



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELCA E.014 OF 2021

PETER MAMBO KARINGA.....APPELLANT /APPLICANT

Vs

JOHN GITONGA.....1ST RESPONDENT

ALBERT MBURU KARINGA.....2ND RESPONDENT

GITHUNGURI CONSTITUENCY RANCHING CO LTD.....3RD RESPONDENT

RULING

1. The Appellant/Applicant filed the application dated 20/7/2021 seeking Orders THAT;

a. Spent.

b. Spent.

c. This Honorable Court be pleased to enlarge the time within which the applicant may lodge their intended appeal against the judgment delivered on 14th October, 2020 in Principal Magistrates Court at Ruiru, PMCC No. 32 of 2019 JOHN GITONGA AND ALBERT MBURU KARINGA –VS- PETER MAMBO KARINGA AND GITHUNGURI CONSTITUENCY RANCHING CO LTD.

d. This Honorable Court be pleased to order a stay of execution of the Judgment delivered on the 14th October 2021 (sic), entered against the Appellant/Applicant by the Hon. J.A Agonda (Mr.) Principal Magistrate, pending the hearing and determination of Appeal lodged in the High Court.

e. This Honorable Court be pleased to issue any other order that may deem just, appropriate and expedient in the interest of justice.

f. Costs of this Application be in the cause.

2. The application is supported by the grounds and the supporting affidavit of Loise W. Ndirangu, the advocate having conduct of the suit on behalf of the Applicant. That having extracted the orders, there is a possibility of the Respondents executing the orders in the judgement in PMCC NO 32 OF 2019 delivered on the 14/10/2020 thus rendering the appeal nugatory. That the Respondents are keen on selling the suit land given the number of prospective buyers who have inspected the property.

3. Further that the delay in filing the appeal was occasioned by the delay in obtaining typed proceedings which were thwarted by the lack of communication on the progress from the Ruiru Law Courts. That the COVID pandemic contributed to the delay in addition to the failure of **Mr Olaka Advocate**, counsel who had conduct of the matter, in obtaining the typed proceedings and the judgement. Lastly that the appeal stands a good chance of success.

4. The Supporting affidavit deponed by the counsel for the applicant rehashed the above reasons for failing to file the appeal on time.

5. The supporting affidavit of the applicant sworn on the 20/7/2021 gave the background of the case leading to the judgement delivered on the 14/10/2017. That being dissatisfied with the judgement he filed a review on the grounds of discovery of new and important evidence which application was dismissed. That he has filed an appeal against the said ruling as well as the judgement of the trial Court. That the delay

in filing the appeal was occasioned by; failure of the advocate to attend to the matter; corona pandemic; lack of communication from the trial Court registry in assisting with the typed proceedings and judgement.

6. The application is opposed by way of Preliminary objection filed by the Respondents. The Respondents are emphatic that the Appellant having preferred a review against the Judgment of Hon. J.A Agonda (SRM) delivered on 14/10/2020, has no rights of appeal against the said judgment. That the intended appeal together with the application dated 20/7/2021 are both unmerited and should be struck out with costs to 1st and 2nd Respondents.

7. Directions were taken on 28/10/2021 to canvass the application and Preliminary Objection by way of written submissions however none of the parties complied. That said the Court will determine the objection based on the submissions pleadings on record.

8. Noting the nature of a preliminary objection is such that if it is successful is capable of disposing the entire suit if successful, I will address it first.

9. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

10. The instant Preliminary objection impugns the plaintiff's application and intended appeal as non-starters having previously preferred to Review of the trial Court judgment. A brief background of this case is necessary for purposes of contextualizing the Preliminary Objection. The trial Court record shows that Respondents claim vide an amended plaint dated 9/7/2019 was allowed in the judgment delivered on 14/10/2020. Inter alia, the Court declared that the late Karinga Njihia was the lawful proprietor of Ruiru Kiu Block 2/3000 and a permanent injunction was issued against the applicant herein from interfering with said land issued against the Appellant herein.

11. The application was vehemently opposed by the Respondents herein. The Court rendered its Ruling on the said application and held that the Appellant had not demonstrated how the purported new evidence was not within his knowledge during the hearing and accordingly dismissed the application with costs on 28/1/2021.

12. The legal underpinning for Review is contained in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act states;

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

13. Order 45 Rule 1 of Civil Procedure Rules provides;

“1. Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the Appellant, or when, being Respondent, he can present to the appellate Court the case on which he applies for the review.”

14. Dissatisfied with the outcome, the applicant filed an application dated 27/10/2020, and sought review of the orders and Judgment of the Court dated 14/10/2020 on the basis of alleged discovery of new and important evidence in his possession in form of a handwriting report signature of his father together with receipts of payments. The second reason for review was that his submissions though filed were not considered by the trial Court. In his supporting affidavit it is clear without any contradictions that what the applicant sought was a review of the whole judgement so much so that the Court should set it aside. The grounds of review when looked at against the proposed grounds of appeal against the judgement are similar in intent. One of the grounds of the review was a disclosure that there is no appeal meaning that the parties had submitted themselves to the review jurisdiction of the Court. It is evident that another reason for the delay in filing appeal is

because the applicant was prosecuting his review application and that explains the filing of draft memorandum of appeal on the 9/2/2021 immediately he lost the review on the 28/1/2021.

15. It is trite that both Section 80 and Order 45 Rule 1 are conclusive that there is no liberty for one to seek both simultaneously, contemporaneously or in a consecutive manner over the same point. In the instant case although the review was fashioned on grounds of discovery of new and important evidence, the whole review was an attack on the judgment of the Court. Some of the grounds are already raised in the draft memorandum of appeal.

16. Having chosen the grounds of review of the judgement and failed the applicant cannot now prefer an appeal against the same judgement. He can only appeal against the ruling non review but not both. Incidentally the applicant has not sought the extension of time to appeal out of time with respect to the said ruling.

17. The application for enlargement of time is declined as any appeal preferred in the circumstances of this case is at the very least incompetent.

18. On the issue of stay of execution pending appeal, the same is rejected because there is no appeal pending.

19. The Preliminary Objection is upheld and the application is for dismissal,

20. It is dismissed with no orders as to costs.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 10TH DAY OF DECEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Njoroge holding brief for Ms. Ndirangu for Appellant/Applicant

Njonjo for 1st and 2nd Respondents

Warutere holding brief for Kanyi Kiruchi for 3rd Respondent

Ms. Phyllis – Court Assistant