



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC MISC. APPLICATION NO. 64 OF 2020

ZABLON AENCHA NTABO & ANOTHER.....APPLICANTS

VERSUS

ROBERT ATANDI ASIMBA.....RESPONDENT

RULING

(Application seeking to set aside an order made ex parte; Order 51 Rule 3; party aggrieved by an order made ex parte has liberty to apply to have it set aside; order made ex parte being a substantive order granting leave to appeal; respondent deserved to be heard before the order was made; application allowed)

1. The application before me is that dated 3 October 2020 filed by the respondent to this miscellaneous suit. It is an application seeking review of the orders made *ex parte* on 1 September 2020. The application is opposed.
2. By way of background, this miscellaneous motion, dated 25 August 2020, sought the following orders :-

(i) That this application be certified urgent and be heard at the earliest.

(ii) That leave be granted to the applicants Zablon Aencha Ntabo, Joyce Kemunto Zablon, to file an appeal out of time in Mombasa ELC No. 74 of 2019, Robert Atandi Asimba vs Zablon Aencha Ntabo & Joyce Kemunto Zablon by extending the time for filing such proceedings, for a period of 30 days from the date of this Court's order.

(iii) That pending hearing and determination of this application there be stay of execution on Mombasa ELC No 74 of 2019, Robert Atandi Asimba vs Zablon Aencha Ntabo & Joyce Kemunto Zablon.

(iv) Costs of this application be in the cause.

3. The suit described as Mombasa ELC No. 74 of 2019 is a suit that was filed at the Chief Magistrate's Court in Mombasa and judgment in it was delivered on 15 May 2020. The applicants thus had 30 days from the date thereof to file their appeal, meaning that the appeal ought to have been filed around about 14/15 June 2020. None was filed in time thus the application seeking leave to file the appeal out of time. The application was filed during the August-September 2020 Court recess and it was placed before the duty judge, Olola J, who ordinarily sits in the Environment and Land Court at Malindi. The Honourable Judge considered the application and made the following directions :-

"I have perused and considered the Motion dated 25th August 2020 as filed herein under Certificate of Urgency. I am satisfied that the matter is urgent. Accordingly I hereby grant leave to appeal as sought under Prayer 2. In addition, I hereby grant a temporary stay of execution for a period of 21 days. Accordingly the Motion to be served for a substantive consideration of prayer no. 3 on 16th September 2020 before the duty Judge at Mombasa.

J. O. Olola, Judge

1st September 2020."

4. It will be seen that the applicants obtained leave to appeal and a temporary stay of execution of the judgment. They subsequently filed the appeal Mombasa ELCA No. 28 of 2020. The matter came before me on 16 September 2020, and was adjourned to 29 September 2020. On that day Mr. Maundu, learned counsel for the respondent, pointed out that there was nothing left to argue of the Miscellaneous motion, since prayer 2 was granted, and prayer 3 only sought stay pending hearing of that application and not pending hearing of the appeal. I agreed, and

ordered that the application be marked as spent though Mr. Maundu did indicate that he wished to have reviewed the grant of prayer 2 and I directed that a formal application for review be filed. This application was subsequently filed.

5. The sole ground is that the prayer for leave to appeal out of time was granted *ex parte* without the respondent being heard. In the supporting affidavit, the respondent raises the issue that leave to appeal ought not to have been granted without him first being given audience as he has reasons to oppose the grant of leave.

6. To oppose the application, a replying affidavit sworn by the 1st applicant was filed. He has deposed that he filed the miscellaneous application on 25 August 2020 and he was granted leave to appeal. He has stated that the appeal was filed on 18 September 2020. He has averred that he gave reasons for not filing the appeal within time. He contends that the application herein has been overtaken by events and the only remedy is to challenge the appeal.

7. I have considered the application alongside the submissions made by counsel.

8. The respondent has presented this application inter alia pursuant to the provisions of Order 51 Rule 3 which provides as follows :-

3. No motion shall be made without notice to the parties affected thereby:

Provided, however, that the court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as to the court seems just, and any party affected by such order may move to set it aside.

9. It will thus be seen from above that a party affected by an order made *ex parte* is at liberty to move the court to set it aside. This is precisely what the respondent has done through this application. The argument of the respondent is that he was never heard before the order to appeal out of time was made. It is a cardinal principle of law that a party be given an opportunity to be heard before orders against him may be made. That is indeed a rule of natural justice. In our instance, the order to appeal out of time was not an interim order, but a substantive order, and I am persuaded that the respondent has made out a case that he deserved to be heard before the order was made.

10. For the above reasons I do allow the application dated 3 October 2020. I review and set aside the *ex parte* order giving leave to appeal. The result is that prayer (ii) of the miscellaneous application dated 25 August 2020 will need to be argued *inter partes*. I am alive to the fact that an appeal has already been filed following the order of 1 September 2020. That appeal was filed pursuant to the order of grant of leave to appeal out of time which I have now set aside. It follows, that with the setting aside of the order that gave leave to appeal, that appeal must now fall by the wayside, and I have no option but to strike out the said appeal. There will be no orders as to the costs of that appeal. If, after argument of the application herein *inter partes*, I am persuaded to grant leave to appeal out of time, another appeal will need to be filed. There will however be a stay of execution of the judgment and decree in *Mombasa CMCC (ELC) No. 74 of 2019* in terms of prayer (iii) of the application dated 25 August 2020 pending *inter partes* hearing of the prayer to appeal out of time.

11. Each party will bear his/her costs of this application.

12. Orders accordingly.

DATED AND DELIVERED THIS 17TH DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA