining in respect of the suit premises to wit, Meru Municipality Block I/244 as at the time of delivery of judgement on 28th November 2018.

ii. That the plaintiff be granted extension of time within which to file a notice of appeal out of time.

2. The application is supported by the sworn affidavit of **Loise Nkatha Muthoni** and premised on the following grounds;

i. That the applicant and her family shall suffer substantial loss if forcibly evicted from the said suit plot which they occupy as their only home .She is ready to offer security as may be ordered by the court.

ii. That the applicant's family has developed the entire suit plot and has made this application timeously.

iii. That the judgement was delivered against the plaintiff/applicant but her former advocates did not, inexplicably, inform her to enable her timeously file notice of appeal and apply for stay immediately. So the plaintiff's former advocate's mistakes should not be visited upon her.

iv. That the honourable court has absolutely unfettered discretion to grant the relief sought, since the defendants/respondents shall not be prejudiced as they will have the right to be heard in the appeal.

3. The applicant also avers that he was not aware of the judgement and only became aware of the same when the Defendants/ Respondents approached his home and informed her that they are going to evict her. That this is a sensitive matter which concerns the family home comprising 4 married sons and 3 daughters. That the properties on the suit premises are 5 electric (3stone and 3 cemented timber) dwelling houses, 11 electrified rental houses (with tenants), a stone wall, 3 grade cows, 70 chicken, a piped water system, bananas ,3 mango trees, nappier grass, over 10 gravellier trees, 3 pawpaw trees etc. These developments attach great economic and sentimental value in the suit plot on which the family has lived since 1989 as a purchaser for value.

4. The application has been opposed by the Defendants/Respondents vide their Replying Affidavit dated 13th March 2019. They aver that the application is fatally defective and untenable in that the advocate purporting to be on record has no *locus standi* in terms of Order 9 Rule 9 of the CIVIL Procedure Rules 2010. That the judgement was read in the presence of the advocate and parties on 28th November 2018, about four (4) months ago and the advocate, Mr. Karanja for Mr. Ondari prayed for a stay of 30 days. This period has since lapsed.

5. Further, the Respondents aver that the pictures annexed thereon were taken elsewhere for the reason that in her evidence, the applicant adduced evidence that the structures on the land were timber houses but the photographs shows stone houses.

6. The Applicant filed a supplementary Affidavit on 18th April 2019. She averred that her advocates are properly on record since they filed a consent from the prior advocates on record. That he was not present when the judgement was delivered nor did her former advocates inform her of the 30 days stay of execution. That the delay is brief and has been satisfactorily explained and is therefore excusable, in the interest of justice. She further states that the Photographs which they have relied on reflects the families' properties, and a visit to the suit plot, if the court wishes can prove her right. That when they filed the suit in 2013 they had not built the permanent structure as the same were built later. She also annexed a draft memorandum of appeal.

Submissions of the Parties

7. The Applicant submitted that her advocates have complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules since they filed a consent in Court on 4th March 2019 where their previous advocate consented to the coming on record of the current advocates. That the current advocates have also filed a notice of change of advocates. On the prayer for maintenance of status quo, they submitted that the defendants have not shown any prejudice to be occasioned if the prayer is granted. The applicant also submitted that the reasons for delay have been sufficiently and satisfactorily explained. The applicant relied on the cited cases of;

-Meru Misc CIVIL Application No. 3 of 2011 (J.R.) Kimachia Farmerrrs Co-operative Society vrs Land Adjudication Officer, Tigania West & Anor,

-Edith Gichuru Koine vrs Stephen Njagi Thoithi (2014) eklr,

-Gabriel Osimbo vrs Chrispinus Mandare (2015) eklr,

-Hon John Njoroge Michuki & Anor vs Kentazuga Hardware Limited (1998) eklr.

8. The Defendants/Respondents submitted that due procedure was not followed for the new advocate to come on record since the new advocate did not seek the leave of the court, and that the four months of inaction by the plaintiff has not been satisfactorily explained. The Respondents relied on the cited authorities of;

-Protein & Fruits Processors Limited & another versus Diamond Trust Bank Kenya Limited [2015] eklr,

-Nicholas Kiptoo Korir Salat versus Independent Electoral and Boundaries Commission & 6 others [2013] eklr,

-Godfrey Makindu vrs Trans Business Machines Limited [2018] eklr.

Analysis and Determination

9. From the record, the arguments raised herein and the rival submissions of the parties, the following presents as the issues for determination

i. Whether the applicant's advocates Carl Peters Mbaabu & Co. Advocates are properly on record?

ii. Whether time should be extended for the Applicant to appeal out of time.

iii. Whether an order of status quo should be granted.

Whether the applicant's advocates Carl Peters Mbaabu & Co. Advocates are properly on record?

10. Order 9, rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—(a) Upon an application with notice to all the parties; or (b) Upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

11. In both **Protein & Fruits Processors Limited & another v Diamond Trust Bank Kenya Limited [2015] eKLR** and **Kazungu Ngari Yaa v Mistry V Naran Mulji & Co. [2014] eKLR** the courts were of a similar opinion that;

“The requirements envisage two different scenarios and the only commonalities are that, there has been a judgment and there was an advocate on record previously. In the first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court”.

12. In this case the firm of Carl Peters Mbaabu came on record by filing a consent from the previous advocates on record and on the same date filed a notice of change of advocates together with the present application. The respondent has not demonstrated in which way he was

prejudiced by this turn of events.

13. In **Buscar EA Ltd t/a Starways Express & another v Patrick Ngala Riziki [2019] eKLR** the Court held that;

“In my view, although the firm of Joseph M. Mwangela & Co. Advocates is not properly on record in terms of Order 9 Rule 9 Civil Procedure Rule, no prejudice has been occasioned to the Respondent. Each case should be considered on its own merits such as this circumstance....”- See also *Ngitimbe Hudson Nyanumba v Thomas Ongondo [2018] eKLR*.

14. I find that the consent filed on 4.3.2019 is proper even though the incoming advocate ought to have sought leave of the court albeit orally.

Whether time should be extended for the Applicant to appeal out of time.

15. This Court has been called upon to exercise its discretion to grant leave to the Applicant to lodge the appeal out of time. In **Buscar EA Ltd t/a Starways Express & another v Patrick Ngala Riziki (supra)**, the court cited the case of **Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)** where the Court of Appeal stated as follows with regard to how such leave should be exercised.

“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”.

16. The applicant filed this application four months after the delivery of the judgement, hence a delay of three months. She explains that she was not informed by her previous advocate of the impending judgement or that a stay of execution for thirty (30) days had been granted. Whereas the Respondent has christened the plaintiff's application as an afterthought, the applicant has since moved with speed and applied for certified copies of the judgement and proceedings.

17. On whether or not the appeal has chances of success. The applicant has filed a draft memorandum of appeal citing various grounds of appeal that relate to the principles of adverse possession and specifically what amounts to interruption of the period of adverse possession. This court pronounced itself regarding the merits of the case in the Judgment. I cannot therefore purport to consider whether the appeal has chances of succeeding or not. If I was to do that, it would essentially amount to casting doubts on my own Judgment. Nevertheless, the concept of adverse possession is an arguable one and it will find its footing during the appeal. I also do not see any prejudice occasioned upon the Respondent if the applicant is granted a chance to appeal. I take cognizance of the multiplicity of the suits between the parties herein and/or relating to the suit premises. The applicant has not exhausted her right to be heard. I therefore find that the prayer to appeal out of time is merited.

Whether an order of status quo should be granted.

18. The applicant has also prayed for this Honourable Court to maintain the status quo obtaining in respect of the suit premises as at the time of delivery of the judgement. What then would be the status quo? During her evidence in chief, applicant had stated that she has semi-permanent buildings on the land. This averment is also captured in her recorded statement dated 21.1.2013. However, in the present application, applicant has stated that she has permanent and semi-permanent buildings on the suit land. She has explained this discrepancy by averring that when the suit was filed, the permanent houses had not been built. However, when she gave her testimony on 17.5.2018, she never mentioned the stone houses. She is therefore not candid on this issue. Nevertheless, I do find that defendants had admitted that plaintiff is the one on the suit land (as a squatter). Further, the defendants still remain the registered owners of the suit land. I therefore find it necessary to have status quo maintained.

19. I proceed to allow the application but with some conditions as follows;

a. Leave is hereby granted to the Plaintiff/Applicant to file her appeal within 7 days of today's date.

b. Pending the hearing and determination of the intended appeal in the Court of Appeal, an order be and is hereby issued, maintaining and preserving the status quo obtaining in respect of the suit premises to wit, Meru Municipality Block I/244 as at the time of delivery of judgement on 28th November 2018.

c. The applicant is to deposit a sum of Ksh. 200 000 as security in this court within a period 30 days.

d. The orders granted herein are to remain in force for a period of ONE YEAR ONLY.

e. If there is none compliance with the orders in clause a) and c) above, then the orders granted herein shall lapse.

f. The applicant is to bear the costs of this application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 2ND DAY OF OCTOBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muriithi holding for C. Mbaabu for plaintiff

Rimita for defendant

HON. LUCY. N. MBUGUA

ELC JUDGE