



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
IN THE ENVIRONMENT AND LAND COURT DIVISION
CIVIL APPLICATION NO. E060 OF 2021

LUCY NYAMBURA GITONGA.....APPLICANT

=VERSUS=

VIJAYKUMAR SHAMJI PATEL.....1ST RESPONDENT

VIRAJ PROPERTIES.....2ND RESPONDENT

Being an Application for Leave to file the Memorandum of Appeal out of time

in an intended Appeal against the Judgment of Hon. D.W. Mburu (SPM)

delivered on 6th Day of March 2020 in

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE COURT AT NAIROBI
MILIMANI COMMERCIAL COURT
CMEL NO. 2031 OF 2019

LUCY NYAMBURA GITONGA.....PLAINTIFF

=VERSUS=

VIJAYKUMAR SHAMJI PATEL.....1ST DEFENDANT

VIRAJ PROPERTIES.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Applicant herein has filed the Notice of Motion Application dated the 15th of April 2021, and in respect of which the Applicant is 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. 2031 OF 2019 between Lucy Nyambura Gitonga 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. 2031 OF 2019 between Lucy Nyambura Gitonga versus VijayKumar Shamji Patel and Another.***

IV. Cost of this Application be provided for.

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

DEPOSITIONS BY THE PARTIES

THE APPLICANT'S CASE

3. The Applicant herein has averred in her Supporting Affidavit that she entered into a Sale Agreement with the Respondents herein, whereby the Respondents covenanted to sell to and in favor of the Applicant the premises otherwise known as **House D38** situate on L.R. NO. 4857/82, 4857/83 and 4857/84, namely **VIRAJ GARDENS**, along Laikipia Road, within Kileleshwa, in the city of Nairobi.

4. It is the Applicant's further averment that pursuant to and in line with the Sale Agreement, same paid to and in favor of the Respondents the entire purchase price, amounting to Kenya Shillings 11,643,554 Only, which payment was duly acknowledged by the Respondents.

5. The Applicant further avers that despite the remittance and/or payments of the total purchase price, the Respondents herein failed to deliver and/or handover the Completion documents and as a result of the failure the Applicant was forced to seek Police Intervention.

6. However, the Applicant proceeds to state that subsequently, she filed Civil Proceedings namely **Milimani CMEL No. 2031 of 2019**, against the Respondents herein, which case was heard and determined by Judgment delivered on the 6th of March 2020, when the suit was dismissed with Costs.

7. It is the Applicant's further averment that at the time the Judgment was delivered she was outside the country and for clarity, she was at Darfur in South Sudan, where she was then working. In this regard the Applicant avers that she was unable to attend Court during the delivery of the Judgment.

8. Nevertheless, the Applicant confirms that her previous Advocate ,who was then on record attended Court during the delivery of the Judgment and thereafter duly informed her, the Applicant, of the outcome of the Judgment.

9. It is the further averment of the Applicant that upon being informed of the outcome, same was aggrieved and dissatisfied and that she thereafter informed her previous Counsel on record that she wished to Appeal against the Judgment.

10. On the other hand, the Applicant further avers that despite her willingness and wish to Appeal, she said she wanted to do so upon perusal and analysis of the Judgment.

11. The Applicant further avers that despite the request by her previous Advocate to be supplied with and/or availed a copy of the Judgment, same was never availed to the Advocate and the situation persisted up to and including the 22nd of February 2021, when her previous Advocate still stated that same had not procured and/or obtained a copy of the Judgment.

12. The Applicant further avers that shortly after the delivery of the Judgment, the Covid-19 Pandemic struck and as a result of that she was unable to among other things, access and/or reach out to her previous Advocate on record and in particular the Applicant avers that she had difficulties in sending her representatives in the country to meet her previous Advocate because the Advocate's offices were closed to allow staff to work from home.

13. Besides the Applicant also avers that subsequently her Advocates on record were able to analyze the Judgment in full and explained the contents thereof unto her and that upon receipt of the said explanation, she is now keen to pursue the intended Appeal.

14. On the other hand, the Applicant further avers that her inability to file the intended Appeal was thus caused by circumstances beyond her control and on this account the Applicant now craves for Leave of the Court to be granted, to enable her to file the Appeal.

THE RESPONDENTS CASE

15. 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.

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

17. 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 Applicant's previous Advocate.

18. 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 Applicant's previous Advocate.

19. It is the Respondents further averment that the Applicant herein was 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 Applicant's previous Advocate, the Applicant herein failed to respond to the request and/or to grant the instructions to pursue an Appeal.

20. 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.

21. 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

22. 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.

23. Following the directions by the Honourable Court, the Applicant filed her 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

24. Having reviewed the Notice of Motion Application, the Supporting Affidavit and the Written Submissions filed on behalf of the Applicant 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 Applicant has supplied and/or availed sufficient cause and/or good reason for the delay

25. It is common ground that the Applicant 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 Applicant, 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.**

26. However, the Applicant 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.

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

28. Before venturing to examine whether the Applicant herein has 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.

29. 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"

30. 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 her 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.

31. 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.

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

33. First and foremost, the Applicant herein has contended that though her previous Advocate on record informed same of the outcome of the Judgment on the 6th of March 2020, and that though same was aggrieved and/or dissatisfied, same did not take out and/or commence the Appeal process, promptly or as envisaged under the Law. Instead, same indicates that she sought for a copy of the Judgment and that she would have wished to Appeal upon perusal and analysis of the Judgment.

34. In my humble view, the Judgment under reference was delivered in the presence of Counsel hitherto representing the Applicant, who must have explained to the Applicant the basis of the Judgment which was delivered and it is in this regard, that the Applicant rightly states that same was aggrieved by the said Judgment. 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 Applicant and thus, to the Applicant.

35. In any event, the Applicant herein has averred that upon the dissemination of the terms of the Judgment unto her by her previous Advocate, same was instantly aggrieved and nurtured the idea of filing an Appeal.

36. On the other hand, the Applicant herself has 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.”

37. 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.

38. It is also worthy to recall that immediately the contents of the Judgment was disseminated, the Applicant felt aggrieved and expressed a desire to challenge the decision by way of an Appeal. However, suffice it to say that the expressed intention to file and/or lodge an Appeal against the Judgment that aggrieved the Applicant herein, was not actualized.

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

40. 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.

41. It is my finding and holding that the Applicant herein was aware of and conversant with the terms of the Judgment, which was duly explained to her by her 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.

42. Secondly, the other reason that has been adverted to by the Applicant to be responsible for the delay in filing the intended Appeal is that the Applicant is said to have been out of the country, at the time when the Judgment was delivered on the 6th of March 2020. For clarity the Applicant herein contends that she was in Darfur, South Sudan where she used to work. However, despite making the aforesaid averment the Applicant herein, has not disclosed to the Honourable Court when, if at all, she ever returned to the country, before activating the process belying the Application herein.

43. Suffice it to say, the Applicant herein could well have been in Darfur South Sudan, but the Applicant has not exhibited a copy of her Passport to show when she departed Kenya and when she returned into the Country, with a view to helping the Court to determine whether her absence from the country could have been responsible for the non-action in instituting and/or mounting the Appeal.

44. It is worthy to note that the copy of the passport, would have helped the Court to unravel the true reason responsible for the inaction, but the Applicant herein, has not deemed it appropriate to avail and supply same. To the contrary, the Applicant has chosen to withhold the information and in my humble view, the withholding of this critical information, must attract adverse inference.

45. As pertains to the obligation to disclose every essential information and the withholding of information that is within the knowledge of a party, it is imperative to refer to and/or take cognizance of **Section 112 of the Law of Evidence Act, Chapter 80 Laws of Kenya**.

46. On the other hand, in support of the finding that the failure to produce a copy of the passport to authenticate absence from the country or

otherwise and which failure forms the basis of the adverse inference, I adopt and reiterate the statement of Law in the case of **Kenya Akiba Microfinance Limited vs Ezekiel Chebii and 14 others**, where the Court held as hereunder;

“Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:-

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving of disproving that fact is upon him.”

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

47. Premised on the foregoing, it is my humble finding that had the Applicant availed the information pertaining to her passport, the information therein could have been adverse to the Applicant’s case and thus the basis of withholding same.

48. Thirdly, the Applicant herein has also advanced the reason that because of being out of the country and coupled with the Covid-19 Pandemic, she was faced with difficulties in sending her representative to meet her Previous Advocate for purposes of lodging the Appeal since the Applicant contends that the Counsel’s offices were closed.

49. On the face of it and without much ado, the said averment would very well constitute a good cause. However, the said averment must be juxtaposed against the contents of the letter dated 22nd February 2021. **See Annexure LNG4.**

50. Looking at the contents of the said Annexure it is evident that the Applicant’s previous Counsel, who is said not to have been accessible or better still said to have closed his offices, wrote to the Applicant herein seeking further instructions. Nevertheless, the said instructions were not forthcoming.

51. In any event though it is stated that the Applicant’s previous Advocate had closed their offices to allow staff to work from home, it has not been stated when the offices were closed and for what duration.

52. At any rate, it is also worthy to note that the Applicant’s previous Advocate who is said to have closed office to allow staff work from home and which is part of the reason that allegedly caused the delay in the filing of the Appeal, has not sworn any Affidavit. In this regard, the probative value of the averment alluded to is very nominal, if at all.

53. 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 Applicant’s then Advocate on record. Perhaps this aspect explains the reason why the Applicant has skirted the issue of when the Judgment got into her possession.

54. Having taken into account the foregoing factors, which are colored with dishonesty, I must say that the conduct of the Applicant 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 Applicant, is one that militates against exercise of discretion in the Applicant’s favor.

55. In view of the foregoing, it is my finding and holding that the Applicant herein has 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, was 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 her previous Advocate on record.

56. 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 Applicant is arguable

57. 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.

58. 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

59. The Applicant herein has 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 Rule 1(4) of the Civil Procedure Rules** and not otherwise.

60. 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.

61. 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 Application is made informally at the time of delivery of the Judgment and pending the filing of the formal application, in which case, the Stay is sought for and granted in the Interim only.

62. 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.”

63. 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.

64. On the other hand, even assuming that such an Order could issue, in the manner pleaded by the Applicant, 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.**

65. 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.

66. 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.”

67. 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, which is the cornerstone and/or fulcrum upon which such an Order can be granted.

COSTS

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

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

FINAL DISPOSITION

70. 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 for the Applicant.

Mr. Ochwo for the Respondent.