



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

CIVIL APPEAL NO. 51 OF 2020

MURIGI MWAURA APPELLANT /APPLICANT

VERSUS

FRANCIS KINUTHIA MWAURA RESPONDENT

RULING

The Matter for determination is the **Notice of Motion Application** dated **18th November 2020**, bought under **Rule 4 of the Court of Appeal Rules, Article 159(2)D of the Constitution, Sections 1A,1B,3A and 63(C) of the Civil Procedure Act, Order 42 Rule 6, Order 22 Rule 51 of the Civil Procedure Rules** by the Appellant /Applicant seeking for Orders that;-

- 1. That Pending the hearing and determination of the intended Appeal herein, this Honorable Court be pleased to issue an Order of Injunction restraining the Respondent by himself, his representatives, his agents and/or any other person acting under his authority/instructions from erecting any structures, alienating, dealing, subdividing, transferring and/or in any other way possible transacting with all the parcels of land known as LOC.4/GATITU/313.**
- 2. That this Honorable Court be pleased to enlarge time to file Appeal and grant the Applicant leave to file an Appeal out of time against the Judgement delivered on 19th December 2019, by trial Magistrate Hon. M.W. Wanjala and the same be admitted for hearing once the record is ready.**
- 3. That the Memorandum of Appeal by the Appellant /Applicant be deemed as properly and duly filed.**
- 4. Costs of and incidental to this application do abide the result of the said Appeal.**

The Application is supported by the Affidavit of **Murigi Mwaura**, who averred that the Respondent has tried to evict him from the suit property and if the Appeal is not allowed, he stands to lose. He further averred that the delay in filing this Appeal was not intentional as it was occasioned by the delay in obtaining certified copies of Proceedings and Judgement from **Thika Registry** and the **draft Memorandum of Appeal** is annexed and marked as **"B"**.

He contended that he did not participate in the Defence hearing before the trial court and he was never given a chance to defend his claim and failure to file an Appeal was as a result of an inadvertent mistake on the part of his former Advocates.

That as a result of the Judgement, he is under imminent threat of eviction by the Respondent. It was his further contention that the Respondent will not suffer any prejudice if the orders sought are granted.

The Appellant /Applicant filed his submissions on **13th May 2021**, through the **Law Firm of Tony Martin Law LLP**, and urged the court to issue the prayers sought in his Application.

Despite the Respondent being duly served, he did not enter appearance nor filed any Pleadings with regards to the Appellant /Applicant's Application.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also considered the Affidavit and the annexures thereto. The Court finds that the issues for determination are;

- a. Whether the Appellant /Applicant has met the legal threshold to be granted leave to Appeal out of time?**

b. Whether the Appellant /Applicant has satisfied the required standard for grant of Stay Orders pending Appeal.

(a) Whether the Appellant /Applicant has met the legal threshold to be granted leave to Appeal out of time

This Court has discretion to allow an intended Appellant /Applicant leave to file an Appeal out of time, but in doing so, the Court is to use its discretion and be satisfied that the Applicant/Appellant has given sufficient reasons to warrant the grant of the said leave. Section 79G of the Civil Procedure Act, provides that:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the Appellant /Applicant of a copy of the decree or order: provided that an appeal may be admitted out of time if the Appellant /Applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

In the case of Nicholas Kiptoo Arap Korir Salat...Vs...The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR, the Court held that:-

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

In line with the foregoing case, it is this Court’s considered view that the question that must then be answered is whether the Appellant /Applicant has explained the reasons for the delay to the satisfaction of this Court.

It is not in doubt that the Judgment herein sought to be Appealed against was delivered on 19th December 2019, and there was a Stay of Execution for 45 days. However, the Appellant /Applicant filed this Application on enlargement of time on 18th November 2020, which is a delay of more than 10 months. Has the Applicant herein satisfactorily explained the reasons for such delay?

The Appellant /Applicant has termed the delay as “technical consideration” and that the delay in filing the Appeal was occasioned by the delay in obtaining copies of proceedings and Judgement from Thika Civil Registry.

However, there is no evidence placed in this court to show attempts to procure the proceedings or the said technical considerations. It is this Court’s considered view that a party has a duty to follow up with its own case Sections 107 and 108 of the Evidence Act are very clear that he who alleges must prove.

The Judgment having been delivered on 19th December 2019, and the Application having been brought 10 months later and with no satisfactory explanation as to why the Appellant /Applicant did not file the Appeal on time, this Court finds that the Appellant /Applicant has failed to satisfy this Court with a satisfactory explanation of the said delay. The Court is therefore not satisfied that the Appellant /Applicant herein is deserving of the Leave to Appeal out of time.

(b) Whether the Appellant/Applicant has satisfied the required standard for grant of stay orders pending Appeal

In determining whether to grant or not to grant the Injunctive Orders sought, the court will be guided by the principles set out in Order 42 Rule 6(2). The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other.”

Even though the Court has disallowed the prayer to enlarge time to file Appeal, the Court will proceed to determine whether the

Appellant/Applicant herein had satisfied the required standard for grant of stay orders pending Appeal. It is evident from the above provisions of law that the Court has discretion to issue an Order of stay of execution. However, the said discretion must be exercised judicially. See the case of Canvass Manufacturers Ltd...Vs...Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853, where the Court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.

The Court will now consider each of the condition and juxtapose them with the available evidence herein to determine whether the Applicant is deserving of the orders sought. Firstly, the Applicant must satisfy that he would **suffer substantial loss**, unless the orders sought are issued.

From the Judgment of the subordinate Court, in the last paragraph which indicates that the Defendant now the Appellant /Applicant in this case, did not adduce any evidence to support his case and there was no piece of evidence at the hearing that could confer upon the Defendant any clot of right to either own, occupy or remain in occupation of the suit land herein. Failure to produce evidence means that the Appellant /Applicant will not suffer substantial loss. The Court makes this finding taking into account that it is not the duty of the Court to deny a successful litigant the fruits of his/her Judgment.

Secondly the Appellant /Applicant must satisfy the Court that the Appeal was made **without inordinate delay**. **This Court as earlier held and found that the Appellant /Applicant has failed to satisfy it with sufficient explanation of the said delay and consequently, has failed in convincing or persuading the Court to exercise its discretion to grant leave to appeal out of time.**

In considering whether the Appeal will be rendered nugatory, the Court must bear in mind that each case must depend on its own facts and peculiar circumstances. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved. The Appellant/Applicant did not demonstrate that if the Appeal is not allowed, it will be an academic exercise. It was not stated, for instance, that the Respondent will not be able to establish ownership of the suit property, should the Appellant/Applicant succeed in his intended Appeal. The two limbs of argueability and the nugatory aspect must be satisfied before this Court can exercise its discretion in favour of the Appellant /Applicant, short of which, the Court cannot grant an orders sought. However, the Court has not granted leave to file an appeal out of time and thus there would be no need of delving so much on whether the applicant is deserving of stay of execution pending appeal.

It is clear that the Appellant /Applicant slept on his rights and only woke up when he was served with the Judgement. Therefore, his application has no merit and the Court has no option but to dismiss the said application entirely with costs.

The Upshot of the foregoing is that the Appellant /Applicant’s Notice of Motion application dated **18th November 2020**, is found not merited and the same is hereby dismissed entirely with no orders as to Costs since Application is not opposed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 17TH DAY OF JUNE 2021

L. GACHERU

JUDGE

17/6/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Kingangi for the Appellant/Applicant

No appearance for the Respondent

L. GACHERU

JUDGE

