



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 31 OF 2019

MWANGI KAMUTU.....1st APPLICANT/APPEALLANT

LUCY WANGUI KAMAU.....2nd APPLICANT/APPEALLANT

JOSEPH MWANGI KANYORO.....3rd APPLICANT/APPEALLANT

MARTIN MAINA KANYORO.....4th APPLICANT/APPEALLANT

-VERSUS-

JOYCE WANGUI KARAGU.....RESPONDENT

RULING

1. Before me for determination is a manmade Notice of Motion dated 2nd December 2019 wherein the 2nd Applicant on her behalf and on behalf of the rest of the Applicants has sought for orders that:

i. Spent

ii. That this honorable Court be pleased to stay the execution in the Chief Magistrates' Court at Nyeri CMCC No. 176 of 2018 pending the hearing and determination of the intended Appeal, to this Court against the ruling dated 29/10/2019 in that case and also that this Court to grant the Applicant leave to file an Appeal out of time against that ruling.

iii. That cost of this Application be provided for.

2. The said Application is premised on the grounds on the face of it as well as the sworn affidavit of Lucy Wangui Kamau the 2nd Applicant, sworn on the 25th November 2019.

3. In response to the Application, the Respondent herein filed their grounds of objection dated the 10th December 2019 on the equal date wherein the Applicants filed their response in the form of written submissions titled "Answer to the grounds of Objection to the Application dated the 2.12.2019"

4. On the day the matter was scheduled for inter-parties hearing, the Applicant sought leave that the Court considers the said filed submissions.

5. The Applicants' Application is based on the grounds that she, the 2nd and 3rd Applicants who are her Children, had been the Defendants this matter which had been initially filed vide the Nyeri CMCC No. 176 of 2018 wherein an ex-parte judgment had been entered against them without their knowledge and despite lack of service with summons to enter appearance, by the Plaintiff and her Advocate.

6. That what they had been served with instead had been a Decree informing them that they had 60 days upon which to vacate from the suit land No. Gatarakwa/Gatarakwa Block IV/490.

7. The Applicants seemed to also state that a ruling had been delivered on the 29th October 2019 wherein efforts to procure a copy of the same from the registry so that she could Appeal were futile as the file went missing but resurfaced on the 19th November 2019 after the Respondent's Counsel had filed an Application to evict them. That their plea to the Court Registry personnel to be supplied with proceedings of the trial Court fell on deaf ears as they had been directed to go to Court so that the lower Court file could be called for.

8. The 1st Applicant's Application for stay of execution was based on the fact that she had lived on the suit land with her husband since the year 1990's land which she had regarded as their matrimonial home. That even after the demise of her husband, she had continued to stay on the suit land for more than 12 years before the Respondent filed suit in the lower Court in the year 2018. That evicting her from the said suit land would therefore leave her and her children destitute.

9. In opposition of the Application, Counsel to the Respondent relied on their Grounds of Opposition herein filed and dated the 10th December 2019 to the effect that the Applicants had not annexed the copy of the impugned ruling of which they intended to Appeal. The Court was therefore not in a position to know whether they had good grounds of Appeal. That the Applicants had also not offered any security for due performance of the decree which was a mandatory requirement under Order 42 Rule 6(2) (b) of the Civil Procedure Rules.

Determination.

10. I have considered the Application herein as well as the grounds of opposition filed on the 10th December 2019 I have considered the Application herewith, wherein the Applicants in a clever way have sought for two orders in a single Application, being orders of;

i. Stay of execution of the orders issued on the 29th October 2019 and

ii. Leave to file an Appeal out of time.

11. On the first order, the law concerning stay of execution pending Appeal, under Order 42 Rule 6 of the Civil Procedure Rules stipulates as follows:

No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and

(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

12. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

ii. The Application is brought without undue delay and

iii. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

13. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

14. In the Application before me, the Applicants have pleaded that they would suffer substantial loss if the said orders are executed because the same will result into their eviction from the suit land where they have continued to live for more than 12 years. On this point alone, I am in agreement that they have discharged the first condition as provided for under Order 42 Rule (6) (2) of the Civil Procedure Rules.

15. On the second condition, upon perusal of the Court record, although the Applicants have not filed a copy of the impugned ruling, yet they have alluded to the frustrations the 1st Applicant underwent in the Court Registry when she had tried to extract the proceedings of the trial Court, to the extent that the file even went missing and resurfaced only upon the Respondent's Application for execution. In their Application however the 1st Applicant stated that after the ex-parte Judgment was delivered in a ruling dated the 29th October 2019 she had filed their Application in the lower Court to set it aside, but her Application had been dismissed wherein she sought for proceedings vide her letter dated the 31st October 2019 and thereafter filed the preset Application on the 2nd December 2019. In the circumstance and in light of her predicament, I find that the said Application was brought without undue delay.

