



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC APPEAL NO. 27 OF 2017

ISAIAH KASYULA KWINGA.....APPELLANT

VERSUS

ROSARIA KAVULI KIMUYU..... 1ST RESPONDENT

TOM MUTHOKA BERNARD..... 2ND RESPONDENT

RULING

1. The application before this court for ruling is the one dated 8th December, 2020 and filed in court on 11th December 2020 by the counsel for the Appellant/Applicant for orders: -

1) Spent.

2) That the Applicant be granted leave to appeal out of time against the judgement and orders of Honourable J. Karanja (Principal Magistrate) delivered on 20th September, 2013 in Makueni PMCC No. 173 of 2009.

3) That the amended memorandum of appeal annexed hereto be deemed as duly filed upon payment of the court fees.

4) That the costs of the application be provided for.

2. The application is predicated on the grounds on its face and is further supported by the affidavit of Cosmas Ngala, the Advocate for the Appellant/Applicant, sworn at Nairobi on 8th December, 2020 as well as the further affidavit of Isaiah Kwinga, the Appellant, sworn at Nairobi on 6th April, 2021.

3. The 1st Respondent, Rosaria Kavuli Kimuyu, has opposed the application vide her replying affidavit sworn at Machakos on 4th March, 2021.

4. The application is expressed to be brought under Order 50 Rule 6, Order 51 Rule 1, Order 9 Rule 9 (a), Order 9 Rule 10 of the Civil Procedure Rules, Section 3A 79G and 95 of the Civil Procedure Act Cap 21 of the Laws of Kenya and all other enabling provisions of the law.

5. It was canvassed by way of written submissions.

6. Cosmas Ngala has deposed *inter alia* that around August 2019 the Appellant/Applicant instructed him to represent him in preparing the appeal, that on looking at the Memorandum of Appeal which the Appellant/Applicant had, he formed the opinion that it needed to be substantially amended, that he honestly believed that there was an appeal as opposed to their application for leave to appeal out of time and that he did not address his mind on whether the appeal could have been filed late, that he admits there has been undue delay in prosecuting the application but pleads with the court to allow the same in view of the peculiar circumstances therein, that when the Appellant/Applicant was served with a suit for eviction filed at Makindu wherein, the issue arose that there was no appeal and that the application for leave to appeal out of time was dismissed for want of prosecution, that they learnt that there was an application dated 9th December, 2013 for leave to file an appeal out of time and that the Memorandum of Appeal availed to him was a draft Memorandum of Appeal attached to the said application which is still pending, that there was a mistake which cannot be visited on the Applicant as a litigant but to his counsel, that failure to prosecute the application for leave to file (sic) is unintentional and grossly regretted, that the intended appeal raises serious issues with high chances of success, that the Applicant has undisputed 6 acres and the issue arose after a sale of an additional one acre, that the applicant has been in possession of the suit land for the last 23 years and is his home and that the court needs to take judicial notice of the fact that from the year 2014 to 2017 land matters were not being heard as the nation waited the establishment of the Environment and Land Court.

7. On the other hand, the 1st Respondent has deposed that she has been advised by her advocates on record which advise she verily believes to be true that the amended notice of motion together with the supporting affidavit are;

- i) Bad in law and incompetent.
- ii) An abuse of the court process.
- iii) Unmeritorious and ill advised.
- iv) Frivolous, vexatious and scandalous.
- v) Brought after inordinate delay.

8. She went on to depose that in the interest of justice and all fairness, the application should be dismissed with costs, that she has been improperly joined in these proceedings as she was not a party in the lower court matter as shown in a copy of judgement annexed as KK-1, that her husband who litigated with the applicant herein died on 8th December, 2010, that upon her husband's death, the Applicant did not sue or substitute her husband with her or any other next of kin thus the suit against him abated on expiry of a year since 8th December, 2020, that substitution having not been done to join the legal administrator of the deceased, she has been improperly sued, that the law is clear that an appeal can only be filed 30 days after the entry of judgment, the initial application for leave to file the appeal out of time was filed since 2013 and the same was not prosecuted until it was dismissed by the court on 18th December, 2017 for want of prosecution, that the amended notice of motion cannot stand on its own the former having been dismissed, that no leave has been granted to amend the earlier notice of motion that the application is a kick jack action after the Applicant was sued in Makindu ELC case No. 14 of 2020 which has woken him from slumber.

9. In rejoinder, the Appellant/Applicant deposed in his further affidavit that the substitution of the deceased with Rosalia Kavui Kimuyu was made on 11th December, 2021 vide the application dated 17th October, 2012 as shown in the copy of the application and proceedings of 11th December, 2012 annexed as IKK 1, that the application for extension of time within which to appeal is still pending as he has extensively explained in his earlier affidavit why it has not been prosecuted, that what the court dismissed on 18th December, 2017 was the application for stay of execution pending appeal, that no leave was required to amend the application dated 9th December, 2013 since the Respondent had not filed any papers in response and that it is in the best interest of the parties that the application before court be heard and allowed so that each party's right may be ventilated on appeal.

10. In their submissions, the counsel on record for the Appellant identified the following issues for determination: -

- i) Whether the delay in prosecuting the application dated 9th December 2013 and amended on 8th December 2020 is explained and/or justified.***
- ii) Whether the Respondent is properly enjoined in these proceeding.***
- iii) Whether the application dated 9th December 2013 is pending and/or was disposed off.***
- iv) Whether the applicant has any arguable appeal if allowed to proceed.***
- v) Any prejudice to be suffered by the parties.***

11. On the issue of whether the delay is explained and/or justified, the counsel's answer was in the affirmative. The counsel added that the Appellant/Applicant admits there was delay but attributes the same to several factors: -

- a) That he instructed the counsel who was by then on record to file an appeal in time but due to some reasons, the file was not filed in time.
- b) That he approached another counsel who did an application to appeal out of time with a draft memorandum of appeal attached to the application.
- c) That when shown the memorandum of appeal, he thought and believed that an appeal had been filed.
- d) The said counsel moved and filed another application for stay of execution and the Applicant had all the reason to believe that the appeal was on course.
- e) That from 2014 – 2017 land matters were not being heard as the Environment and Land court was being constituted. Once established, the file was moved from Machakos High Court to Makeni land court and the court picked from there.
- f) That as he was not comfortable with the counsel because he rarely availed himself in court, the Applicant instructed a new counsel now on record.
- g) That he took, the memorandum of appeal to the new counsel and the counsel started working on the memorandum by way of

substantially amending it.

h) The new counsel swears, just as the Applicant, that he consciously believed that the appeal was already in place, and never entertained his mind that the same could have been filed out of time as deponed he obtained several documents from the court file but the application dated 9th December, 2013 was never availed to him.

i) That it was only upon being served with pleadings in Makindu Smcc No. 14 of 2020 late last year where the Respondent deposed that there was no appeal as the application for leave to appeal out of time was dismissed for want of prosecution that the counsel opted to peruse the court file once more only to discover that the memorandum of appeal the Applicant has been relying upon was an attachment to the application for leave to appeal out of time and that the application had not been disposed of.

j) Out of these developments, the amended application now before the court was filed.

12. On whether the Respondent is properly enjoined in these proceedings, the counsel submitted that this was done in the subordinate court on 11th December, 2012 after the trial court allowed the application dated 17th October, 2012.

13. On whether the application dated 9th December 2013 is pending or was disposed of, the counsel submitted that the proceedings of 18th December, 2017 show that the application that was dismissed was the one dated 12th October, 2017 and filed in court on 13th October, 2017. The counsel added that at no time did the court deal with the application dated 9th December 2013 thus the same was amended and was never disposed of.

14. On whether the Appellants/Applicants have an arguable appeal, the counsel submitted that the Respondent husband swore an affidavit and gave oral evidence that he sold one (1) acre of his land to the Appellant/Applicant in 2008. The counsel went on to submit that the Appellant/Applicant had from 1997 to 2008 acquired six (6) acres which were not in contestation before entering into a sale agreement for an additional one acre.

15. On whether the Appellant/Applicant stands to suffer prejudice, the counsel submitted that the former has a home in the parcel of land in dispute and that he has heavily developed it. The counsel pointed out the Appellant/Applicants has nowhere else to call home thus he will suffer prejudice unlike the Respondent who has not been using the said disputed parcel.

16. The counsel on the following cases;

1) **Christopher Muriithi Ngugu -Vs- Eliud Ngugu Evans [2016] eKLR.**

2) **Patriotic Guards Ltd -Vs- James Kipchirchir Sambu [2018] eKLR.**

3) **Edney Adaka Ismail -Vs- Equity Bank Ltd [2014] eKLR.**

4) **Bank of Africa Kenya Ltd -Vs- PutSarajevo General Engineering Co. Ltd and 2 Others [2018] eKLR and**

5) **Kenya Power & Lighting Co Ltd -Vs- Benzene Holdings Ltd t/a Wyco Paints [2016] eKLR.**

17. On their part, the counsel for the 1st Respondents identified the following six issues for determination: -

i) Whether the 1st Respondent was a party in the lower courts case.

ii) Whether the Applicant substituted Barnabas Kimuyu Ndwii who was the 1st Defendant in Makueni PMCC No. 173 of 2009.

iii) Whether the Applicants suit has henceforth abated.

iv) Whether the Applicants application is merited.

v) Whether the Applicant has any claim against the 1st Respondent.

vi) Who is to bear the costs of the application.

18. The Respondent's counsel addressed the six (6) issues in an omnibus manner. He started by submitting that the instant application lacks merits as it was filed to defeat the 1st Respondent in ELC Number 14 of 2020 at Makindu Principal Magistrate's Court. The counsel added that paragraph 12 of the 1st Respondent's replying affidavit on this issue has not been controverted. It was submitted that the Respondent was not a party in the lower court matter as shown in the judgement annexed to her replying affidavit as KK1.

19. The counsel cited Order 24 Rule 4 of the Civil Procedure Rules which provides as follows;

4(1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or

continue, the court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased Defendant.

(3) Where within one year no application is made under sub rule (1) the suit shall abate as against the deceased Defendant.

20. Arising from the above, the counsel submitted that the suit against Barbabas Kimuyu Ndwii who was the original Defendant in Makueni SRMCC No. 173 of 2009 abated on or about 7th December, 2011 which was one year from his date of death on 8th December, 2010. The counsel pointed out that the Appellant/Applicant did not provide any evidence that he in fact applied for substitution in accordance with Order 24 Rule 4(1) of the Civil Procedure Rules. In addition, the counsel pointed out that the Appellant/Applicant had not produced citation proceedings and this shows that no substitution was done and hence the suit against the 1st Defendant abated by operation of the law.

21. It was also submitted that by the time the instant application was filed on 11th December, 2020, there was no cause of action against Bernabas Kimuyu Ndwii. The counsel added that the 1st Defendant was long dead by the time the application dated 9th December 2013 was filed and which the Applicant relies on.

22. The 1st Respondent further contends that the instant application cannot be based on an application that had already been dismissed. The counsel concluded by urging the court to dismiss the application for being bad in law and incompetent.

23. Having perused the application, the replying affidavit and the rival submissions filed by the counsel on record for the parties, it is apparent that the issues for determination are;

i) Whether the Appellant/Applicant should be granted leave to appeal out of time against the judgment and consequential order causing from the judgement delivered on 20th September, 2013 in Makueni PMCC No. 173 of 2009.

ii) Whether the amended memorandum of appeal annexed should be deemed as duly filed upon payment of the requisite court fees.

24. I will address the two issues together. I wish to point out at the outset that the record herein clearly shows that the application that was dismissed for want of prosecution on 18th December, 2017 is the one dated 12th December, 2017 and filed in court on 13th December 2017. The said application sought for stay of execution of the judgement of the lower court and the order issued thereunder pending the hearing and determination of the appeal amongst other prayers.

25. Upon dismissal of the said application the application for leave to appeal out of time dated 9th December, 2013 and filed in court on even date remained on record. There is no doubt that there has been delay in prosecuting the said application and the Appellant/Applicant has conceded as much. Be that as it may, the Respondent cannot be heard to say that the Appellant/Applicant ought to have sought for leave to file the amended application dated 8th December, 2020 since she had not responded to the application that was being amended.

26. It is clear from the explanation proffered by the Appellant/Applicant on why he did not prosecute the said application dated 12th December, 2013 that his counsel on record is largely to blame. In my view it would be unjust to blame the Appellant/Applicant for the mistake of his counsel. I am guided by the case **of Belinda Muras & 6 Others -Vs- Amos Wainaina [1978] KLR** where C.B. Maden JA (as he then was) stated thus;

“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by a senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better.”

27. The Respondent herein contends the suit against the 2nd Respondent (now deceased) abated on 7th December, 2011 which was one year from his date of death on 8th December, 2010 but a quick perusal of the uncertified copy of the proceedings in Makueni PMCC No. 173 of 2009 shows that the application to enjoin the Respondent herein dated 17th October, 2012 was allowed on 11th December, 2012. However, this is an issue that will substantially be dealt with on merits during the appeal.

28. Primarily, the Appellant/Applicant complains that the judgement in Makueni PMCC 173 of 2009 that he seeks to appeal against failed to take into consideration the fact that the deceased 2nd Respondent had in his sworn affidavit conceded that he sold 6 acres to the Appellant/Applicant and that the latter had been in possession of the same with full knowledge and consent of the Respondent for 23 years. Given those circumstances, it seems to me that it is only fair and just that the Appellant/Applicant gets his day in court to challenge the said judgement of the lower court. The Respondent herein will be not be prejudiced as she can be compensated by an order for costs in the event that the appeal is not successful. I am guided by the case of **Edith Gichungu Kome -Vs- Stephen Njagi Thoithi [2014] eKLR** where Otieno Odek, JA expressed himself thus;

“The Applicant feels aggrieved by the decision of the learned Judge. Whether or not she will succeed in the intended appeal is a matter for the Appellate court to decide. At this stage I should not delve into the merits of the intended grounds of appeal and the issues to be raised in appeal. I find the Respondent shall not be prejudiced if the Applicant gets her day in court to challenge the judgement of the learned Judge. The Respondent can be compensated by an order for costs in the event that the intended appeal

is not successful. For those reasons, I hereby exercise my discretion in favour of granting leave to file a fresh notice of appeal and record of appeal out of time.”

29. I am also minded to take cognizance of the overriding objective of the Civil Procedure Rules is to ensure that justice is done in all cases. As such, the Appellant/Applicant will be under the obligation to ensure that the appeal is disposed of expeditiously.

30. The upshot of the foregoing is that the amended notice of motion application dated 8th December, 2020 has merits. I will proceed to allow it as hereunder;

1) **That the Applicant is hereby granted leave to appeal out of time against the judgement and orders of Honourable J. Karanja (Principle Magistrate) delivered on 20th September, 2013 in Makueni PMCC No. 173 of 2009.**

2) **That the amended memorandum of appeal annexed hereto be deemed as duly filed upon payment of the court fees.**

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 10TH DAY OF SEPTEMBER, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi