



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MILIMANI
CIVIL APPLICATION NO. E061 OF 2021

JACOB RAJAB MBEYA.....1ST APPLICANT

MARY NJOKI MBEYA.....2ND APPLICANT

VERSUS

VIJAYKHUMAR SHAMJI PATEL.....1ST RESPONDENT

VERAJ PROPERTIES.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Applicants herein have filed the Notice of Motion Application dated the 15th of April 2021, and in respect of which the Applicants are seeking the following Orders;

I.(Spent)

*II. This Honourable Court be pleased to grant Leave to the Applicants herein to file a Memorandum of Appeal out of time in respect to the Judgment delivered by Hon. D.W Mburu on the 6th of March 2021 in **Milimani CMEL NO. 2030 OF 2019 between Jacob Rajab Mbeya and Mary Njoki Mbeya versus VijayKumar Shamji Patel and Another.***

*III. The Leave so granted by this Honourable Court to file the Memorandum of Appeal out of time act as a Stay of Execution of the Judgment in **Milimani CMEL NO. 2030 OF 2019 between Jacob Raajab Mbeya and Mary Njoki Mbeya versus VijayKumar Shamji Patel and Another.***

IV. Cost of this Application be provided for.

2. The subject Notice of Motion Application is premised on various grounds which have been enumerated at the foot thereof. They are a total of 20 grounds, which seek to explain the reasons beneath the failure to commence and/or mount the intended Appeal within the requisite and Statutory timelines.

3. On the other hand, the Applicants have also filed a Supporting Affidavit sworn by the 1st Applicant on the 15th of April 2021, to which the 1st Applicant has deposed to and enumerated the reasons underlying the inability to timeously file the intended Appeal. Besides, the 1st Applicant, has also attached various Annextures with a view to vindicate the averments contained in the Supporting Affidavit.

4. Upon being served with the subject Application, the Respondents filed and lodged a Replying Affidavit sworn by the 1st Respondent on the 11th of June 2021, in respect of which the Respondents have opposed the Application.

DEPOSITIONS BY THE PARTIES

THE APPLICANTS CASE

5. Vide the Supporting Affidavit sworn on the 15th of April 2021, the 1st Applicant has averred that the 2nd Applicant and himself entered into a Sale Agreement with the Respondents, with a view to purchasing premises situate on L.R. NO. 4857/82, 4857/83 and 4857/84, otherwise, namely **VIRAJ GARDENS**, along Laikipia Road, Kileleshwa, within the City of Nairobi.

6. It is the 1st Applicant's further deposition that the 2nd Applicant and himself paid the total purchase price and thus same were entitled to the Completion documents, for purposes of effecting transfer and Registration of the purchased Properties into their names.

7. The 1st Applicant further avers that as a result of the failure to render and/or remit the Completion documents, the 2nd Applicant and himself were constrained to file Civil Proceedings, namely **Milimani CMEL NO. 2030 OF 2019 between Jacob Raajab Mbeya and Mary Njoki Mbeya versus VijayKumar Shamji Patel and Another**.

8. Besides the 1st Applicant avers that the Suit, (details in terms of the preceding paragraph) was heard and disposed of by the Judgment rendered on the 6th of March 2020, though erroneously captured in the Application as the 6th of March 2021.

9. Following the rendition of the Judgment, the 1st Applicant avers that their Advocate on record, informed same of the outcome of the Judgment and that the 2nd Applicant and himself were unhappy with the Judgment in question. In this regard, the 1st Applicant avers that he informed their Counsel then on record that same would want to Appeal against the Judgment albeit upon perusal and analysis thereof.

10. Nevertheless the 1st Applicant avers that despite a request by his previous Advocates on record to be supplied with a copy of the Judgment, same was never supplied to and/or in favor of the previous Advocates. In fact, the Applicant avers that as at 22nd February 2021, a copy of the Judgment had not been availed to his previous Advocates.

11. It is the further averment of the 1st Applicant that as a result of the non-provision of a copy of the Judgment, he was unable to proceed and lodge the intended Appeal.

12. On the other hand, the 1st Applicant has also averred that the failure to file the intended Appeal was also informed by the fact that both the 2nd Applicant and himself were outside the country when the Judgment was delivered. Consequently, same were unable to reach their Advocates previously on record.

13. It is the further deposition by the 1st Applicant that shortly after the delivery of the Judgment, Covid-19 Pandemic struck and as a result of the said Pandemic, there was a ban on International Flights and coupled with the closure of their Advocates' offices, premised on the Pandemic, they were unable to reach their previous Advocates and therefore issue further instructions.

14. The 1st Applicant further avers that it is only in early 2021, that the 2nd Applicant and himself returned into the country and thus contracted their Advocate, who informed same that the copy of Judgment hitherto requested for, had not been supplied and/or availed.

15. As a result of the fact that his previous Advocate had not procured or been availed a copy of the Judgment, the 1st Applicant avers that same thereafter proceeded to and instructed their current Advocate, to pursue the issue of the Judgment and also the intended Appeal.

16. In a nutshell, the 1st Applicant avers that the failure to file and/or lodge the intended Appeal, was caused by circumstances beyond the control of the 2nd Applicant and himself. In this regard, the Applicants therefore seek leave of the Court to file the intended Appeal, as well as Stay of Execution.

THE RESPONDENTS CASE

17. Upon being served with the subject Application, the Respondents filed a Replying Affidavit, which was deposed to by the 1st Respondent, who as expected opposed the Application for Leave to extend time for purposes of filing an Appeal out of time.

18. According to the Respondents, the Judgment in respect of the suit before the Subordinate Court was delivered in the presence of Counsel for the Applicants herein on the 6th of March 2020.

19. It is also the Respondent's averment that upon the delivery of the Judgment, the Applicants Counsel sought for a copy of the Judgment. However, the terms of the Judgment, were well known to the Applicants previous Advocate.

20. It is the Respondents further averment that a copy of the Judgment, which was delivered on the 6th of March 2020 was obtained by their Advocate and thereafter the said copy was shared with the Applicants previous Advocate.

21. It is the Respondents further averment that the Applicants herein were well aware of the terms of the Judgment, but same were not keen to prefer an Appeal. In fact, the Respondents have averred that despite request for instructions from the Applicants previous Advocate, the Applicants herein failed to respond to the request and/or to grant the instructions to pursue an Appeal.

22. Further the Respondents aver that the subject Application, has been filed more than 13 months from the date of delivery of the Judgment, which according to the Respondents, represents an inordinate delay and therefore the subject Application and the intended Appeal are an afterthought. In this regard, the Respondents have invoked the Doctrine of Laches.

23. Finally, the Respondents have also averred that as a result of the time-lapse, an impression was created that the litigation herein had been concluded. Consequently, it is the Respondents position that the grant of Leave and the intended Appeal, shall occasion undue prejudice to the Respondents.

SUBMISSIONS BY THE PARTIES

24. The Application herein came up for Hearing on the 26th of May 2021, when the Honourable Court gave directions that the subject Application be canvassed and otherwise be disposed of by way of Written Submissions.

25. Following the directions by the Honourable Court, the Applicants filed their Written Submissions on the 11th of June 2021, whereas the Respondents filed their Submissions on the 20th of September 2021. For clarity, the two sets of Written Submissions are on record.

ISSUES FOR DETERMINATION

26. Having reviewed the Notice of Motion Application, the Supporting Affidavit and the Written Submissions filed on behalf of the Applicants on one part and having taken into consideration the Replying Affidavit and the Written Submissions filed on behalf of the Respondents, the following issues become pertinent and are thus appropriate for determination;

I. Whether the Applicants have supplied and/or availed sufficient cause and/or good reason for the delay

II. Whether the intended Appeal by the Applicants is arguable

III. Whether the Leave Granted to file an Appeal out of time should operate as an Order of Stay of Execution

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Applicants have supplied and/or availed sufficient cause and/or good reason for the delay

27. It is common ground that the Applicants herein had a right to Appeal against the Judgment and/or decision of the Learned Senior Principal Magistrate rendered on the 6th of March 2020. In this regard, it was incumbent upon the Applicants, to file and/or mount the intended Appeal within the Statutory 30 days provided for by the Law. **See Section 79 of The Civil Procedure Act.**

28. However, the Applicants herein, did not appropriate and/or take advantage of the Right to Appeal within the Statutory period and indeed no Appeal was filed for a duration of over 13 months, that is 1 year 1 month, after the rendition of the Judgment.

29. Owing to the failure to file the intended Appeal, within the Statutory timelines, the Applicants have now approached this Court and are seeking extension of time within which to file an Appeal against the Judgment of the Subordinate Court. In this regard, it then behoves the Applicants herein to supply to the Honourable Court sufficient cause or good reason, why the intended Appeal, was not taken within time.

30. Before venturing to examine whether the Applicants herein have exhibited a sufficient cause, it is imperative to appreciate and/or understand what then amounts to sufficient cause, which must be satisfied, met and/or established, before the Honourable Court can proceed to exercise the Discretion in favour of the Claimant, where appropriate.

31. The meaning and import of the word Sufficient Cause, which has been found to be synonymous with good reason, were underscored by the Honourable Court in the decision in the case of **Wachira Karani Vs. Bildad Wachira (2016) eKLR**, where the Honourable Court observed as hereunder;

"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

32. From the foregoing excerpt, what becomes apparent is that for an Applicant to satisfy the threshold of sufficient cause, the Applicant must show that same has not acted in a Negligent manner or there has not been want of Bonafides on his part in view of the facts and the circumstances of the case. Better still the Applicant must not appear to have been sluggish, apathetic and/or deliberately inactive, in taking action, with a view to furthering the intended cause of action.

33. Put differently, where it is apparent and/or evident that a party, though knowledgeable and/or aware of the rights, acts in a negligent and apathetic manner or otherwise adopts a conduct that reeks of *mala fides* or slovenliness, such a party, cannot contend that same has a sufficient cause and/or good reason, to approach a Court of Law, for exercise of Judicial Discretion.

34. Having appreciated the import and tenor of the meaning of sufficient cause, it is now worthy to examine the reasons proffered by the Applicants for the failure to mount and/or otherwise commence the intended Appeal within the stipulated timelines.

35. First and foremost, the Applicants herein have contended that though their previous Advocate on record informed same of the outcome of the Judgment on the 6th of March 2020 and that though same were aggrieved and/or dissatisfied, same did not take out and/or commence the Appeal process, promptly or as envisaged under the Law. Instead, same indicate that they sought for a copy of the Judgment and that they would have wished to Appeal upon perusal and analysis of the Judgment.

36. In my humble view, the Judgment under reference was delivered in the presence of Counsel hitherto representing the Applicants, who explained to the Applicants the basis of the Judgment which was delivered. Granted, the copy of the Judgment was not instantly available, but the gist of the reasoning and the substratum of the Judgment, was duly disseminated to the Counsel for the Applicants and thus, to the Applicants.

37. In any event, the Applicants herein have averred that upon the dissemination of the terms of the Judgment unto them by their previous Advocate, same were instantly aggrieved and nurtured the idea of filing an Appeal.

38. On the other hand, the Applicants themselves have also annexed a copy of their previous Advocate's letter, **see Annexure LNG4**, which states as follows;

“.....please note after delivery of the Judgment particularly on the 16th of March 2020, we requested for further instructions from the Plaintiffs, for purposes of Appealing the decision of the Court, but to date we are yet to receive any instructions.”

39. It is imperative to note that the letter under reference was dated the 22nd of February 2021 and yet same indicates that request for instructions, to prefer an Appeal was made on the 16th of March 2020.

40. It is also worthy to recall that immediately the contents of the Judgment was disseminated, the Applicants felt aggrieved and expressed a desire to challenge the decision by way of an Appeal.

41. In the premises, the question that begs the answer is why no Appeal was filed within the Statutory timelines, now that the Applicants were well aware of the terms of the Judgment. Better still, why did the Applicants withhold instructions from their previous Advocate, if same were indeed keen to Appeal against the Judgment and decision of the Trial Court.

42. I must observe that even where the copy of the Judgment has not been availed to a Counsel, who was on record for a party and who was present at the time of delivery of the Judgment, a suitable Memorandum of Appeal can be crafted and filed and thereafter same can be amended, where appropriate.

43. It is my finding and holding that the Applicants herein were aware of and conversant with the terms of the Judgment, which was duly explained to them by their previous Advocate on record, but out of apathy and/or slovenliness, same did not put in place the appropriate mechanism for purposes of filing the requisite Appeal.

44. Secondly, the other reason that has been adverted to by the Applicants to be responsible for the delay in filing the intended Appeal is that both Applicants are said to have been out of the country, at the time when the Judgment was delivered on the 6th of March 2020. In this regard, the Applicants have exhibited and/or displayed copies of their passports bearing the Immigration stamps and showing the respective exit and return dates.

45. In respect of the 1st Applicant, the copy of the passport which has been exhibited shows that same exited Kenya via Jomo Kenyatta International Airport on the 27th of January 2020 but returned to Kenya on the 20th of December 2020. In fact, it is evident that when the case in the Subordinate Court was heard, it is the 2nd Applicant who testified before the Honourable Court for and on behalf of both Applicants. Suffice it to say, that the 1st Applicant was out of the country at the material time.

46. As pertains to the 2nd Applicant, the copy of the passport which has been exhibited shows that same exited Kenya through Jomo Kenyatta International Airport on the 25th of September 2020, but returned to the country on the 20th of December 2020. For clarity, the return date into the country by both Applicants appear to coincide.

47. Having reviewed the exhibits, namely copies of the Applicants passports, what becomes apparent is that the 2nd Applicant was no doubt present in Kenya when the Judgment was delivered. In fact, the 2nd Applicant only left the country on the 25th of September 2020, approximately six months and nineteen days, after the Judgment was delivered.

48. It is also evident from a copy of the Judgment which has been exhibited by the Applicants that it is the 2nd Applicant herein who attended Court and testified for and on behalf of the 1st Applicant and indeed the 2nd Applicant took the position that same had the authority of the 1st Applicant. Indeed, that position, speaking to the 2nd Applicant having the authority, to plead, act and make appearances on behalf of the 1st Applicant, has not been controverted.

49. Nevertheless, the point that I am making is that the 1st Applicant herein and by extension the 2nd Applicant are being dishonest with the Honourable Court when the 1st Applicant avers in Paragraph 13 of the Supporting Affidavit as hereunder;

“That nearly the same time the Covid-19 Pandemic was on the rise and as such many counties (countries) including Kenya and China cancelled all International travels and since we were in the Diaspora, this affected us since we were not able to travel back to Kenya to meet our then Counsel on record to analyze the Judgment together and instruct her to file an Appeal.”

50. The deposition alluded to shows that both the Applicants were in the Diaspora or put differently, outside the country. However, this deposition is at variance with the copies of the passports which have been exhibited, particularly on the part of the 2nd Applicant.

51. As if that was not enough, the Applicants have further averred that same only returned into the country early this year, read 2021. However, from the exhibited copies of the passports, again it is evident that the Applicants herein returned into the country on the 20th of December 2020 and not early 2021. In this regard, it is similarly evident that the Applicants are not being candid with the Honourable Court.

52. It is important to recall and note that a party who seeks Equity must come with clean hands and must himself/herself be honest with the Court. However, in respect of the subject matter, the Applicant herein have been less than honest. Simply put, the Applicants are guilty of dishonesty.

53. I must point out that the conduct of the Applicants, whereby same are keen to peddle conscious and deliberate falsehoods, does not auger well for the course of justice. In this regard, the Applicants conduct is devoid of candour and hence the conduct is detestable.

54. Thirdly, and in perpetuation of the dishonest conduct, the Applicants herein have exhibited a copy of the Judgment of the Subordinate Court, which same are keen and/or desirous to Appeal against, but have conveniently failed to state in the Affidavit when the Judgment came into their possession. In fact, whereas paragraph 17 of the Supporting Affidavit seemed to suggest that the copy of the Judgment was still not available as at the 15th of April 2021, but a copy thereof is attached to the subject Application and thus one wonders how, where and when did the Judgment get into the possession of the Applicants.

55. I must also state that there is the evidence by the Respondent that when their Advocate got a copy of the Judgment, on the 17th of March 2020, same forwarded and/or dispatched a copy of the Judgment to the Applicants then Advocate on record. Perhaps this aspect explains the reason why the Applicant have skirted the issue of when the Judgment got into their possession.

56. Having taken into account the foregoing factors, which are colored with dishonesty, I must say that the conduct of the Applicants herein is one that is wrought with deliberate attempt to delay, obstruct and otherwise defeat the course of justice. In any event the conduct that has been exhibited by the Applicants, is one that militates against exercise of discretion.

57. In view of the foregoing, it is my finding and holding that the Applicants herein have not exhibited, established and/or proven the existence of sufficient cause and/or otherwise good reason as to why Leave should be granted to file an Appeal out of time, whereas same, were knowledgeable and/or conversant with the terms of the Judgment, as early as the 6th of March 2020, when same was delivered in the presence of their previous Advocate on record.

58. On this account only, I would be constrained to dismiss the Application. However, because there are two other issues that have been similarly enumerated, I am enjoined to pronounce myself on same, as well.

ISSUE NUMBER 2

Whether the intended Appeal by the Applicants is arguable

59. As pertains to the proposed and/or intended Appeal, I must say that the arguability or otherwise of the Appeal, would be dependent on whether Leave has been granted. I say this because the arguability of the Appeal, can only be ventured into, subject to exhibition of sufficient cause.

60. Nevertheless, having extensively addressed the issue of sufficient cause, and having come to the conclusion that none has been exhibited, I do not therefore wish to belabor, the aspect of the arguability of the Appeal, with a view to determining whether the Leave sought should be granted.

ISSUE NUMBER 3

Whether the Leave Granted to file an Appeal out of time should operate as an Order of Stay of Execution

61. The Applicants herein have sought that the Leave so granted by this Honourable Court to file the Appeal out of time should act as a Stay. However, I am afraid the only time that Leave granted can act as an Order of Stay is where the Court is dealing with an Application for Judicial Review pursuant to and under the Provisions of **Order 53 of the Civil Procedure Rules** and not otherwise.

62. In view of the contents of the preceding paragraph, I must say that the relief sought in prayer 3, is curiously worded, but however, inapplicable and thus incapable of being granted, in the manner sought or at all.

63. Notwithstanding the curious pleading in terms of Prayer 3 of the Notice of Motion Application, I must however point out that an Order of Stay pending Appeal can only issue and/or be issued where an Appeal has since been lodged and thereafter the Application is grounded on the Appeal so far filed, save for the Court of Appeal where such an Order can issue, albeit upon the filing of a Notice of Appeal. Besides, the only other exception, is where the Order is sought informally during the delivery of the Judgment, albeit pending the filing of a Formal application.

64. In respect of the subject matter and given that the envisaged Appeal is to be filed to this Honourable Court, the relevant Provision is found in **Order 42 Rule 6 of the Civil Procedure Rules**, which provides as hereunder;

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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.”

65. Taking into account the foregoing Provisions of the Civil Procedure Rules, which are explicit and unequivocal it is my finding and holding that an Order of Stay of Execution as sought cannot be granted. Simply put, the Order of Stay of Execution pending an Appeal presupposes the existence of an Appeal and in the absence of such Appeal, such an Order cannot issue in vacuum.

66. On the other hand, even assuming that such an Order could issue, in the manner pleaded by the Applicants, which I have stated otherwise, I must say that an Applicant seeking for an Order of Stay of Execution pending the Hearing and Determination of an Appeal must meet certain Statutory thresholds. **See Order 42 Rule 6(2) of the Civil Procedure Rules.**

67. On my part I have examined and reviewed the Supporting Affidavit to discern the evidence of substantial loss, which is the cornerstone to granting an Order of Stay of Execution, but unfortunately there is no such evidence forthcoming. It suffices to note that the evidence of substantial loss must be express and not speculative.

68. In this regard, I repeat and reiterate the decision in the case of **Kenya Shell Limited vs Benjamin Kibiru Karuga & Another (1986) eKLR**, where the Honourable Court stated;

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

69. In respect of the subject matter, even if an Order of Stay of Execution could issue in the absence of an existing Appeal, which I have answered in the negative, I would still not have ventured to grant such an Order in the absence of proof of Imminent substantial loss.

COSTS

70. By dint of the Provisions of Section 27 of the Civil Procedure Act, Chapter 21, Laws of Kenya, costs are at the discretion of the Court. Nevertheless, costs do follow the event unless there is good cause to deprive the successful party of such costs.

71. In respect of the subject matter and given the conduct exhibited by the Applicants, which I have found to be devoid of candour, the Order that commends itself to me, is that the Applicants shall bear the costs of the Application.

FINAL DISPOSITION

72. In a nutshell, the Notice of Motion Application dated 15th April 2021 be and is hereby Dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI.

In the presence of;

June Nafula Court Assistant.

Mr .Dennis Mare Counsel for the Applicants.

Mr.Ochwo Counsel for the Respondents