



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 19 OF 2018

PAUL KINOTI ANAMPIU.....APPELLANT

VERSUS

MWIKA KANAMPIU M'AKWALU.....1ST RESPONDENT

MICHAEL MUIRURI MWAURA.....2ND RESPONDENT

RULING

1. The applicant seeks leave to file his appeal out of time and temporary orders of injunction. The application is premised under **rule 5 (2) (b)** of the **Court of Appeal Rules, Section 3 & 3A** of the Appellate Jurisdiction Act and any other provisions of the law.
2. The application is supported by grounds on the face of it and a supporting affidavit sworn by **Mwika Kanampiu M'Akwalu** on **15.9.2021**. The reasons given are that the appeal was delivered virtually at Garissa on **28.7.2021**, he only came to know about it on **3.9.2021** long after the time to file a notice of appeal had elapsed. Secondly the applicant states he lives on the suit land, is likely to be evicted and thirdly his appeal has merits.
3. In opposition the respondent swore a replying affidavit on 28.10.2021. The main grounds are: the application is made in the wrong court; lacks merits; delay has not been sufficiently explained, time to appeal has lapsed and the application does not meet the grounds for stay.
4. In oral submissions, the respondent maintained the applicant was aware of the judgment within 5 days after and took no action at all to appeal.
5. Secondly it was submitted the application was made two months after the judgment and the delay has not been explained at all.
6. Thirdly, it was submitted the decree has not been attached, and that the applicant has not met the conditions warranting issuance of stay orders.
7. Fourthly, the respondent submits no draft memorandum of appeal has been attached for the court to know the grounds of appeal being preferred.
8. As regards a prayer for temporary injunction, the respondent submits there is no pending appeal filed hence the court cannot grant orders in vain and in any event the applicant has not met the threshold in ***Giella –vs- Cassman Brown***.
9. Lastly the respondent submitted the applicant was not utilizing the entire land for he had sold part of it.
10. In a rejoinder the applicant reiterated his request to be allowed to appeal out of time.
11. The applicant gives the reason given for not filing the notice of appeal on time is the applicant's absence at the date of the delivery of judgment and non-notification by his former lawyers. The court coram during the judgment indicates parties were absent.
12. Secondly the court file is not clear if parties were notified of the date of the delivery of judgment.
13. **Section 7** of the **Appellant Jurisdiction Act Cap 9** provides the High Court may extend time for giving notice of intention to appeal from a judgment of the High Court notwithstanding the said period has already expired. The position was confirmed in ***Kenya Airports Authority & Another –vs- Timothy Nduvi Mutungi [2014] eKLR***.

14. In Stanley Kahoro Mwangi & 2 Others –vs- Kanyamwi Trading Co. Ltd [2015] eKLR the court held the principles guiding the court on an application for extension of time as the period for the delay, reason for the delay, chances of the appeal succeeding and any degree of prejudice to the respondent if the application is granted.

15. In the instant case, the delay was for only two months. Secondly the reasons given are that the applicant was not present during the delivery of judgment and that he was unable to agree with his lawyers on time on the next step to take.

16. To my mind, the delay is not inordinate and reasons given are also reasonable and genuine under the circumstances.

17. Thirdly issue before the lower court and the High Court regards land which is in the name of the respondents and which the applicant claims to have been transferred fraudulently. Though no draft memorandum of appeal has been attached, I am inclined to find issues raised as requiring the applicant to be given another chance to have them determined at the Court of Appeal.

18. Lastly, the respondents submitted they are yet to take possession of the sold portion. The prejudice to be occasioned if the notice of appeal is allowed to be filed out of time does not therefore exist at the moment.

19. As regards the application for stay and injunction, no appeal has been filed and secondly the court by its judgment dated 28.7.2021 allowed the appeal and substituted the same with an order dismissing the applicant's suit in the lower court. This is a negative order which as per Section 2 of the Civil Procedure Act is not capable of being executed.

20. In Milcah Jeruto –vs- Fina Bank Ltd [2013] eKLR, it was held on order of stay cannot be granted where a negative order has been issued. This means the parties stay in the position they were in before coming to court. It does not therefore mean the intended appeal will be rendered nugatory and or any substantial loss will be suffered by the applicant. There is no evidence of any decree seeking to evict him.

21. In Kaushik Panchamatia & 3 Others –vs- Prime Bank Ltd & 2 Others [2020]eKLR the Court of Appeal held a negative order is incapable of being stayed because there is nothing to stay.

22. In the premises, I grant the applicant leave to file and serve a notice of appeal within 14 days from the date hereon.

Prayers 1 and 3 of the notice of motion dated 15.9.2021 are rejected.

Costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 1ST DAY OF DECEMBER, 2021

In presence of:

APPELLANT IN PERSON – PRESENT

NJINDO FOR RESPONDENTS

COURT ASSISTANT - KANANU

HON. C.K. NZILI

ELC JUDGE