



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL NO. 41 OF 2019

STEVEN OUKO ONOKA.....APPELLANT

VERSUS

STANLEY SHIUNDU AMUKAYA.....RESPONDENT

RULING

Steven Ouko Onoka (*hereinafter referred to as the applicant*) comes before me with the application dated 25/11/2019 praying for leave to appeal against the ruling dated 15/10/2019. The grounds for the application are that the applicant was dissatisfied with the ruling dated 15/10/19 and has lodged an appeal. The appeal raises several issues. The appeal will be rendered nugatory if leave is not granted. The applicant risks losing his own home known to him. The application should be granted in the interest of justice.

In the supporting affidavit, he states that there was an attempt to settle the matter by consent but it did not materialize. He denies having instructed his advocate to enter into any consent and therefore the consent entered was done so fraudulently though he admits that he was for an out of court settlement and was agreeable to paying Kshs 500,000/= as deposit.

Mr. Mwamu, learned counsel for Applicant argues that the right to appeal is constitutional and therefore the court should give leave to appeal. Mr. Odeny, learned counsel argues that the right of Appeal is not automatic. Moreover, that the appeal has already been lodged without leave of the court.

According to Mr. Odeny, leave was to be sought orally before the court that pronounced judgement on the date and time of pronouncement of judgment or within 14 days after judgment. This was not done. There is no provision for leave to be granted by the superior court. The time limit for applying for leave was within 14 days. There was a delay in filing the application on 27/11/2019.

I have considered the application and the rival submissions of counsel. The facts of this matter are that the counsel for the parties in the lower court entered into a consent to settle the matter in the terms that the applicant was to pay the respondent the sum of Kshs. 1,480,000 in exchange for land parcel Kisumu/Manyatta "A" 2704 as follows:

a. A.Kshs. 1,300,000 to be paid on or before expiry of 45 days from today.

b. The balance of Kshs. 150,000 to be paid on or before expiry of 90 days from today.

2. In default of payment in one (1) above, an order for the eviction of the defendant from the Plaintiff's land parcel Kisumu/Manyatta 'A'/2704 to be executed by the O.C.S Kondele Police Station.

The applicant tried to challenge the consent order but the application was dismissed with costs. The applicant has appealed but without leave of the court. He now seeks the court's leave to appeal.

Section 75 of the Civil Procedure Act provides that

1. An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) an order under section 64;

(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) any order made under rules from which an appeal is expressly allowed by rules.

Section 75 is clear that the court appealed to has the power to grant leave to appeal. The Act does not provide any conditions for leave to be granted.

Order 43 (2) of the Civil Procedure Rules provides that an application for leave

“2) An appeal shall lie with the leave of the court from any other order made under these Rules.”

Rules are hand maidens of Justice and therefore a rule cannot override the law. Appeal is a constitutional right but has to be exercised within the law and provisions of the constitution such as **Article 159 of the Constitution** where a discretion has to be exercised. The application for leave must be made expeditiously.

Order 43 (2) provides that leave must be made within 14 days in the court appealed from. But also, the court appealed to has Jurisdiction to grant leave to appeal and therefore **Order 43 (3)** though worded in mandatory terms is merely directory and does not limit the courts power. However, the application for leave should be made expeditiously.

Section 75 of the Civil Procedure Act and **Order 43 of the Civil Procedure Rules** do not provide for time limit for filing an application for leave to appeal in the court appealed to. However such application should be made within 14 days in the court appealed from.

I do find that there is no time limit to make the application in the court appealed to; the same should be made within reasonable time. The applicant never made an application in the court appealed from but chose to make application in this court. The ruling was made on 15/10/2019. Application for leave in this court was made on 27/11/2019 more than 30 days after the ruling. I do find 30 days to be inordinate delay. The upshot of the above is that the application is dismissed with costs. Orders accordingly.

DATED AND DELIVERED THIS 6th DAY OF January, 2020.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

Omondi T for applicant

M/S Imbaya for respondent

C.C Joanne

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE