



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 17 OF 2018

(Formerly KAKAMEGA ELC NO. 78 OF 2014)

PAMELA IMBUKA NJARO.....1ST PLAINTIFF

FRANCIS BOGE NJARO.....2ND PLAINTIFF

VERSUS

JOSEPH VUTITA NJARO.....1ST DEFENDANT

MOLYN CREDIT LIMITED.....2ND DEFENDANT

KENNEDY K. SHIKUKU

T/A ESHIKONI AUCTIONEERS.....3RD DEFENDANT

KENNEDY NANDI VITISIA.....4TH DEFENDANT

RULING

1. The application for determination is the Motion, dated 15th July 2020. It is brought at the instance of the 1st plaintiff, to be known hereafter as the applicant. It seeks, in the main, leave to file notice of appeal out of time and stay of execution of the decree pending intended appeal.

2. The reasons given by the applicant are on the face of the application, which largely revolve around the fact the court had downscaled its operations following the outbreak of Covid-19 pandemic. It is averred that judgment in the matter was delivered on 8th May 2020, in the absence of the parties, due to the pandemic, and following directions by the Chief Justice that rulings and judgments be delivered electronically. The appellant further avers that she was aggrieved by the said judgment, and desired to appeal against it, but, again due to challenges presented by the pandemic, she was not able to take the requisite steps timeously. The courts had downscaled operations, and her advocates had closed down their offices for the same reason. She also avers that the Chief Justice had also given directions that execution of decrees and orders be suspended for the same reasons. She argues that when the courts upscaled she sought to file her notice of appeal only to find that the time within which she should have had filed it had expired.

3. In her affidavit, in support of the application, sworn on 15th July 2020, the applicant largely reiterates what is in the grounds on the face of the application, that due to the Covid-19 pandemic the courts had downscaled their operations as at the date of the delivery of the judgment and her advocates had closed shop, which meant that she was unable to file her notice of appeal within the period prescribed. She deposes that following the upscaling of court operations she still desired to appeal, but she found herself out of time, hence the instant application. She avers that she has since applied for certified copies of typed proceedings, and that she believed that her appeal raises weighty legal issues.

4. Only the 4th defendant has filed grounds of opposition, dated 27th July 2020, and an affidavit, sworn on even date. I shall hereafter refer to the 4th defendant as the respondent. In the grounds of opposition, it is averred that leave to appeal out of time can only be granted by the Court of Appeal, there was no order or decree emanating from the judgment that is capable of being stayed, stay would imply that the dismissal of the applicant's suit was suspended, the respondent was the registered owner of the subject land since 2014 and he was entitled to all the rights appurtenant to such registration, no appeal existed to found a basis for stay, the person named in the application as 2nd applicant had not granted authority to the applicant to bring it on her behalf and the application was in abuse of court process.

5. In his affidavit, the respondent avers that the applicant had all the time to file appeal but she did not avail herself of the opportunity. Firstly, that her advocates, just like all the others, had been given opportunity to consent to the judgment being delivered electronically. Secondly, that the judgment was delivered on 8th May 2020, with the knowledge of all the advocates on record. Thirdly, that once the

judgment was delivered the applicant instructed the firm of Oguso & Okunga, Advocates, on 21st May 2020, who immediately filed applications in court, and it is argued that nothing prevented the said advocates filing a notice of appeal. He avers that the applicant has not demonstrated that she would be prejudiced should the stay orders not be granted.

6. The application was argued orally on 30th July 2020. No directions had been given for filing of written submissions, but the applicant had filed written submissions on 28th July 2020. The respondent did not file any. In her written submissions, the applicant argues three grounds. The first ground relates to jurisdiction to determine an application for extension of time to file notice of appeal. She cites the Appellate Jurisdiction Act, Cap 9, Laws of Kenya, and the Court of Appeal Rules, to argue that the law empowers the High Court to extend time for that purpose. She has cited the decisions in *Kenya Airports Authority & another vs. Timothy Nduvi Mutungi* [2013] eKLR, *Loice Chemutai Ngunde & another vs. Winfred Leshwori Kimung'eni & 2 others* [2015] eKLR, and *Edward Njane Ngonga & another vs. Damaris Wanjiku Kamau & another* [2016] eKLR. With respect to whether the court should extend time in this case, it is argued that the exercise of that discretion was unfettered. She points out the principles that ought to guide the court in exercising the discretion to extend to me, had identified her reasons as those set out in her application – essentially the challenges that came with the Covid-19 pandemic. She has cited *Stanley Kapoor Wangi & 2 others vs. Kenyamwi Trading Company Limited* [2015] eKLR and *Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge* [2013] eKLR. The last issue is concerning stay of execution. She cites Order 42 rule 6 of the Civil Procedure Rules. She avers that should stay orders not be granted the respondent was likely to transfer the property to third parties.

7. During the oral hearing of the application, Ms. Aligula, for the applicant, largely reiterated the arguments made in the written submissions filed by the applicant. Mr. Chitwa, for the respondent, began by arguing that an application for stay of execution of decrees and orders could only be anchored on a valid notice of appeal or a duly filed memorandum of appeal filed at the Court of Appeal. It was also submitted that the prayers sought by the applicant against the respondent were dismissed, and, therefore, what the applicant was seeking was suspension of those dismissal orders. It is submitted that no order existed that could be stayed. It was also submitted that there was no draft memorandum of appeal attached, to demonstrate that solid grounds of appeal existed. He asserted that the annexed draft notice of appeal did not demonstrate any grounds of appeal. With regard to the challenges presented by the Covid-19 pandemic, it was submitted that although the courts downscaled services, that did not mean that the courts ceased to operate. He cited *Donald O. Raballa vs. Judicial Service Commission & another* [2018] eKLR, *County Government of Mombasa vs. Kooba Kenya Limited* [2019] eKLR and *Moroo Polymers Limited vs. Wilfred Kasyoki Willis* [2019] eKLR, to make the point that extension of time to file a notice of appeal is the exclusive preserve of the Court of Appeal.

8. The principal prayer in the application is extension of time to file notice of appeal. Although section 66 of the Civil Procedure Act, Cap 21, Laws of Kenya, does provide for rights of appeal from decrees of the High Court to the Court of Appeal, the said Act does not carry any provisions on filing of notices of intention to file such appeals. The Civil Procedure Rules, which provide the procedures for civil proceedings, does have a provision, at Order 42 rule 6(4), on notices of appeal, with respect to appeals to the Court of Appeal, which reads as follows:

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

9. The law that regulates processes of appeals to the Court of Appeal is the Appellate Jurisdiction Act and the Rules made under it, the Court of Appeal Rules. These provisions are in section 7 of the Appellate jurisdiction Act and Rule 4 of the Court of Appeal Rules, which state as follows:

“7. Power of High Court to extend time

The High Court may extend time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”

“4. Extension of time

The Court may, on such terms as it thinks fit, by order extend the time limited for by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

10. It is clear beyond peradventure that the High Court has power, under section 7 of the Appellate Jurisdiction Act, to extend time, to an intending appellant, to file a notice of intention to appeal. It is black and white.

11. The respondent placed before me decisions of the Court of Appeal, which he submitted were specific that extension of time to file notice to appeal could be granted by the Court of Appeal. He did not submit on the effect of section 7 of the Appellate Jurisdiction Act. I have carefully perused through the said decisions, and found that none of them supports the contention by the respondent. The said decisions turned on Rule 4 of the Court of Appeal Rules, as the applications they were dealing with were premised on the said rule, which rule is limited to applications before the Court of Appeal. None of the decisions addressed themselves to section 7 of the Appellate Jurisdiction Act, leave alone holding that extension of time to file a notice of intention to appeal could only be made by the Court of Appeal.

12. With respect to jurisdiction of the High Court to extend time to file notice of appeal, it is my finding that such jurisdiction exists, and the Motion, dated 15th July 2020, is, therefore, properly before me.

13. The second consideration is whether the orders sought are available. Under section 7 of the Appellate Jurisdiction Act, the exercise of that power is discretionary. The principal reason given for the failure to file the notice within the time allowed is the onset of the Covid-19

pandemic. The applicant argues that the judgment she seeks to appeal against was delivered at a time when the courts had downscaled their operations because of the pandemic, which she says also affected operations by advocates, who closed down their chambers. She has also said that the Chief Justice had given directions that rulings and judgments be delivered electronically. No documents were attached to support these contentions, but I believe that I can take judicial notice of the onset of the corona virus and the subsequent chaos that it caused in the legal profession and judicial processes. The courts downscaled, and conducted businesses remotely. Advocates closed offices, and, where they operated, were required to conduct business with the court electronically or virtually. That had its challenges, as some of them did not have the requisite facilities. It is, therefore, not idle for a party to cite the Covid-19 pandemic as a reason for failure to take certain steps timeously. The onset of the pandemic forced the courts and advocates, and the country generally, to act abnormally.

14. I find it a matter of some curiosity that none of the parties made any reference to the fact that a notice of appeal had in fact been lodged herein on behalf of the applicant. There is, indeed, a notice of appeal, on record, dated 21st May 2020, which was lodged herein on even date, by Messrs. Oguso & Okungu, Advocates. According to rule 75(2) of the Court of Appeal Rules, the notice of appeal should be lodged at the High Court within fourteen days of date of the decision against which it is desired to appeal. The fourteen days would then be reckoned in terms of rule 3 of the Court of Appeal Rules, which would mean that the notice of 21st May 2020 was filed within the fourteen days allowed in law. It would appear that the advocates urging the Motion before me did not seem to be aware of the existence of this notice, for if they were, they would have addressed me on whether or not it was a valid notice.

15. I note the said notice was filed by a firm of advocates that had filed the Motion, of even date, seeking leave to come on record in the place of Messrs. Akwala & Company, Advocates, who had acted for the applicant up to the date of delivery of judgment. The Motion dated 21st May 2020 was never argued, and no orders were ever granted on it, for it was withdrawn by a notice to cease acting, dated 15th July 2020. It would appear, therefore, that the same was filed by an advocate who was either not properly instructed or had not yet properly come on record. That would mean the notice was not properly on record. I would have loved to hear from the advocates on its propriety.

16. I am persuaded that the reasons advanced by the applicant are sufficient for grant of the order sought of extension of time to file notice of appeal. I am particularly emboldened in so doing because of the fact that the applicant had made an effort to file one within fourteen days, the only challenge being that the same was filed by an advocate who was yet to properly come on record. Mistake of counsel, the mantra goes, should not be visited on the client. See *Pithon Waweru Maina vs. Thuka Mugiria* [1983] eKLR.

17. The third matter for determination is with respect to stay of execution of the judgment. I note that the suit was dismissed. No positive order was made that would require execution. There is nothing to execute, and, therefore, there would be no basis at all for grant of the stay order sought. The respondent talked of such a stay order, if made, amounting to suspension of the judgment. Stay is only granted to stop a decree or order being executed. Where the order or decree is incapable of being executed, as in the present case, there would be no point of granting the stay order. It would be an exercise in futility. The same would not amount to a suspension of the judgment. Indeed, there is no provision for suspending a judgment, that has been delivered, pending appeal.

18. In the end, I hereby extend the time for filing notice of intention to file appeal, against the judgment herein, by fourteen (14) days. The prayer for stay of execution is disallowed. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6th DAY OF October, 2020

W MUSYOKA

JUDGE