



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. APPLICATION NO. 28 OF 2020

SAMUEL MUNYI ROBERT.....APPLICANT

VERSUS

JOSEPH NJERU MWANIKI.....1ST RESPONDENT

CAROLINE MUTHONI.....2ND RESPONDENT

EDWARD MURIITHI.....3RD RESPONDENT

(Sued respectively in their capacity as the Chairman,

Secretary and Treasurer of KIBUGU DAIRY FARMERS CBO)

DAIMA SACCO LTD.....4TH RESPONDENT

RULING

1. The applicant herein moved this court vide an application dated 13.08.2020 and wherein he substantially sought for orders staying the intended auction of the applicant's land parcel No. Ngandori/Ngovio/2067 pending the hearing and determination of the intended appeal and further for leave to file an appeal out of time against the ruling in Embu Chief Magistrate's Court Civil Case No. 12 of 2020 delivered on 27.02.2020. The applicant further prayed for the costs of the application.
2. The application is premised on the supporting affidavit of the applicant herein and further on the grounds on the face of it. The applicant's case is that the trial court delivered a ruling on 27.02.2020 and the applicant did not intend to appeal as he hoped that the main suit in the lower court would be heard and determined within a short time but the same was delayed by the scaled down activities of the court due to Covid-19 Pandemic. That, however, the applicant has realized that the only way to preserve the suit property is to appeal against the said ruling so that the same can be preserved pending the hearing of the lower court's suit and that the intended appeal has overwhelming chances of success especially since the applicant was a guarantor but the trial court found that he was the borrower and not guarantor. That the reason for the delay was due to the breakdown of communication between the applicant and his advocate due to Covid-19 pandemic.
3. The respondents filed grounds of opposition wherein they averred that they are not representatives of the Kibugu Dairy Farmers' CBO but mere members and further that there was no loan which was guaranteed to the CBO but the acts of the applicant were illegal and malevolent and conspiratorial between the applicant and the 4th respondent.
4. The 4th respondent opposed the application vide the replying affidavit sworn on it's behalf by Christine Muriithi - Advocate and wherein she deposed that the applicant charged the suit land to secure a loan of Kshs. 4,000,000/- and which loan is in arrears and thus the 4th respondent is entitled to sell the suit property by public auction. That the applicant was issued with a statutory notice but did not do anything to forestall the 4th respondent's intended auction until after three months when he approached the lower court. That the appeal is an afterthought as the court operations were never shut down due to Covid-19 and the applicant had time to file the application after the scaling up of operations in June 2020. Further that, the draft memorandum of appeal does not have a triable issue and the applicant has not satisfied the conditions for granting orders of stay of execution as the applicant has not offered security for stay.
5. The 1st – 3rd respondents filed a replying affidavit sworn by the 1st respondent wherein they reiterated the averments in the grounds of opposition and also deposed that there was not at any time that Kibugu Dairy Farmers CBO held a general meeting or had on its agenda meeting that approved or may have consented to such authority to have the applicant guarantee the said loan and thus there was no such loan which was offered to the CBO.

6. The 2nd respondent filed her own affidavit wherein she deposed that they (1st -3rd) were voted out as officials of CBO and thus they are wrongly enjoined and that the applicant did not guarantee CBO any loan and thus CBO has no obligation to repay the same. Further that, the applicant has not explained the delay and has not annexed a copy of the ruling to enable the court determine whether the intended appeal has overwhelming chances of success. That the applicant has not attached the certificate of delay to show that the court failed to supply him with the proceedings and ruling in time.

7. The application was canvassed by way of written submissions wherein each party reiterated the contents of their pleadings as summarized hereinabove. The applicant submitted that he has made a case for the grant of extension of time to appeal and for the grant of orders of stay of intended auction. Reliance was placed on Section 79(G) of the Civil Procedure rules, Order 50 Rule 6 of the Civil Procedure Rules 2010, **Sila Mutiso –vs- Rose Hellen Wangari Mwangi Civil Appeal NBI 251 of 1997** and **Kenya Power and Lighting Company – vs- Rose Anyango & Anor Misc Civil Application 29 of 2020** in support of the submissions to the effect that the applicant has satisfied the conditions for grant of orders of leave to appeal out of time. Reliance was further placed on Order 42 rule 6(2) and the case of **Victory Construction –vs- MB (a minor suing through next friend one PMM) Civil Appeal No. 19 of 2019** to support the submission that the applicant has satisfied the conditions for grant of orders of stay of intended auction.

8. On their part, the respondents submitted that the application ought to be dismissed as it lacks merit and it's just but a delaying mechanism and further that the 1st -3rd respondents were wrongly enjoined as they are no longer officials of the CBO and thus this court does not have jurisdiction over the matter where the parties are wrongly joined. Reliance was placed on **Apex International Ltd and Anglo leasing and Finance International Limited –vs- Kenya Anti-Corruption Commission (2012) eKLR**. Further that the reasons for delay were never sufficient to justify the grant of the orders sought.

9. I have considered the application herein, the responses by the respondents and the rival submissions. As I have noted elsewhere, the applicant sought for an order of stay of the intended auction of the suit land pending the hearing and determination of the intended appeal and also for leave to appeal out of time. It is my view that the issue for determination is whether the applicant has made a case for the grant of the said orders.

10. However, since the applicant seeks leave to appeal against the ruling of the lower court, it is my view that the said issue ought to be determined first.

11. When dealing with appeals from the subordinate court to the High Court, the applicable provision is **Section 79G of the Civil Procedure Act** which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section, however, allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which to appeal is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.

12. In exercise of that discretion, the court is supposed to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See **Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported)** and **Thuita Mwangi –vs- Kenya Airways Limited [2003] eKLR**).

13. As for the length of the delay, I note that the impugned ruling was delivered on 27.02.2020 and the application herein filed on 13.08.2020 which is almost six months thereafter. It is my considered view that the delay was not inordinate or excessive.

14. As for the reasons of the delay, the applicant's case is that he was not able to file the appeal as there was scaled down operations due to Covid-19 pandemic and that he lost communication between himself and his advocate and further that the applicant believed that the suit before the lower court would be disposed of expeditiously.

15. I have considered the said reasons and it is my view that the same are not valid reasons. Despite the Covid-19 pandemic and closure of courts to general public, it is in the public domain that filing and hearing of applications was still being conducted via zoom and other online platforms. As such, the pandemic cannot be blamed for the delay. Further, it has not been shown that there was breakdown of communication between the applicant and his advocate. I note that the same advocates on record herein are the same advocates who were on record in lower court. Further, the reasons to the effect that the applicant was hopeful that the suit in the lower court would be disposed off expeditiously cannot be sufficient reasons.

16. It is a matter of common knowledge that for an auction to take place, all that is needed is the Statutory Notice. As such, hoping that the suit would have been dealt with fast enough cannot be a reason for not filing the appeal in time. It is in fact an admission of laxity on the part of the applicant. It is my view therefore that, the reasons given are not valid enough to warrant granting of leave to appeal to this court. As Odunga J observed in **Dilpack Kenya Limited –vs- William Muthama Kitonyi [2018] eKLR**); where an appellant has a good case on merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant. As the court observed in **Andrew Kiplagat Chemaringo –vs- Paul Kipkorir Kibet [2018] eKLR**: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

I am of the view that the reasons given herein are not sufficient.

17. Further, even considering the chances of the appeal succeeding if the application is granted, I note that the intended appeal is against the ruling by the trial court dismissing the applicant's application for orders of injunction against the respondents from entering, trespassing,

and/or disposing off the suit land herein. The dispute revolves around a loan whereby the applicant used the suit land as security for a loan in favour of Kibugu Dairy Farmers' CBO. I have perused the said ruling and I note that the learned trial magistrate was right in her reasoning. It is trite that injunction orders can only be granted upon the court having been satisfied as to the conditions which were laid down in **Giella – vs- Cassman Brown (1973) E.A 358**.

18. Without pre-empting the suit before the trial court, it is my considered view that the applicant did not satisfy the said conditions. He did not dispute the loan and neither did he dispute the fact that it is in arrears. His case is just that the loan was given in favour of CBO. There is no evidence of the said loan having been credited into CBO's account. The applicant attached to the application a copy of the bank statement for CBO but he did not bother to even highlight the transaction in question. Further, despite the 1st- 3rd respondents having deposed that they are no longer in office as officials of CBO and minutes to that effect having been annexed, the applicant did not bother to substitute them.

19. It is my considered view that the applicant did not prove prima facie case against the 1st -3rd respondents. The 4th respondent is within its right to exercise the statutory power of sale and/ or to recover the said loan. There is no *prima facie* case which can warrant the granting of the orders of injunction. The trial court rightfully observed while quoting with approval **Elizabeth Wanjiku Kariungi –v- Equity Bank (Kenya) Limited [2017] eKLR** that when a borrower or a chargor is aware that he or she is in arrears, it is much more prudent to engage the lender in negotiations, hoping to achieve a mutually acceptable re-scheduling of the loan payments, than engaging the borrower in litigation. As such, the chances of the intended appeal succeeding are dim.

20. In view of the foregoing, the applicant herein has not satisfied the legal requirements so as to warrant this court's exercise of the discretion in his favour and grant leave to the applicant to appeal out of time. As such, prayer 4 of the application is disallowed.

21. That being the case, it therefore means that prayer 3 also fails.

22. The respondent is awarded the costs of the application

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

.....**for the Applicant**

.....**for the Respondents**