



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC. NO. 39 OF 2019

(FORMERLY CIVIL CASE NO. 116 OF 2015)

MOHAMED YUNIS SOROYA.....INTENDED APPELLANT

VERSUS

MOHAMED YUSUF SOROYA KHAN.....1ST RESPONDENT

SOROYA GROUP LIMITED2ND RESPONDENT

(Being an application for leave to appeal out of time and for orders of stay of execution from the Ruling delivered on 10th February 2015 by Resident Magistrate Honourable T. S. Nchoe in Civil Case No. 3104 of 2014 at Nairobi, Milimani Law Courts.)

MOHAMED YUSUF KHAN SOROYA.....1ST PLAINTIFF

SOROYA GROUP LIMITED.....2ND PLAINTIFF

VERSUS

GIKERA & VADGAMA ADVOCATES.....1ST DEFENDANT

MOHAMED YUNIS SOROYA.....2ND DEFENDANT

RULING

The intended Appellant filed the application dated 19/3/2015 seeking leave to appeal out of time against the ruling of the Resident Magistrate the Honourable T. S Nchoe delivered on 10/2/2015 at the Milimani Law Courts. The Applicant seeks stay of execution of part of the order issued by the learned magistrate on 10/2/2015 requiring the firm of Gikera and Vadgama Advocates to surrender the title documents over the suit land to the Plaintiff. He also seeks to stay the proceedings in **Milimani CMCC No. 3104 of 2014**. The application was made on the ground that the court gave orders on February 2015 requiring the firm of Gikera and Vadgama Advocates to surrender all the documents in their possession in relation to the suit land to the Plaintiff.

The Intended Appellant averred that he filed an application for stay, review and setting aside of the orders in the same court on 19/2/2015 and the court directed that that application would be heard on 23/2/2015. When the matter came up before Hon. Nchoe on 23/2/2015, the Learned Magistrate declined to grant the orders for stay of execution. The Respondent filed a preliminary objection which the Applicant was given time to respond to when the matter came up in court on 27/2/2015.

The background to the claim is that the suit related to custody of title documents over the suit land in which the Applicant and the 1st Respondent are tenants in common. The 1st Respondent instructed Gikera and Company Advocates in 2013 to transfer the suit land to the 2nd Respondent, a company in which he holds shares with his son. The Applicant claimed that the 1st Respondent misrepresented to the firm of advocates that he had a valid power of attorney donated by the Applicant to deal with the suit land. On discovering that the power of attorney had been revoked, Gikera and Company Advocates withheld the title over the land to await a determination as to whom the advocates were to release the title. The Respondents sued Gikera and Vadgama Advocates for the release of the title. Gikera and Valgama Advocates filed an application dated 18/6/2014 seeking to be removed from the proceedings and to have the Applicant joined as a party. Parties canvassed the application dated 18/6/2015 and the Learned Magistrate in the ruling delivered on 10/2/2015 directed Gikera and Vadgama Advocates to surrender all the documents relating to the suit land in its possession to the Plaintiff. The crux of the Applicant's intended appeal is that the court made an order which was not sought in the application and which was not argued by the parties. The Applicant is apprehensive that the

1st Respondent may transfer the suit land to defeat his interest in the land.

The Respondents filed a notice of preliminary objection on 7/5/2015 urging that the court cannot exercise any of the powers conferred by Section 79 of the Civil Procedure Act because the proceedings are still pending before the Resident Magistrates court. The 1st Respondent urged the court to summarily reject the appeal in view of the pending application in the magistrate's court. He contended that the Applicant should have complied with the orders made by the Learned Magistrate before filing this application.

The 1st Respondent filed a replying affidavit on 26/5/2016 opposing the application. He argued that the Applicant had not satisfied the court that he had good and sufficient reasons for failing to file the appeal in time. He urged that the 1st Defendant continued to disregard the court order directing the release of the title documents which in his view amounted to contempt for the court.

Parties filed submissions which the court has considered. The court notes that the matter was first placed before the Hon. Aburi J as Duty Judge on 20/3/2015. The application came up before different judges of the High Court on diverse dates before the file was transferred to the Environment and Land Court on 28/2/2019. From the court record, it would seem that the parties attempted to negotiate an out of court settlement which eventually was not reached.

The appeal should have been lodged by 10/3/2015. The Applicant urged that the delay was not unreasonable and that the appeal had high chances of success. He contended that the court ordered the release of the title documents to the 1st Respondent without giving him a hearing.

The 1st Respondent admitted that he held the suit land in common with the Intended Appellant. Mr. Kongani, advocate for the 1st Respondent, faulted the Applicant for not including the replying affidavit that was filed in the suit by Mr. Gikera. He stated that he did not have a copy of that Replying affidavit. The 1st Respondent submitted that the Learned Magistrate considered all the factors before arriving at his decision. The 1st Respondent submitted that the delay of nine days was unreasonable. The 1st Respondent further argued that the Applicant will have a chance to argue the issues raised in this application before the Learned Magistrate. The 1st Respondent urged that the Applicant had not demonstrated the loss he would suffer if the Respondent kept the title documents. The 1st Respondent incorporated the 2nd Respondent and wished to use his interest in the suit land for businesses purposes. The Appellant was opposed to having the title released to the 1st Respondent and contended that the 1st Respondent had prepared a transfer in respect of the whole piece of land to the 2nd Respondent.

The issue for determination is whether the court should grant the orders sought. Under Section 79G of the Civil Procedure Act, 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. Under Order 42 the court must be satisfied that substantial loss may result to an applicant if an order of stay of execution is not given. The application must be made without unreasonable delay and the applicant may require such security for the due performance of the order.

The court notes that in the application dated 18/6/2014, Gikera and Company Advocates sought to be struck off the proceedings upon depositing the original title over the suit land in court. The court directed this firm to release the title to the 1st Respondent.

In the court's view, the delay of nine days is not inordinate. The Applicant explained that the delay was brought about when he sought to have the order set aside or reviewed in the proceedings before the learned magistrate who made the orders he seeks to appeal against. The court is satisfied that the Applicant who owns the suit land jointly with the 1st Respondent will suffer loss if an order for stay of execution is not granted and the title documents are released to the 1st Respondent who wishes to transfer the suit land to the 2nd Respondent.

The court grants an order of stay of execution of the order issued by the learned magistrate on 10/2/2015 requiring Gikera and Vadgama Advocates to surrender the title documents over the suit land to the 1st Respondent. It is prudent to stay proceedings in Civil Case No. 3104 of 2014 until the appeal is heard and determined.

Dated and delivered at Nairobi this 23rd day of January 2020

K.BOR

JUDGE

In the presence of:-

Mr. O. Mudany holding brief for E. Ongoya for the Applicant

Mr. Utoto Kongani holding brief for Mr. Osundwa for the 1st Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 2nd Respondent