



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KITUI

HIGH COURT CIVIL MISC. APP. CASE NO. E068 OF 2021

BERNARD DAVID MUNYALO.....APPLICANT

VERSUS

SABINA KANINI MWEMA.....RESPONDENT

RULING

1. **Benard David Munyalo**, the Applicant herein, has brought this **Notice of Motion** dated **25th October 2021** seeking for the following reliefs/orders.

(i) *Spent*

(ii) *A temporary injunction restraining the Respondent whether by herself, his agents, servants from wasting, further construction, excavating, subdividing, disposing, selling, transferring and or alienating the parcel of land known as Kyangwithya/Kaveta/716 pending the hearing and determination of this application and intended appeal.*

(iii) *That leave be granted to the Applicant to appeal out of time against the ruling of Hon. Margaret K. Kasera SPM delivered on 24th June 2021 in Kitui CMCC Succession Cause No. 132 of 2014.*

(iv) *That the annexed draft Memorandum of Appeal be deemed duly and properly filed.*

(v) *That costs be provided.*

2. The applicant has listed the following grounds for this application namely: -

i. *That the applicant is the son of the late Munyalo Nzuku Kalua. The Respondent is a daughter in law to the late Munyalo Nzuku Kalua, the registered owner of land parcel number Kyangwithya/ Kaveta/716 which parcel is the subject in Kitui Chief Magistrate's Court Succession Cause No. 132 of 2014 (Estate of Munyalo Nzuku Kalua) (deceased)*

ii. *That the trial court delivered its ruling without notice to the Applicant on 24th June 2021 dismissing the Applicant's objection to the confirmation of grant which was founded on the basis that the Respondent had discretely approached the succession court without involving the Applicant and had allocated all the land to herself*

iii. *That the ruling on the Applicant's objection was scheduled to be delivered on 23rd March 2021 and later on 8th June 2021*

iv. *That the trial court was not sitting on the two dates and consequently the ruling was not delivered then. The court directed that the ruling would be delivered on notice*

v. *That when the trial court delivered its ruling on 24th June 2021 without notice to the applicant or his advocates, the outcome was also not communicated to the applicant or his advocates in time.*

vi. *That the advocates for the applicants had no notice when the ruling was delivered and could not have instructed any counsel to hold their brief*

vii. *That upon dismissing the applicant's objection without notice, the court on 24th August 2021, the trial court confirmed the*

grant in Kitui Chief Magistrate's court succession cause No 132 of 2014 in the name of the Respondent thus allocating her land parcel No Kyangwithya/ Kaveta/716(whole) and without a share to the applicant thus gravely prejudiced.

viii. That aggrieved by the ruling of the trial court, the Applicant has preferred to file an appeal which appeal is arguable and has high chances of success. The appeal raises pertinent issues for determination and if prayers sought in this application are not granted, the applicant will suffer great prejudice

ix. That the time allowed for filing an appeal has run out and the applicant has approached this court in good faith seeking extension of time to appeal

x. That the delay herein is not so inordinate or so great as to be inexcusable and the Respondent is unlikely to suffer any prejudice if the Applicant is allowed to file his appeal

xi. That the Applicant is highly apprehensive that without this Honourable Court's intervention, there is great likelihood the Respondent will move to dispose or transfer the land to third parties or put the property beyond his reach thus greatly prejudicing the Applicant

xii. That land parcel number Kyangwithya/ Kaveta/716 is the only Applicant's ancestral land with deep cultural and social meaning and connection. The sentimental value attached to the land cannot be adequately compensated by way of damages

xiii. That the Respondent will not suffer any substantial loss if this application is allowed and as the application has been brought in good faith

xiv. That it is in the interest of justice that this Honourable Court do issue orders as sought by the Applicant in this application. The Applicant is willing to abide by the orders and directions of this Honourable Court.

3. The Applicant has supported the above grounds through his affidavit sworn on 25th October 2021.

4. In his oral submissions made through Counsel, the Applicant reiterated that he was an objector at the lower court having filed his objection which was heard and that a ruling to the objection was scheduled for delivery on 21st March 2021 when the said court was not sitting. The Applicant argues that there was no notice given as to when the ruling was to be delivered. He points out that the same was nevertheless delivered on 24th June 2021 without their knowledge and that it only came to their knowledge on 24th August 2021 when the grant was being confirmed.

5. The Respondent has opposed this application through grounds of objection dated 28th October 2021. The Respondent contends that the decision by the Appellant to appeal is an afterthought because this application has been brought after lapse of four months from 24th June 2021 when the ruling was delivered.

6. The Respondent further contends that the reliefs sought is misconceived, far-fetched and unsustainable because in her view, the substratum of the application is founded on miscellaneous cause whose tenure lapses upon determination of the main prayer.

7. The Respondent submits that a party does not need proceedings to lodge an appeal and that this application is frivolous and an abuse of court process by an indolent party. She faults the applicant for not utilizing the opportunity he had to appeal. She further claims that when the ruling was delivered on 24th August 2021 the Applicant was represented by Kithome advocate.

8. This court has considered this application and the response made. The main bone of contention by the respondent is that this application is misconceived and unsustainable because its substratum is founded on a miscellaneous cause whose tenure ends once this court determines the main prayer. The main prayer is leave to appeal out of time.

9. It is my considered view that the Respondent's contention in that regard is not well founded because if this court is persuaded that the applicant deserves a chance to appeal and hence leave to appeal, the leave granted certainly is time bound which means that if the appellant does not prefer the appeal within specific timeline, the temporary relief automatically lapses. The big question in my view is whether the applicant in this matter deserves a discretion from this court because extension of time is a discretionary matter under **Section 79(a) of the Civil Procedure Act**. The Applicant is required by law to demonstrate a "good" and "sufficient cause" and under the provisions of **Order 50 Rule 6**, this court is also given power to enlarge time as justice may require.

10. The Applicant complains that the ruling, the subject of his intended appeal was not delivered on the due date but on another date because in the scheduled date, the court was not sitting. The ruling is said to have been delivered on 24th June 2021. The Respondent stated at bar that the Applicant was represented by one Kithome advocate but there is no affidavit filed to ascertain that fact. This leaves the Applicant's contention made on oath that he was unaware of the date of the ruling unchallenged.

11. This means that the ruling was delivered in his absence and if it is true that he came to learn about it in court on 24th August 2021, way after the time of appealing was over, there is sufficient reason to find that the Applicant deserves a chance. I have of course noted that the Applicant could not explain well the reasons for not filing this application until 25th October, 2021 which is about 60 days when he learnt about it. I have however perused through the draft memorandum of appeal and I find that on a *prima facie* basis, the grounds are not frivolous.

12. The Applicant could have perhaps done himself favours by placing the copy of the pleadings before me with a view to enabling the court

determine the real weight of his intended appeal. But that notwithstanding, this court is inclined to exercise its discretion in a manner that facilitates access to justice rather than causing unnecessary hindrance to a party who has demonstrated real desire to appeal.

13. On the second limb of the application, which is a prayer for an injunctive relief, this court has considered the nature of the dispute from the pleadings filed. I have also considered, the provisions of **Order 42 Rule 6 (6) of the Civil Procedure Rules** which provides: -

“Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just, provided the procedure for instituting an appeal from subordinate court or tribunal has been complied with.”

The applicant has sought for leave to appeal out of time which, as I have observed above, he deserves. The Respondent in my view would not suffer much prejudice if preservatory orders are given to preserve the substratum of the intended appeal.

In the premises this court finds merit in the application dated 25th October 2021. The same is allowed only in the following terms: -

(i) The applicant is granted leave to appeal out of time. He has 30 days from the date of this ruling to file his appeal.

(ii) There shall be a temporary preservatory restricting the respondent from disposing, charging, transferring, sub- dividing or alienating that parcel of land known as Kyangwithya/Kaveta/716 pending determination of the intended appeal.

(iii) In default of conditions (i) above, the Order in (ii) lapses automatically.

(iv) The applicant is directed to fast track this appeal when filed by moving speedily in filing the Record of Appeal and prosecuting it timely.

(v) Costs of this application shall be borne by the applicant.

DATED, SIGNED AND DELIVERED AT KITUI THIS 3RD DAY OF NOVEMBER, 2021.

HON. JUSTICE R. K. LIMO

JUDGE