



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 442 OF 2013

SULEIMAN WAITHAKA MWANGI.....PLAINTIFF

VERSUS

JIMMY KARATU KIMARU.....1ST DEFENDANT

ELDOC COMPANY LTD.....2ND DEFENDANT

DISTRICT LAND REGISTRAR, UASIN GISHU.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

THE NATIONAL LAND COMMISSION.....5TH DEFENDANT

THE CHIEF LAND REGISTRAR.....6TH DEFENDANT

RULING

[NOTICE OF MOTION DATED 20TH JANUARY, 2021 BY 2ND DEFENDANT]

1. The 2nd Defendant filed the Notice of Motion dated 20th January, 2021 seeking for leave to appeal on the judgment delivered on the 11th November, 2020 and the decree arising therefrom out of time, and stay of execution of the said judgment and decree, pending the hearing and determination of the intended appeal. The application is based on the twelve (12) grounds on its face and is supported by the affidavit sworn by **Dr. Constantine Olieba Akwanalo**, a director to the 2nd defendant, sworn on the 20th January, 2021 and another by **John I. Nyarotso**, an advocate for the 2nd defendant, sworn on the 22nd February, 2021. It is the 2nd Defendant's case that the court delivered its judgment on 11th November, 2020 without notice to the parties. That the 2nd Defendant got to know of the judgment late and after the time for filing the appeal had lapsed. That the mistake of the Court of delivering judgment without notice to the parties should not be visited upon an innocent litigant seeking justice, and leave to file the appeal out of time and stay of execution should be granted. That the 2nd Defendant is likely to suffer irreparable loss and damage should the application not be granted. That the 2nd Defendant is willing to abide by the conditions and terms the court will direct.

2. The application is opposed by the Plaintiff through the Replying affidavit sworn by **Suleiman Waithaka Mwangi** on the 12th February, 2021. The Plaintiff's case is that he has begun execution of the judgment and will be greatly prejudiced as the 2nd Defendant has delayed in filing the application. That contrary to the 2nd Defendant's claim, a notice of delivery of the judgment dated the 29th October, 2020 by the Deputy Registrar was served upon Counsel for the parties on the 3rd November, 2020 at 11.34 a.m. through email. That for the 2nd Defendant's Advocate, the e-mail was sent through nyarotsokhwa@yahoo.com that belongs to Mr. Nyarotso Advocate who runs the firm. That if Counsel failed to notify their client, the 2nd Defendant, then it's the Counsel and not the Court that is to blame. That the application should be dismissed with costs.

4. That the 2nd Defendant sought leave to file a further affidavit which was granted on the 16th February, 2020. That consequently, the 2nd Defendant filed the supplementary affidavit sworn by **John I. Nyarotso** Advocate for the party on the 22nd February, 2021. That the deponent concedes that in 2020, he was an associate in the firm on record for the 2nd Defendant. That the notice of delivery of judgment was not sent to the official e-mail address that is, maritimomondiadv@gmail.com. That he never received the e-mail allegedly sent on 3rd November, 2020 at 11.30 a.m. or any other date, and if sent, it could have gone to spam messages. That upon perusing the Court record, only **Mr. Wabwire** for the Attorney General was present when the judgment was delivered virtually on the 11th November, 2020.

5. That during the mention of the 16th February, 2021, the Court among other directed parties to file their written submissions within 14

days. That during the subsequent mention of the 21st April, 2021, the Court extended the time by another 7 days after noticing that none of the parties had complied with the earlier order. That to-date however, no written submissions have been filed.

6. The following are the issues for the Court's determinations;

(a) Whether the 2nd Defendant has made a reasonable case for leave to appeal out of time, and stay order pending the determination of the intended appeal to issue.

(b) Who pays the costs?

7. The court has carefully considered the grounds on the Notice of Motion, affidavit evidence tendered, the record, and come to the following determinations;

(a) That though the 2nd Defendant's position is that no notices of delivery of judgment on the 11th November, 2020 was issued, and or served by the Court, the Plaintiff has disputed that claim and availed a copy of the notice dated the 29th October, 2020, addressed to M/s Maritim Omondi & Company Advocates, The Attorney General, and M/s Betty Koech & Company Advocates plus a printed e-mail by Sarah of Environment & Land Court Registry of 3rd November, 2020 showing that the notice of judgment was sent at 11.34 a.m. to bettykoechadvocates@gmail.com, bckoech13@gmail.com, denniswabwire@gmail.com and nyarotsokhwa@yahoo.com. That none of the parties have disowned the said e-mail addresses or indicated any mistake in any of them.

(b) That the court has perused the record and noted that the pleadings, including the written submissions were filed before the onset of the global Covid-19 pandemic. That at that time the Court had not required parties and Advocates to include their e-mail addresses in such documents. That accordingly, when the judgment dated the 23rd October, 2020 was forwarded by the trial Judge to this court for delivery, the Deputy Registrar and the Registry staff issued the notice of judgment and served the Counsel on record through the e-mail addresses received and retained for digital communication due to the prevailing pandemic.

(c) That the record confirms that the judgment dated 23rd October, 2020 was delivered by this Court on the 11th November, 2020 in the presence of only Mr. Wabwire of Attorney General's Chambers for the 3rd, 4th and 6th Defendants upon the Court being satisfied that all Counsel had been served with the notice through e-mail.

(d) That though the notice was not sent to maritimomondiadv@gmail.com, which is reportedly the official e-mail for the 2nd Defendant's Counsel on record, the Counsel served, Mr. Nyarotso through nyarotsokhwa@yahoo.com has at paragraph 1 and 3 of his supplementary affidavit, conceded he was the one in conduct of this case on behalf of the 2nd Defendant. That though he alleges that he did not receive the e-mail forwarding the notice dated the 29th October, 2020 on 3rd November, 2020 at 11.30 a.m., the record and Plaintiff's replying affidavit has confirmed that it was sent on that date at 11.34 a.m. That it is surprising that the Counsel, who is the deponent of the supplementary affidavit at paragraph 6 acknowledges having received expert advice that the e-mail may have gone to spam messages, but has not disclosed whether he checked to confirm if it was there or not. That as there is no evidence that the e-mail forwarding the notice sent at 11.34 a.m. on 3rd November, 2020 did not go through, then the court takes it that the notice of judgment was properly issued and served upon all Counsel for the parties in this suit.

(e) That as the Court had done its duty to issue and serve the notices for judgment about seven days before the due date, it was upon each Counsel to communicate to their respective clients and decide whether or not to attend. That on the due date, only Counsel for 3rd, 4th and 6th Defendants attended, but the Counsel for the Plaintiff and 2nd Defendant though obviously served, chose not to.

(f) That having found that the notice for judgment had been issued and digitally served on 3rd November 2020, then the Court finds that the 2nd Defendant has not attempted to explain why the Notice of Appeal was not filed within the time set by the law. There is also no explanation presented as to why the application for stay of execution was not filed earlier. It is worthy to note that the application was filed on 21st January, 2021 while the decree had been issued two days before on the 19th January, 2021.

(g) That on the applications for leave to file an appeal out of time the Court takes note that the notice of motion has been brought under **Orders 42 Rule 6, Order 50 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A, 63(e), and 75 of the Civil Procedure Act**. That none of those provisions specifically deals with the granting of leave to appeal out of time. That **Section 7 of the Appellate Jurisdiction Act Chapter 9 of Laws of Kenya** provides for powers of this Court as follows;

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death, no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

That what the 2nd Defendant has sought for is leave to appeal out of time, and not extension of time to file a notice of appeal. That in the case of ***Richard Kipmalel Chesimet Vs Nandi County Government, Eldoret ELC No. 99 of 2015***, the Court dealt with a similar application for leave to appeal out of time among others. That the Court referred to ***Trimborn Agricultural Engineering Limited Vs David Njoroge Kabaiko & Another [2000] eKLR, Muchingi Vs James Muchungi Kiragu & Another [1998] eKLR*** and held as follows;

“...this Court has no jurisdiction to hear and determine the application hence the application for leave to file an appeal out of time is hereby struck out with costs.”

That the Court agrees with that finding and therefore decline the prayer for leave to appeal out of time.

(h) That as there is no merit in the application by the 2nd Defendant, the Plaintiff is entitled to costs.

8. The foregoing leads the Court to find that the 2nd Defendant's Notice of Motion dated 20th January, 2021 has no merit and is dismissed with costs.

It is so ordered.

DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 12TH DAY OF MAY, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Kandie for Maritim for the 2nd Defendant and

M/s Koech for Plaintiff.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.