



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C MISC NO. 3 OF 2021

PATRICK WAWERU MAINA.....APPLICANT

VS

MUGA AUCTIONEERS GENERAL MERCHANTS.....1ST RESPONDENT

HOUSING FINANCE COMPANY LTD.....2ND RESPONDENT

STANLEY W. MAINA.....PROPOSED INTERESTED PARTY

RULING

1. The Applicant filed a Notice of Motion Application dated 24/02/2021 expressed under Order 50 Rule 5 of the Civil Procedure Rules for seeking orders that; -

a. Spent.

b. The Applicant be granted leave to Appeal against the ruling of Hon. E.M Muriuki Nyagah Senior Principal Magistrate in Murang'a CMCC No. 13 of 2019 dated 27/10/2020 out of time.

c. The first and second Respondents, their agents, servants and/or anybody claiming through or under them be restrained by way of interim injunction through entering into private treaty or scheme of settlement which involves alienating, selling, or advertising or offering for sale, transferring or any other manner dealing with Plaintiff's land parcel No. LOC 11/MARAGI/7963 pending the hearing of this application interpartes.

d. That costs of this application be borne by the Respondents.

2. The Application is supported on grounds on the face of it that are echoed in the Supporting Affidavit sworn by Patrick Waweru Maina on even date. The Applicant is the absolute owner of land parcel no. LOC 11/MARAGI/7963 (hereinafter referred to as the suit land) and had filed an application dated 11/01/2019 in the trial Court to restrain the Respondents from exercising their statutory power of the suit land; that interim orders were granted on 11/01/2019 and discharged on 26/03/2019; that consequently the Applicant applied to reinstate the application dated 11/01/2019 but was dismissed on 27/10/2020 hence the instant application.

3. The Applicant averred that he secured a loan of Kshs. 5 million from the 2nd Respondent using the suit land as security. While admitting default and willingness to redeem the suit land, the Applicant contends that the demanded sum of over Kshs. 10 million is exorbitant and contentious. That he was not aware of the dismissal of the application for reinstatement until 19/02/2021 through his current Advocates hence his desire to Appeal out of time. Copies of the application, parties' correspondence, copies of advertisement, trial Court Ruling and memorandum of Appeal were annexed to the Affidavit as "PWM1 - PWM5".

4. The Application is opposed vide the 2nd Respondent's Replying Affidavit sworn on 08/03/2021 by Christine Wahome, Litigation Manager. On behalf of the 1st Respondent described as their Agent, the 2nd Respondent averred that the application is an abuse of Court process as it offends provisions of section 6 of the Civil Procedure Act. That the Applicant filed a similar application in the trial Court seeking similar orders as the instant one which application is still pending hearing and determination. That the trial Court's impugned ruling discharged the interim orders of injunction as opposed to alleged dismissal for non-attendance.

5. She deponed that the Applicant's conduct in the trial Court is undeserving of the equitable relief sought herein as Court directions on 19/03/2019 declining further extension of interim orders in the event the Applicant failed to file a further Affidavit as requested. That the

Applicant ought to prosecute his pending application dated 11/01/2019 instead of pursuing the intended Appeal seeking reinstatement of interim orders that would be contrary to Order 40 Rule 4 (2) & (4) of the Civil Procedure Rules. The 2nd Respondent swore that the Applicant had not demonstrated any due diligence in requesting for proceedings in pursuit of the intended Appeal and urged dismissal of the application with costs.

6. On 11/03/2021, directions were taken and parties agreed to canvass the Application by way of written submissions. The Applicant filed his submissions dated 19/04/2021 whereas the Respondents filed theirs dated 14/04/2021.

7. In his cursory submissions, the Applicant recounted the history of his case as enumerated in his Application and supporting affidavit. He argued that the mistake of counsel ought not be visited on a litigant and that his intended Appeal is arguable. In essence that the Applicant ought not to be shut out on account of the former erstwhile Advocates. He added that he has satisfied the stringent requirements for grant of injunctions as enunciated in the classical case of **Giella v Casman Brown (sic)**. The Applicant did not cite any authorities in support of his plea.

8. On behalf of the Respondents, it was submitted that the issue for determination is whether leave to Appeal out of time should be granted to the Applicant. They relied on section **79G** of the Civil Procedure Act that provides for period for filing Appeals to the High Court and acknowledged that such grant of leave is an exercise of Court discretion which should be exercised judiciously. That an Applicant must demonstrate that he has a good and sufficient cause for not filing the Appeal within time. That the Applicant has not proffered any substantial explanation for the delay in filing his Appeal and in any event the allegation that his former advocates did not appraise him of the disputed Ruling is unsubstantiated. Reliance was placed on the cases of **F K (Minor suing through his mother and next friend NMK) v Jones Mutua & 3 others [2018] eKLR** and **Mwangi v Kenya Airways Ltd [2003] KLR**.

9. The Respondents were emphatic that the Applicant's intended Appeal is not only unarguable but illogical because this application is sub judice; that the application dated 11/01/2019 was not dismissed hence the prayer for reinstatement is misplaced; that the Applicant's conduct in the trial Court was tainted and coupled with non-compliance of Court directions and lastly that the application for reinstatement was ill-timed, a year after the interim orders were discharged and immediately after the 1st Respondent's move to advertise the suit land for sale. They conclude that the application is unmeritorious and prayed for its dismissal with costs.

10. The gravamen of the instant Application is whether the Applicant is entitled to leave to file an Appeal out of time against the trial Court Ruling delivered on 27/10/2020. It is expressed to be brought under **Order 50 Rule 5** of the Civil Procedure Rules which states; -

5. Time for giving security for costs, when not to be reckoned [Order 50, Rule 5 of the Civil Procedure Act.]

The day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given shall not be reckoned in the computation of time allowed to plead, or take any other proceeding in the cause or matter.

11. In my view the said Rule is not relevant to the prayers sought in the instant Application. Be that as it may, I will analyze the Application on merit. Furthermore, the Notice of motion application included one STANLEY W. MAINA as proposed interested party; the Applicant did not address his capacity or address the requirement for his inclusion as he does not appear in the trial Court pleadings.

12. As rightly submitted by the Respondent, the relevant provision for seeking leave to Appeal out of time is found at **Section 79G** of the Civil Procedure Act which states; -

“79G. 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 been requisite for the preparation and delivery to the Appellant of a copy of the decree or order. Provided that an Appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the Appeal in time.”

13. The proviso is clear that the Appellant has to satisfy the Court that he had **‘good and sufficient cause’ for not filing the Appeal within time**. It is trite that the nature of this relief is discretionary which the Court must apply its mind judiciously and upon reason rather than arbitrarily.

14. Further, **Section 95** of the Civil Procedure Act provides;

“95. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

15. It is common ground that the Applicant seeks to file his Appeal out of time. He blames his Advocates for not informing of the Court's impugned Ruling in good time. The Respondent has termed this application an abuse of Court process and is premised on unsubstantiated grounds. The application was filed **4 months** after delivery of the Ruling and while the period of delay is excusable, no plausible reasons have been advanced to explain the delay. For instance, the Applicant has not explained how he came to learn of this Ruling since his former Advocates did not appraise him of the same. He only deponed that he received copy of the Ruling on 19/2/2021 from his current Advocates whom he doesn't disclose how or when he instructed them.

16. In the case of **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR** the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

“.....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an Appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the Court must act upon reason(s) not based on whims or caprice. In general, the matters which a Court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the Appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted.”

17. Additionally, the Supreme Court on the issue of merit of an application to extend time, held in **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**: -

“.....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.”

18. In the Court of Appeal case of **Imperial Bank Limited (In Receivership) & another v Alnashir Popat & 18 others [2018] eKLR** the Court enumerated some of the considerations to be borne in mind while considering an application for extension of time to include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of Appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the Appeal or intended Appeal; and whether, prima facie, the intended Appeal has chances of success or is a mere frivolity.

19. The Respondents have argued that the intended Appeal is not arguable and outlined their reasons thereof. They mainly highlighted the conduct of the Applicant in the trial Court and claim that the impugned Ruling relates to a matter that is sub judice as the Application was not dismissed as the Applicant may want this Court to believe. A reading of the 2nd page of the impugned Ruling at paragraph reveals that the Application dated 11/01/2019 was not dismissed but the interim orders were discharged. They also argued that reinstating the interim orders would be in contravention of **Order 40 Rule 4 (2) and (4)** of the Civil Procedure Rules which provide;

(2) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the Court for a period not exceeding fourteen days.

.....

(4) All applications under this order shall be heard expeditiously and in any event within sixty days from the date of filing unless the Court for good reason extends the time.

20. It is the finding of this Court that the Applicant has not explained the delay in filing this application. The application was filed 3 months after the delivery of the ruling which because of unexplained delay is found to be inordinate.

21. My reading of the ratio of the ruling is that the Court discharged the interim orders. The substantive application is still pending in the lower Court and I see no prejudice that the Applicant will suffer if the subject application is not granted. He still has the opportunity to canvass his application. On that ground prayer No 3 of this application in my considered view would be subjudice. In that sense the Court finds that there is no arguable Appeal prima facie.

22. In the upshot the application is not merited and it is dismissed with costs to the Respondents.

23. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 17TH DAY OF JUNE 2021.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ndungu HB for T M Njoroge for the Applicant

Morancha HB for Juma for the 1st & 2nd Respondents

Alex: Court Assistant