



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 507 OF 2017

(Formerly Kisii ELC case No. 420 of 2014)

DANIEL MWITA NYAISUTI.....APPLICANT

VERSUS

MWITA RAGITA1ST RESPONDENT

MUGOSI RAGITA.....2ND RESPONDENT

RULING

1. By a Notice of motion dated 2nd July 2019 and filed herein on even date under inter alia, Articles 40, 48 and 59 (2) of the Constitution of Kenya, 2010 alongside Order 42 Rule 6 (1) (2) and (5) and (7) of the Civil Procedure Rules, 2010 (The application herein), the applicant, one Daniel Mwita Nyaisuti who was then acting in person and currently represented by M/s Gituni Riroh and Company Advocates, is seeking orders infra;-

a) Spent

b) Spent

c) **THAT** this honourable court be pleased to enlarge time to the plaintiff/applicant to file Notice of Appeal from the Judgment and Decree of the date and delivered on 20th day of May 2020 and upon time being enlarged as such, the plaintiff/applicant be allowed to file Appeal herein out of time.

d) **THAT** consequent to prayer three (3) hereinabove being granted, there be a stay of execution of the judgment and decree of this court dated and delivered on 20th day of May 2020 pending the hearing and determination of the appeal case.

e) **THAT** cost of this application be provided for.

2. The application is supported by a fifteen (15) paragraphed annexed affidavit of the applicant sworn on even date together with copies of the Judgment delivered herein. The same is also based on grounds (a) to (p) set out on its face which are all noted accordingly.

3. Briefly, the applicant's lamentation is that this court delivered judgment whereby his suit was dismissed with costs on 20th May 2020. That by then he was represented by M/s J.O. Soire and Company Advocates, but judgment was delivered vide email in his absence hence he was not aware of the delivery of the same. That he learned of the judgment and decree on 29th June 2020 in the Environment and Land Court Registry at Migori. That the prescribed period of filing the notice of appeal had elapsed. That since he was aggrieved with the whole judgment, he is desirous of filing an appeal raising many serious and significant issues. That the execution proceedings to realize the fruits of the judgment and decree are imminent thus, he filed the instant application.

4. On 27th July 2020, the respondents, Mwita Ragita and Mugosi Ragita filed a statement of grounds of opposition dated 25th July 2020 through M/s Oguttu, Ochwangi, Ochwal and Company Advocates now, M/s Ogutu Mboya Ochwal and partners Advocates. The grounds include that;-

i. The instant Notice of motion dated the 2nd day of July 2020 is mischievous, misconceived and otherwise legally untenable

ii. The instant Notice of motion is meant to frustrate the defendant /respondents from enjoying the fruits of their judgment and therefore the instant notice of motion has been filed by the plaintiff/applicant who could not prove his case when he was granted the opportunity by the honourable court.

iii. The plaintiff/applicant has to come to this honourable court by filing the instant Notice of motion too late in the day after costs have been assessed and fearing execution has prompted him to file the instant notice of motion. The said inordinate delay has not been explained.

iv. The Notice of motion dated the 2nd day of July 2020 is devoid of merits.

v. The instant Notice of motion has been filed by a stranger contrary to the provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010.

5. The application was canvassed by way of written submissions further to this court's orders and directions given on 28th July 2020; see Order 51 Rule 6 of the Civil Procedure Rules, 2010 and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.

6. So, learned counsel for the respondents filed submission dated 9th July 2021 on 15th July 2021 giving the introduction and background of the matter and identified five (5) issues for determination including whether the application has been mounted by a stranger and whether the application has met the conditions set out for staying of execution of the decree. In discussing the issues, counsel submitted that the applicant is a stranger in view of Order 9 Rule 9 (supra) since the firm of M/s Soire and Company Advocates since is still on record for him and cited the cases of **Stephen Mwangi Kimote =vs= Murata Sacco Society (2018) e KLR, Florence Itare Mkaha =vs= Pwani Tawakal Mini Coach and another (2014) eKLR, to buttress the submissions.**

7. Counsel further submitted that the applicant has not demonstrated that he is bound to suffer substantial and irreparable loss if the orders are not granted. That the application was lodged more than 40 days after the judgment and decree of the court and that the applicant has not made an offer and or proposal for the provision of security of costs as prescribed. Counsel relied on **Order 42 rule 6 (supra), Kenya Shell Ltd =vs= Benjamin Karuga Kabiru and another (1986) eKLR, (2014) Nicholas Kiptoo Arap Salat =vs= IEBC and 7 others (2013) eKLR and George Mwenda Muthuri =vs= Mama Day Nursery and Primary School Ltd (2014) eKLR,** among other authoritative pronouncements.

8. The applicant did not file submissions. He was duly served further to an affidavit of service sworn and filed herein.

9. I have carefully studied the entire application, the grounds of opposition and the respondents' submissions inclusive of the issues framed therein. Therefore, I am of the considered view that the issues for determination herein are compressed thus;

a) Is the application competent?

b) Subject to issue number (a) hereinabove,

i. Has the applicant satisfied the threshold for staying of execution of the judgment and the decree herein? and

ii. Has the applicant met the requirements for the enlargement of time to file an appeal?

10. In respect of the first issue, I consider all the provisions of the Constitution and the law under which the application has been initiated. The applicant commenced the same in person further to the notice dated and filed in court on 7th July 2020.

11. Notably, ground (e) of the application reads; -

“..... That the plaintiff/applicant was represented by the firm of J.O. Soire and Company Advocates in this matter with Mr. Soire having the personal conduct over the same”

12. On 13th July 2020, the notice to act in person was served on the firm of M/s Oguttu, Ochwangi, Ochwal and Company Advocates for the respondent as well as the applicant's counsel. This is discerned in paragraphs 4 and 5 of an affidavit of service sworn by Walter Juma Opiyo, a licence court process server and duly filed in Court on 20th July 2020.

13. At ground 9 of the grounds of opposition, the respondents complain that the applicant is a stranger who filed the application contrary to Order 9 **Rule 9 (supra)** which provides as follows; -

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court-

a) Upon an application with notice to all the parties; or

b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

14. In **Simbiri NanBell Community Health Centre Ltd =vs= Erick Odede and 4 others (2020) e KLR**, the Court of Appeal allowed the notice of motion and struck out an appeal arising from this court's decision, with costs to the applicant. The court remarked that;-

“Where some essential step has not been taken or has not been taken within the prescribed time, it isnotice of appeal neither filed nor served within time.....motion allowed and notice of appeal struck out with costs.....”

15. **Article 159 (2) (d) and (e) of the Constitution of Kenya 2010** provides that this Court shall not be tied to procedural technicalities and that the principles and purpose of the Constitution shall be protected and promoted. **Section 19 (1) of the Environment and Land Court Act 2015 (2011)** is aligned to the said Constitutional principles.

16. In **Muchungi vs James Muchungi Kiragu & Another [1998] eKLR** cited in **George Muthuri** case (supra), it was held that extension of time for lodging an appeal is within the unfettered discretion of the Court. That the applicant must show that the delay is excusable and does not prejudice his or her opponent.

17. In the case or **Raphael Musila Mutiso and 3 others vs Joseph Ndava Nthuka and another [2019] eKLR**, the Court of Appeal held that delay for a day will result to dismissal of an application if not explained. This court is aware of extension of time as observed in **Salat case** (supra) and the provisions of **Order 50 Rules 6 to 8 of the Civil Procedure Rules 2010**.

18. It was the duty of the applicant to pursue his counsel to find out the position of the case as held in **Engineers Ltd vs James Kahoro Mwangi [2011] eKLR**. Further, even failure to raise legal fees, per se, is not justifiable in such circumstances.

19. **Order 9 Rule 9** (supra) is a mandatory legal provision and I approve the decision in **Kimote case** (supra). The applicant failed to file submissions in support of the application and the reasons given therein are not satisfactory. In the obtaining scenario, the application is rendered unmeritorious.

20. A fortiori, the notice of motion dated 2nd July 2019 and filed on even date is hereby dismissed with costs.

21. It is so ordered.

DELIVERED, DATED and SIGNED at HOMABAY via e-mail further to notice issued to parties, this 22nd day of September 2021.

G. M. A. ONGONDO

JUDGE