



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. E494 OF 2020

LANDMARK HOLDINGS LIMITEDAPPLICANT

VERSUS

ROBERT MACHARIA KINYUA (Suing as the legal Representative of
the estate of GRACE MWARI KIMOTHO Deceased)..RESPONDENT

RULING

1. The application dated 24th November, 2020 and the application dated 26th November, 2020 were heard simultaneously. This ruling is therefore in respect of the two applications.

2. The application dated 24th November, 2020 seeks orders that:

1. Spent

2. Spent

3. The Applicant be granted an extension of time within which to file an application, under Order 43 rule 1(3) of the Civil Procedure Rules, 2010 for leave to appeal to the High Court, from the ruling and order of the subordinate court in Milimani CMCC No. 4055 of 2015 dated and delivered on 29th May, 2020.

4. The Applicant, on leave to appeal being granted, be granted an extension of time to file and prefer an appeal to this court out of time against the ruling and order of the subordinate court in Milimani CMCC No. 4055 of 2015, dated and delivered on the 29th May, 2020 between the parties hereto

5. On the grant of prayer 3, 4 and 5 hereinabove, there be a stay of execution of the judgment and decree of the subordinate court in Milimani CMCC No. 4055 of 2015 between the parties hereto, and of further proceedings, pending the hearing and determination of that intended appeal.

6.The costs of this application be provided for.

3. According to the grounds and the affidavit in support of the application, the lower court judgment was delivered on 1st November, 2017 for a principal sum of Ksh.1,157,710/= and the total came to Ksh.1,484,095/= after assessment of costs. It is stated that the Applicant has so far paid the sum of Ksh.1,484,095/= in settlement of the decretal sum thereby satisfying the decree wholly or substantially. That the Applicant filed an application before the lower court seeking declaratory orders that the decree has been satisfied and for the taking of accounts but the said application was dismissed with costs and the Applicant denied leave to Appeal and come on the record under Order 9 rule 9 Civil Procedure Rules. The Applicant is dissatisfied with the said ruling and wishes to appeal. The delay in filing an appeal is attributed to the delivery of the ruling without notice and in the absence of the parties.

4. It is contended that the Respondents are intent on executing the decree herein and have proclaimed the Applicant's property yet the Applicant has paid to the Respondent the decretal sum of Ksh.1,484,095/= as per the cheques issued to the Respondents under Work Injury Benefits Act (W.I.B.A). That the intended Appeal has high chances of success and that the Applicant ought to be allowed to ventilate it's

Appeal. That the outstanding decretal sum has been deposited in court and the Respondents will not suffer any prejudice. That the Respondents' means are unknown and the Applicant stands to suffer substantial loss if the application is not allowed.

5. The application is opposed. It is stated in the replying affidavit that the Applicant appealed against the judgment of the lower court and the High court upheld the judgment of the lower court on 14th June, 2019. That the Applicant has not fully satisfied the decretal sum and has only paid Ksh.670,639/= hence the execution proceedings. That there is no Notice of Appeal and therefore no further Appeal is pending and therefore the Applicant has exhausted his right of Appeal. The Respondents decried the delay in the filing of the application at hand and stated that the Applicant does not stand to suffer any loss.

6. The application dated 26th November, 2020 seeks orders that:

1. Spent

2. That this court be and is hereby pleased to discharge, vacate and/or set aside forthwith the ex-parte stay orders granted on 25th November, 2020 forthwith.

3. That upon grant of prayer 2, the application dated 24th November, 2020 by the Applicant/Respondent be struck out as being an abuses of the court process.

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

7. It is stated that this court lacks the requisite jurisdiction to hear this suit as the matter is *res judicata* and an abuse of the court process. That the *ex parte* interim orders issued herein are *prejudicial* to the Applicant and ought to be discharged. That the Appeal to the High Court has already been determined yet there is a prayer for leave to file another Appeal.

8. The application is opposed. It is stated that the intended Appeal is against the ruling delivered on 29th May, 2020 in respect of the application dated 23rd January, 2020. That it has not been disclosed to the court that the sum of Ksh.813,465/= has been settled under W.I.B.A and the sum of Ksh.948,000/= deposited in court. It is contended that the estate of the deceased herein has made a bid to get double compensation under W.I.B.A and through the suit herein.

9. I have considered the two applications, the responses thereof and the written submissions filed by the respective counsel for the parties.

10. The application dated 24th November, 2020 seeks orders for extension of time within which to file an application for leave under Order 43 rule 3 Civil Procedure Rules from this court to Appeal from the ruling of the lower court delivered on 29th May, 2020. That upon being granted the said leave to be allowed to Appeal to this court. There is therefore no leave being sought to Appeal against the judgment of the lower court delivered on 1st November, 2017. The Appeal in respect of the said judgment was determined by the High Court on 14th June, 2019 and the Appeal dismissed with costs. There is no evidence of any Notice of Appeal having been filed against the judgment of the High Court. It is apparent therefore that the Appeal process in respect of the judgment herein has been exhausted. However, there is no Appeal filed against the ruling of the lower court delivered on 29th May, 2020. The Appeal against the said ruling is therefore *not re judicata*.

11. 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 30 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.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 75 and 95 of Civil Procedure Act Cap 21 Laws of Kenya)

12. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be consideration for extending time.”

In the case at hand, the delay is not unreasonable and has been explained to the satisfaction of the court.

13. The cheques for payment under WIBA for Ksh.500,000/= and Ksh.313,465/= have been exhibited herein. The Warrants of Attachment annexed herein reflect a deduction of the sum of Ksh.670,693/= payment. The question whether the decretal sum has been fully satisfied is the subject of the intended Appeal. The sum of Ksh.948,000/= which is the amount reflected in the Warrants of Attachment has been deposited in court.

14. With the forgoing, the application dated 24th November, 2020 is hereby allowed. Consequently, the application dated 26th November, 2020 is hereby dismissed. Costs in cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2021

B.THURANIRA JADEN

JUDGE