



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAKURU
ELC NO. 280 OF 2017

(FORMERLY HCCA NO. 50 OF 2014)

FATHER FAUTUS NDENYERE1ST APPELLANT

CATHOLIC DIOCESE OF NAKURU.....2ND APPELLANT

VERSUS

LUCY WAITHIRA KARANJA.....1ST RESPONDENT

NJUGUNA KARANJA2ND RESPONDENT

RULING

1. Judgment was delivered in this appeal on 30th November 2020 as follows:

a. The respondents' case in the subordinate court is dismissed.

b. The respondents to vacate from the parcel of land known as Kihingo/Likia Block 2/537 (Pwani Mutukanio) within 45 (forty-five) days from the date of delivery of this judgment. In default, an eviction order shall automatically issue and the appellants shall be at liberty to evict them.

c. A perpetual injunction is hereby issued restraining the respondents by themselves, their servants, agents or assigns from entering, occupying, claiming, using or otherwise interfering with the appellants' enjoyment and utilization of the parcel of land known as Kihingo/Likia Block 2/537 (Pwani Mutukanio).

d. The appellants shall have costs of this appeal, costs of the respondents' case in the subordinate court and costs of the counterclaim.

e. The appellants shall also have interest on all costs at court rates.

2. Being dissatisfied with the judgment, the respondents simultaneously filed Notice of Appeal dated 12th January 2021 and Notice of Motion dated 12th January 2020, the subject of this ruling. It seems there is a typographical error on the date of the application and that the intended date was 12th January 2021. The application seeks the following orders:

1. [Spent]

2. THAT this court be pleased to extend the time for filing a notice of intention to lodge an appeal to the court of appeal against the judgment of this court delivered on 30th November 2020 and the notice of appeal filed out of time be deemed as properly filed.

3. [Spent]

4. THAT pending the hearing and determination of the intended appeal to the Court of Appeal, there be a stay of execution of the decree and judgment of this court delivered and issued on 30th November 2020.

5. THAT costs of this application to abide the outcome of the appeal to the court of appeal.

3. The application is supported by the affidavit sworn by Njuguna Karanja, the second respondent. He deposed that at the time the judgment was delivered, there were restrictions concerning in-person court attendances due to the COVID-19 pandemic and that consequently, all judgments were delivered electronically. That Mr. Muhia, the advocate who was handling the matter for the respondents is elderly and may have had challenges with the use of electronic devices to attend court sessions. He added that he never got any communication on the outcome of the judgment and after the advocate opened his office in January 2021, he visited the advocate and informed him that he heard rumours that he had lost the case and would be evicted. That prompted the advocate to send a representative to court who obtained a copy of the judgment.

4. He deposed further that he immediately informed the advocate that he intended to appeal against the judgment. He added that the court went into recess upon expiry of the period within which notice of appeal ought to have been filed and that he has been in occupation of the suit property since 1986.

5. The respondents opposed the application through grounds of opposition in which they took the position that this court lacks jurisdiction to entertain an application for extension of time to file notice of appeal, that no satisfactory explanation has been tendered for the delay and that the application is an afterthought.

6. The application was canvassed through written submissions. The applicants submitted that this court has jurisdiction to grant extension of time to file notice of appeal, under **Section 7** of the **Appellate Jurisdiction Act**. They relied on the case of **Edward Njane Nganga & Another v Damaris Wanjiku Kamau & Another [2016] eKLR**. They added that taking into account the period covered by the recess, the delay in bringing the present application is not inordinate.

7. Regarding stay of execution, the applicants submitted that they have lived on the suit property since 1985 and that an eviction will cause them substantial loss and render the appeal an academic exercise. They added that they are willing to abide by whatever conditions the court imposes for due performance of the decree.

8. The respondents submitted that this court lacks jurisdiction to extend time to file notice of appeal and that in the absence of a valid notice of appeal, stay of execution pending appeal cannot be granted. Regarding the limb of substantial loss, the respondents conceded that the applicants have been in possession and argued that an order of stay will result in the respondents being denied entry into their property and being kept from enjoying the fruits of the judgment. They relied on the case of **Kenya Shell Ltd vs Kabiru & Another [1986] KLR 410** and urged the court to dismiss the application with costs.

9. I have duly considered the application, the affidavits, the grounds of opposition and the submissions. Three issues arise for determination; whether this court has jurisdiction to extend time for filing notice of appeal, whether in the circumstances time should be extended and lastly whether stay of execution should issue.

10. I will start with the issue of jurisdiction since that is the entry point in any litigation. The applicants seek to appeal to the Court of Appeal against the judgment that was delivered in this appeal on 30th November 2020. There is no dispute that the applicants filed a notice of appeal on 14th January 2021. By dint of **rule 75 (2)** of the **Court of Appeal Rules, 2010**, the notice of appeal ought to have been lodged within fourteen days of 30th November 2020. In other words, it should have been filed by the end of the day on 14th December 2020.

11. Section 7 of the Appellate Jurisdiction Act provides as follows:

Power of High Court to extend time

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...

12. In view of the provisions of **Article 162 (2)** of the **Constitution of Kenya 2010**, this court has the status of the High Court. The above provisions of **Section 7** of the **Appellate Jurisdiction Act** leave no doubt that the High Court and indeed all courts with the status of the High Court, including this court, have jurisdiction to extend the time for filing notice of appeal in respect a judgment of the court. That position was affirmed by the Court of Appeal in **Mary Wambui Njuguna v William Ole Nabala & 9 others [2018] eKLR**. Thus, the simple answer to the first issue for determination is that this court has jurisdiction to extend time for filing notice of appeal in respect of the judgment herein.

13. Do the circumstances herein warrant extending time for filing notice of appeal in respect of the judgment? The principles applicable to an application for extension of time to lodge notice of appeal were restated in the case of **Nyaigwa Farmers' Co-operative Society Limited v Ibrahim Nyambare & 3 Others [2016] eKLR** as being *inter alia* the length of the delay, the reason for the delay and the degree of prejudice to the respondent if the application is allowed.

14. The notice of appeal herein was filed on 14th January 2021. In view of the provisions of **rule 75 (2)** of the **Court of Appeal Rules, 2010**, it ought to have been filed by the end of the day on 14th December 2020. So, what was the extent of the delay? I bear in mind that the requirements as to filing of a notice of appeal and the period within which to do so are all requirements under the **Court of Appeal Rules, 2010**. In that regard, it is important to bear in mind that **rule 3 (e)** of the **Court of Appeal Rules, 2010** as read with **Section 26 (1) (c)** of the **Court of Appeal (Organization and Administration) Act, 2015** exclude the period from 21st December to 12th January, both days inclusive from being reckoned in the computation of time. In essence, the delay was therefore of only seven days. I do not consider that to be inordinate delay.

15. Regarding the reason for the delay, the applicants contend that they only came to know about the judgment sometime in January 2021, after they called on their advocate. The advocate is said to be elderly and that he had challenges joining the proceedings on the date of delivery of judgment, which were conducted through video conference. The court takes judicial notice that indeed, Mr Muhia who was previously on record for the applicants is a senior advocate who has served the bar for many years. I further note that the respondents have not challenged the possibility that Mr Muhia may have had difficulties joining the online session. I therefore find the reason given for the minor delay of seven days to be acceptable.

16. Lastly, as regards the degree of prejudice to the respondents if extension of time for filing notice of appeal is allowed, I see none. The respondents concede that the applicants are still in possession. It is apparent that the decree is yet to be executed. In those circumstances, the applicants should be allowed to pursue their right of appeal.

17. I now turn to the question of whether stay of execution should issue. This court's jurisdiction to grant stay of execution pending appeal is guided by **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** which provides as follows:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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.

18. Thus, an applicant seeking stay of execution pending hearing and determination of an appeal must demonstrate that substantial loss will result to her if stay is not granted and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. Further, the applicant is required to give such security as the court may order for the due performance of the decree.

19. The judgment of this court will, among others, result in eviction of the applicants from the suit property. Such a development will no doubt amount to substantial loss to the applicants. Regarding the limb of making without unreasonable delay, I note that the present application was filed on 14th January 2021, alongside the notice of appeal. Taking into account this court's end of year recess which runs from 21st December to 13th January, the delay was not at all unreasonable.

20. I am satisfied that the applicants have made a case for granting stay pending appeal. So as to ensure that the appeal is proactively prosecuted, I will limit the duration of the stay orders.

21. Regarding security, I consider it appropriate that the applicants deposit in court such sum as will be determined as the party and party costs of this appeal.

22. In view of the foregoing discourse, I make the following orders:

a. Time for giving notice of intention to appeal from the judgment of this court delivered on 30th November 2020 is extended by 10 (ten) days.

b. The Notice of Appeal filed by the applicants on 14th January 2021 is deemed as properly filed.

c. Pending the hearing and determination of the intended appeal to the Court of Appeal, there be stay of execution of the judgment of this court delivered on 30th November 2020 and the decree arising therefrom.

d. The stay is conditional on the applicants depositing in this court such sum as will be determined as the party and party costs of this appeal. The deposit shall be made within 21 (twenty-one) days of the costs being determined. In default, the stay orders shall automatically lapse.

e. The stay orders shall, if the applicants timeously comply with the condition in (d) above, remain in force for a period of only 1 (one) year from the date of delivery of this ruling, unless otherwise extended by the Court of Appeal.

f. Costs usually follow the event. The event in this appeal has since occurred: the applicants herein were ordered to bear costs of this appeal. Consequently, costs of the present application shall be borne by the applicants.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF MAY 2021

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mwangi for the appellants/respondents

Ms Alwala holding brief for Mr Githui for the respondents/applicants

Court Assistants: B. Jelimo & J. Lotkomoi