16. On the last condition as to provision of security, the Applicants in their Application, have indicated that they will suffer substantial loss unless the order of stay is given. They should therefore be able to quantify such loss they are likely to suffer, which amount should be the equivalent to the amount they are required to give or undertake to pay should the intended Appeal not succeed. The Applicants have not even given an undertaking to provide any security or meet any condition(s) that the Court may impose as pre-requisite for the grant of stay

pending Appeal.

17. It is the Court which exercises discretion as to what kind of security a party should provide based on the circumstances of the case. Security will be ordered where a Court grants the prayer for stay of execution.

18. After going through submissions, pleadings and the record before the Court I find the following issues arising;

i. **Whether the Application before the Court is competent and meritorious?**

ii. **If answer in affirmative, what conditions should be imposed in grant of orders sought?**

iii. **What is the order as to costs?**

19. In the case of **Mohammed Salim T/A Choice Butchery –vs- Nasserpuria Memon Jamat (2013) eKLR**, The Court upheld the decision of **M/s Portreitz Maternity –vs- James Karanga Kabia Civil Appeal No. 63 OF 1997** and stated that:

***“That right of Appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right*”**

20. I have gone through the Application, supporting affidavits and the grounds of objection thereto. I have not yet had an advantage of perusing the record of the trial Court record which parties did not deem fit to annexed herein, however the technicalities being raised by the Respondent will be better served in the Appeal.

21. The Court is empowered to ask the Applicant to deposit security. Such security as stated in *Order 42 Rule (6) (2) (b)* is for the due performance of such decree or order as may ultimately be binding on her. Since I have not had the opportunity of seeing lower Court proceedings, I am not in a position to know the value of the payment of the purchase price of the suit property in contention.

22. On the second Application wherein the Applicants have sought leave to file their Appeal out of time, Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya prescribes the period of 30 days for filing of Appeals from decrees or orders of the lower Court to the High Court, (here read the Environment and Land Court) from date of the decision or order. The said provision permits the admission of an Appeal out of the statutory period of 30 days where there is sufficient or good cause shown as to why there was delay in such filing, the section stipulates as follows;

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that 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.

23. In the case of **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** the court held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. *extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;*

2. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*

3. *whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*

4. *where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*

5. *whether there will be any prejudice suffered by the Respondent, if extension is granted;*

6. *whether the application has been brought without undue delay; and*

7. *whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].*

24. Have the Applicants fulfilled the above requirements so as to be granted leave to file her appeal out of time?

25. Anyara Emukule J in **Gerald M'limbine v Joseph Kangangi [2009] eKLR** interpreted the proviso to Section 79G of the Civil Procedure Act as follows;

“My understanding of the proviso to Section 79G is that an applicant seeking an Appeal to be admitted out of time must in effect file such an Appeal and at the same time seek the Court’s leave to have such an Appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court’s permission to admit a nonexistent Appeal out of the statutory period. To do so would actually be an abuse of the Court’s process which under Section 79B says.....”

26. It is clear that Section 79G of the Civil Procedure Act permits such filing of an Application for leave out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the Appeal in time.

27. The case of **Mwangi V Kenya Airways Ltd [2003] KLR** laid down three conditions to be fulfilled with regard to delay which are:

- i. The length of delay
- ii. The reason for the delay.
- iii. Possibly, the chances of Appeal succeeding if the Application is granted and
- iv. The degree of prejudice to the respondent if the Application is granted.

28. The judgment/ruling of the Magistrate’s Court was delivered on 29th October 2019. The Applicant applied for certified copies of the proceedings within 2 days as shown by the annexure of her Application. The documents sought were had not been supplied as at the time she made this Application which was accompanied with her Memorandum of Appeal. In my view, the Applicant acted diligently and expeditiously in the various steps she took with a view to lodging an Appeal.

29. Having considered the application, the supporting affidavit and the oral submissions hereto, I find that the Application dated 2nd December 2019 herein was brought without unreasonable/excusable delay the ruling having been issued on the 29th October 2019.

30. The Court is, therefore, inclined to grant and hereby grants leave to, the Applicants to file their Appeal out of time so as to enable them exercise their right of Appeal. The Respondent will not suffer any prejudice since he will have an opportunity to challenge or oppose the Appeal.

31. In the circumstance, I make the following orders:

- i. That there shall be stay of execution of decree in Nyeri Chief Magistrates’ Court Case No. 176 of 2018 pending the hearing and determination of the Appeal herein on *condition that the Applicants shall within 21 days from the date of this ruling deposit Kshs.500,000/= (Five Hundred Thousand) in a joint earning interest account In default, the stay shall automatically lapse.*
- ii. That the Appeal herein as filed is hereby admitted out of time and deemed to be duly filed and served within the stipulated statutory period.
- iii. That the Applicant/Appellants shall within 60 days from to date compile, file and serve upon the Respondent a complete record of Appeal.
- iv. The Deputy Registrar is directed to call for the proceedings of the lower Court record for admission of this Appeal to hearing expeditiously.
- v. Costs to abide as per the outcome of the Appeal.

It is so ordered.

Dated and delivered at Nyeri this 13th day of February 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE