



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. MISC. APPLICATION NO. 66 OF 2019

TULITO OLE KAMUANA.....APPLICANT

VERSUS

JOSEPH OLE SEITAH.....RESPONDENT

RULING

What is before court for determination is the Applicant's Notice of Motion Application dated the 12th July, 2019 where he seeks the following orders:

1. Spent
2. That the firm of M/S Nairi & Co. Advocates, Amani House & Park, Opp MTTI, P. O. Box xxxxx - xxx Kajiado; Cell + 254 711 xxx xxx, Email: nairiadvocate@gmail.com, be allowed to come on record for the Applicant herein in place of M/S Kivuva Omuga & Co. Advocates, Sampu Villa 1st Floor and in terms of annexed Notice of Change of Advocates.
3. That the Honourable Court be pleased to stay execution of the whole Judgement delivered on the 12th March, 2015 and consequential orders issued thereto by this Honourable Court pending the *inter partes* hearing and determination of this Application.
4. That this Honourable Court be pleased to grant leave to the Applicant/Defendant to Appeal out of time against the whole judgement made on the 12th March, 2015 in this matter.
5. That such orders be made as this Honourable Court may deem fit or expedient.
6. That costs of the Applicant be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of TULITO OLE KAMUANA who deposes that he is greatly aggrieved with the whole judgement entered against him on 12th March, 2015 in Kajiado Principal Magistrates Court vide Civil Suit No. 10 of 2013. He claims the Judgment and Decree ensuing thereof has not been enforced and or perfected by the Respondent. He explains that the delay in lodging the Appeal was occasioned by the fact that his previous Advocate messrs Kivuva Omuga & Company Advocates inadvertently failed to inform him of the outcome of the Kajiado Principal Magistrate's Court Civil Suit No. 10 of 2013 and only got to know of the said outcome on 22nd February, 2019 when he was arrested for allegedly failing to pay costs which ended up in his being committed to civil jail. He contends that due to communication breakdown with his Advocate, he virtually lost track of the lower court case and the Advocate did not advise him of the outcome of the said case. He avers that upon engaging the services of the current Advocate who perused the proceedings and judgement in the lower court, he realized there were errors of law and fact which the trial court committed and therefore an Appeal against the said Judgement has overwhelming chances of success. Further, the trial court lacked jurisdiction to hear including determine the case and was outrightly biased against him. He reiterates that the mistake in not filing the Appeal on time was due to the fact that his Advocate failed to properly advise him and hence punishment should not be meted on him. Further, the suit property and its fixtures are worth millions which he has been occupying together with his family and now they are faced with imminent eviction. He avers that the intended actions of the Respondent would cause irreversible as well as irreparable harm including damage to him and his family. He states that on or about 9th July, 2019 his intended Advocates communicated with his erstwhile Advocates indicating their intention to come on record for him and a consent was recorded to that effect. He is ready and willing to furnish any security for the due performance of the Decree issued in furtherance to the Judgement delivered on 12th March, 2015.

The Respondent opposed the application and filed a replying affidavit where he deposes that the application is full of falsehood and do not reflect the true position of this matter. He confirms being the lawful owner of Plot No. 319/ BUSINESS IL BISSIL TRADING CENTRE and was issued with the original Letter of Allotment on 4th November, 1991. He insists the Applicant wrongfully and unlawfully trespassed and

invaded his plot, started constructing thereon, to the total abuse of the Respondent's proprietary rights. He contends that the Applicant's actions are malicious, prejudicial and meant to illegally as well as unlawfully interfere with his rights over the plot. He reiterates that the Applicant was fully heard, argued his case and tendered evidence before the Magistrate's Court in Civil Suit No. 10 of 2013 as evident in the judgement. He reiterates that it is in the interest of justice that this application be dismissed and the Applicant TULITO OLE KAMUANA ordered to stop trespassing and render vacant Plot No. 319/BUSINESS IL BISSIL TRADING CENTRE.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Applicant's Notice of Motion dated the 12th July, 2019 including the parties' affidavits and rivaling submissions, the following are the issues for determination:

- Whether the firm of messrs Nairi & Co. Advocates, should be allowed to come on record for the Respondent in place of messrs Kivuva Omuga & Co. Advocates.
- Whether there should be a stay of execution of the Judgement delivered on 12th March, 2015.
- Whether the Applicant should be granted leave to file an Appeal out of time.

As to whether the firm of messrs Nairi & Co. Advocates, should be allowed to come on record for the Respondent in place of messrs Kivuva Omuga & Co. Advocates. I note the Applicant's erstwhile advocate and the firm of messrs Nairi & Co. Advocates entered into a consent for the said firm to come on record for the Applicant. Order 9 Rule 9 of the Civil Procedure Rules provides that: '**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 without an 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.'

Since the Advocates entered into a Consent, and in relying on the provisions of Order 9 Rule 9 of the Civil Procedure Rules, I will proceed and allow the firm of messrs Nairi & Co. Advocates, to come on record for the Applicant herein.

As to whether there should be a stay of execution of the Judgement delivered on 12th March, 2015. The Applicant has sought for a stay of execution of the Judgment and Decree pending appeal, which application is opposed by the Respondent. The Applicant blames his failure to file an Appeal within time on his erstwhile Advocates who failed to update him on the outcome of the lower court case and avers that he is ready to offer security. He contends that he will suffer substantial loss together with his family since execution of the Decree is imminent.

Order 42 Rule 6(2) of the Civil Procedure Rules provides that: '**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.'**

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:

"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.'

From the averments in the supporting affidavit, I note the Applicant seeks a stay of execution of the Judgement delivered more than six years ago. The Applicant further admits that he was committed to civil jail for failure to pay costs of the suit. This in essence means that the Decree herein has been executed. Further, the Applicant has not denied that he fully participated in the proceedings in the lower court but only claims his erstwhile lawyers failed to inform him of the outcome of the said case. The Applicant contends that he has an arguable appeal. However, to my mind, I opine that the Applicant should have been vigilant in the matter once he had participated in the proceedings and not wait for six years after he has been committed to civil jail to seek a stay of execution. This in essence means that he has come too late in the day. Based on the standards set in the aforementioned decision and quoted legal provisions while applying them to the circumstances at hand, I find that the Applicant has not met the threshold of stay of execution and decline to grant the said orders.

As to whether the Appellant should be granted leave to file an Appeal out of time.

I will proceed to highlight certain relevant legal provisions:

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 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.**'

Further, Section 95 of the Civil Procedure Act provides as follows: ' **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.**'

While Order 50 Rule 6 of the Civil Procedure Rules stipulates that: ' **Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.**'

The Applicant in his supporting affidavit annexed a draft Memorandum of Appeal wherein he highlighted his reasons for the appeal and contended that he has an arguable appeal. The Respondent insists the Applicant has not demonstrated the arguability of the Appeal. In the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR**, the Learned Judge stated that: ' **Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:**

- a. **The period of delay;**
- b. **The reason for the delay;**
- c. **The arguability of the appeal;**
- d. **The degree of prejudice which could be suffered by the Respondent if the extension is granted;**
- e. **The importance of compliance with time limits to the particular litigation or issue; and**
- f. **The effect if any on the administration of justice or public interest if any is involved.....**

Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is *not* required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.'

In the instant case, judgment was entered in favour of the Respondent on 12th March, 2015. The Applicant has not lodged an Appeal and except for indicating he is ready to provide security, he has not indicated what security he can provide. Further, except for blaming his erstwhile advocates for failing to update him on the progress and outcome of the lower court case, which I note he participated in, as well as the site visit undertaken to confirm position of the two plots. Further, he has not provided any other proper reasons why he failed to lodge an Appeal within the requisite time and only came to seek leave after he had been committed to civil jail for failure to pay costs of the lower court suit. Insofar as he has enumerated grounds of Appeal in his draft Memorandum of Appeal and demonstrated that he will suffer irreparable harm if evicted, I find the delay inordinate. It is trite that cases do not belong to the Advocates but to the parties who have a duty to follow up on their own cases. If the Applicant indeed participated in the hearing and site visit, then I find the blame on the erstwhile advocate just a mere excuse. Based on my analysis above while associating myself with the cited decision and legal provisions, I will decline to grant this prayer as sought.

It is against the foregoing that I find the Applicant's Notice of Motion dated 12th July, 2019 unmerited, except for the prayer allowing the firm of messrs Nairi & Company Advocates to come on record for him. I will hence proceed to dismiss prayers Nos. 3,4,5,6, and 7 of the said Notice of Motion, with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE