



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC APPEAL NO. E005 OF 2020

JOHN MUNIU MWANGLI.....APPLICANT

VERSUS

JOHN NJERU KAMWETA.....RESPONDENT

RULING

1. The applicant vide a Notice of Motion Application dated 4th November 2020 filed in Court on 11th, November 2020 sought the following substantive orders:-

2. That this honourable court be pleased to issue stay of execution of the judgment emanating from the Chief Magistrate's Court at Molo, ELC Case No.29/2019.

3. That, the applicant herein be granted leave to appeal out of time against the whole judgment of the Hon R Yator Principal Magistrate, delivered on 28th May, 2020 at Molo.

2. The application was supported on the following grounds set out on the body of the application as follows:-

1. That the judgment herein was delivered on 28th May, 2020.

2. That the judgment was neither delivered with the applicant's knowledge nor his advocate.

3. That the respondent's advocate did not notify the Applicant's advocate about the same.

4. That the judgment was delivered during the time when the court operations were not active due to Covid-19 Pandemic.

5. That is it only fair and just that the Applicant's appeal is allowed.

3. The application was further supported on the affidavit sworn by John Njeru Kamweti the applicant .

4. Kimoriot Jemator advocate for the Respondent swore a relying affidavit dated 18th January 2021 in opposition to the applicant's application . The applicant's position was that the judgment was delivered without any notice to him and that he only learnt of the judgment when his advocate visited Molo Law courts to find out if the judgment had been delivered. He stated the judgment was delivered electronically on 28th May 2020 via email. The applicant averred that his advocate had not received any notice for the delivery of the judgment. He further averred that the judgment was delivered during the height of Covid -19 pandemic when court operations had been drastically down scaled and there was hardly any operations at the court registries. The applicant averred that he was dissatisfied and aggrieved with the judgment and wished to lodge an appeal against the same and in view of the fact that the time allowed within which to lodge an appeal had lapsed, he sought leave to be allowed to file the appeal out of time.

5. The respondent vide the replying affidavit by his advocate averred that the judgment of the lower court was delivered on 28th May 2020 pursuant to the notice that had been issued earlier by the court. The respondent's advocate pursuant to the Notice wrote to the Court on 27th May 2020 confirming that the judgement may be delivered via email. The respondent averred that a copy of the unsigned judgment was emailed to the applicant's advocate through their email " Simiyuadvocate@yahoo.com" which was the advocates official email address. The respondent contended that the applicant's application was misconceived and without any basis.

6. The respondent further contended the respondent had not demonstrated any sufficient cause to warrant the exercise of the court's discretion to extend time for filing of the appeal out of time under the provisions of section 79G of the Civil Procedure Act. The Respondent additionally contended the applicant had brought the application under the wrong provisions of the law which rendered the same defective.

7. The Applicant's application for extension of time to file an appeal out of time is predicated on the ground that he had no notice of the delivery of the judgment and that at the time he learnt that the judgment had been delivered, the period to lodge an appeal had lapsed. It is common knowledge that following the break-out of the Covid -19 Pandemic in Kenya in March 2020, normal court operations were hampered and in some instances courts were literally shut down. In May 2020 the pandemic had become widespread in the country and generally the courts had scaled down their operations. Physical in person hearings were suspended. Courts issued directions to facilitate the ongoing scaled down operations which to a large extent were conducted remotely by means of video conferencing. In case of rulings and judgments they were delivered electronically and initially email transmissions were utilized until delivery virtually by way of video conferencing became the preferred mode of delivery.

8. In the instant matter it is not apparent how the notice for delivery of judgment was given to the parties and although the copy of the annexed judgment indicates the same was sent via email to the applicant's advocates, there is no evidence of how the transmission was effected, if at all. The applicant has denied receiving the notice for delivery of the judgment and/or the judgement by way of email through his advocates. On the facts it is not possible to affirm the applicant's advocates received the notice and/or the judgment.

9. Under section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya the Court has power to extend time for filing an appeal out of time where sufficient cause is demonstrated to explain the delay. Section 79G provides as follows :-

79G. Time for filing appeals from subordinate courts. 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 [Rev. 2012] CAP. 21 Civil Procedure 35 [Issue 1] 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.

10. I have considered the explanation proffered by the applicant and I agree the outbreak of Covid-19 pandemic altered the order of things and it is a fact that the normal operations in the courts was disrupted. These were abnormal circumstances and the court would not ignore the happenings and insist on the normal procedure being adhered to. As I have observed above there is no certainty that the applicant had notice of the delivery of the judgment and/or received the copy of the judgment.

11. The Applicant has a right to appeal against the judgment in pursuit of justice and given the circumstances it would be unfair to deny him the opportunity to exercise his right of appeal. I have seen a draft of the intended memorandum of appeal annexed to the application and I cannot rule out the intended appeal being arguable. In the circumstances I exercise my discretion to allow the applicant to file his appeal out of time at any rate within 21 days from the date of this ruling.

12. On the issue of stay of execution as sought by the applicant the court has to be guided by the provisions of Order 42 Rule 6 (2) which provides thus: -

“No order for stay of execution shall be made under subrule (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.

13. The draft memorandum of appeal challenges the validity of the award made by the learned trial magistrate. The award is in the nature of a monetary award. Ordinarily execution of a monetary decree would not render an intended appeal nugatory. As the appellant however questions the legality of the award I will grant a conditional stay of execution of the decree emanating from the lower court's judgment on terms that the applicant deposits a sum of Kshs500,000/= in an interest earning account in the joint names of his advocates and the respondent's advocates within forty- five (45) days from the date of this ruling. In the event the applicant does not make the deposit within the time prescribed the stay will lapse and the respondent shall be at liberty to proceed with execution.

14. The costs of this application shall abide the outcome of the intended appeal. Orders accordingly

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH SEPTEMBER 2021.

J M MUTUNGI

JUDGE