



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 52 OF 2013

ALEXANDER VINCENT MABONGA

(Suing as the legal representative of

JOSEPH WEKESA TULULA (deceased).....PLAINTIFF

VERSUS

HILDA WANJIRU TULULA1ST DEFENDANT

JOSEPH MIENI.....2ND DEFENDANT

RULING

1. The application dated **30/7/2019** and filed in court on the same date has been brought by the plaintiff/applicant seeking the following orders:

1. **...spent**

2. **That the court be pleased to grant leave to the applicant to file an appeal out of time and that the Notice of Appeal annexed hereto be deemed as duly filed upon payment of requisite court fees.**

3. **...spent**

4. **That the court be pleased to order stay of execution of judgment given on 6/5/2019 pending hearing and determination of this application and the appeal.**

5. **That costs of this application be awarded to the applicant.**

2. The application is brought under provisions of **Sections 1, 3, 3A of the Civil Procedure Act, Order 22 Rule 22 of the Civil Procedure Rules.**

3. The grounds on the face of the application are that judgment was delivered awarding the defendant **4 acres** of land and the plaintiff intends to appeal; that the intended appeal has overwhelming chances of success; that failure to file and serve a notice of appeal within the time prescribed was occasioned by lack of knowledge of the date of delivery of judgment; that the delay is not inordinate or inexcusable and that the appeal will be rendered nugatory unless leave to appeal out of time and stay are granted.

4. The application is supported by the affidavit of the plaintiff, sworn on **25/7/2019**. In that affidavit the plaintiff reiterates the same grounds above. He states that on the date the matter was scheduled for delivery of judgment the court did not sit and subsequently no notice of judgment was issued to the parties; that a notice of appeal was filed on **13/6/2019** which was rejected by the registry for being out of time and that the respondent will suffer no prejudice given that the land is under his control.

5. The respondent filed a replying affidavit dated **21/10/2019**. He depones that the application is fatally defective and an afterthought; that the applicant was aware of the delivery of judgment since the Deputy Registrar gave notice which was displaced on the Court's Notice Board and forwarded to the LSK Kitale Chapter WhatsApp Group; that the applicant has not demonstrated what steps he took after learning that the court was not sitting on **12/4/2019** and that the appeal has no chances of success since the applicant admitted that the children of his deceased's sister shall get a part of their share of the land. This last point is important because the defendant's entitlement would have to be processed through the estate of the plaintiff's sister.

6. The plaintiff filed his submissions on 21/1/2020. The 2nd defendant filed his submissions on 4/2/2020.

7. I have considered the application and the response and the submissions. The issues that arises for determination in the application are as follows:

- (1) *Whether the applicant should be granted leave to file an appeal out of time;*
- (2) *Whether an order of stay of execution of judgment pending appeal should issue;*
- (3) *Who should bear the costs of this application?*

(1) Whether the applicant should be granted leave to file an appeal out of time

8. This court has jurisdiction to extend time within which an applicant needs to file an appeal to the Court of Appeal. (See the case of **Kenya Airports Authority & Another vs Timothy Nduvi Mutungi, Court of Appeal, Civil Application No. NAI 165 of 2013 (UR 113/2013) (2014) eKLR**, the case of **Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR** and lastly the case of **Loise Chemutai Ngurule & Another v. Winfred Leshwari Kimung'en & 2 Others (2015) eKLR**.)

9. In the case of **Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR** it was stated as follows:

“It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.”

10. The question arising in the instant application is whether the applicant deserves such an extension of time. The main issue that must be addressed is whether there is satisfactory explanation for the delay.

11. As to whether the delay has been properly explained, I note that the reason given for the delay is that the applicant did not know of the judgment date. It is correct that the court never sat on 12/4/2019 when it was supposed to deliver the judgment in the matter.

12. The court record shows that judgment was delivered on 6/5/2019. However a notice issued by the Deputy Registrar on 8/4/2019 notified advocates, litigants and members of the public that the 2019 Easter Vacation would commence on 10/4/2019 and terminate on 23/4/2019 both days inclusive; hot on the heels of the notice aforementioned the Deputy Registrar issued another notice on 15/4/2019 notifying all that all matters scheduled to come up before court for judgements and rulings including this suit had been rescheduled to 6/5/2019.

13. The plaintiff's counsel is deemed to be of the category of persons that would place keen interest on the dates court vacations begin and end, and especially so when certain matters had been scheduled for hearing, ruling or judgment on dates that subsequently happened to fall under the vacation period. It is clear that had the counsel for the applicant enquired at the registry or perused notices displayed on the notice board, he would have been seized of the information that judgment in this matter would be read on 6/5/2019. Had he done that he would have been in a position to attend the delivery of judgment and to advise his client appropriately and to obtain his instructions on the way forward. There is therefore no good explanation for intimation that the applicant's counsel could not know the new date of judgment before it was delivered.

14. However I must take cognizance of the fact that **paragraph 12** of the applicant's affidavit states that he is based in the United Kingdom; the same fact was brought to the attention of the court as parties were readying themselves for the hearing of the main suit herein. This court is of the view that with increase in distance also comes attendant difficulty of communication in some cases when expense, time zoning and other factors are considered.

15. Mistakes of counsel are common and in certain deserving cases this court is inclined to overlook those mistakes if only to do substantive justice to an applicant. In the case of **Sheikh T/A Hasa Hauliers v Highway Carriers Ltd[1988] eKLR** the Court of Appeal (**Gachuhi, JA**) observed as follows:

“It must be clear that the court is to administer justice through the procedure laid down. It is important in administering justice that the suit in court is between two litigants and the counsel is merely putting the case for his client forward. The litigant, may not be aware of the failure of his advocates in complying with rules. He is at the mercy of his advocate. It is the law of agency that the principal is bound by the acts of his agent. Yet in administering justice, why should the litigant suffer due to the mistakes and errors of his advocate.

If the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant's rights. Mr. Maosa relied on *Pithon Waweru Maina v Thuki Mugiria (ibid)* as an authority that a litigant should not be punished through the mistake of his counsel. This is what was referred to by Harris J in *Shah v Mbogo, (ibid)* so as to avoid miscarriage of justice. The judge misdirected himself in importing matters which caused miscarriage of justice.”

16. Here is an applicant who has explained that he was abroad by the time the crucial events and omissions in this case happened. It is clear

that the judgment was delivered in the absence of the plaintiff and his counsel on 6/5/2019. The applicant was required to file a notice of appeal within 14 days of that date that is by 20/5/2019. He did not do so; it is evident that he tried to file a notice of appeal out of time on 13/6/2019 which he alleges was rejected by the court registry for being out of time; a request for certified copies of proceeding and judgment was also filed on the same date. Thereafter he filed the instant application on 30/7/2019, a period of 70 days from the delivery of judgment.

17. Before me is a defendant who holds a decree in his favour in a suit filed in the year 2013. While considering whether to allow the application before me I must consider whether there is a good ground for denying the decree holder the fruits of his judgment; for while it is correct that every litigant has the right to appeal to a higher court the decree holder's rights must be considered. In the case of **Kenya Railways Corporation v Quicklubes E.A. Limited [2015] eKLR** the Court of Appeal (Mohamed JA) cited the decision in **M/S Portreitz Maternity -vs- James Karanga Kabia, Civil Appeal No. 63 of 1997**, it was stated as follows:

“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.”

18. Whether the applicant's advocate is to blame for the mistake that led to the non-filing of the notice of appeal in time, that now does not matter; that the applicant, who relied on the services of his counsel who could have advised him appropriately but failed to do so, did not know of the new judgment date and that he was abroad by that time this court are sufficient reasons and on that account this court is inclined to extend the time for filing a notice of appeal as sought.

(2) *Whether an order of stay of execution of judgment pending appeal should issue*

19. A stay of execution of judgment is sought. The judgment in this case favoured the 2nd defendant and ordered that the land be subdivided to enable the 2nd defendant obtain title to the parcel he had purchased. This court was of the view that the plaintiff holds the land in trust for the benefit of his siblings and that the interest of the 2nd defendant as a purchaser was included therein.

20. The conditions for a grant of stay of execution are contained in **Order 42 rule 6** of the **Civil Procedure Rules** which provides as follows:-.

“6.(1) 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 subrule (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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) 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.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (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 a subordinate court or tribunal has been complied with.”

21. (i).That the application must have been made without unreasonable delay, (ii). That the court must be satisfied that substantial loss may result unless the order is made, and (iii). that the Applicant is prepared to offer security, are the three conditions a court considers in an application for stay.

22. I have already determined above that this is a proper case for extension of time within which to file a notice of appeal. The issue of delay was addressed in the discussion on that issue. What remains is to consider whether the applicant would suffer substantial loss.

23. As regards substantial loss, it is the applicant's apprehension that if this court does not grant the stay sought the land will be subdivided and title will be issued to the 2nd defendant as ordered. There is, in my view, a real possibility of disposal of the suit land unless the stay orders are granted. The disposal, if it occurs would render the appeal nugatory.

24. The 2nd respondent is said to be still in occupation of the suit land. The applicant acknowledged that he holds the land in trust for his

siblings one under whose estate the respondent claims as stated above. This court having pronounced itself on the entitlement of the 2nd respondent and, leave to file a notice of appeal having been granted, it is upon the appellate court to give its opinion.

25. This court has considered that all efforts to transfer the suit land into the 2nd defendant's name would be rendered a waste of resources perchance the plaintiff's appeal succeeds. The 2nd defendant is still in possession and would only suffer a slight delay in the processing of his title to the suit land if the stay orders are granted pending the finalization of the appeal, now that the leave to file and serve a notice of appeal has been granted.

26. I find that the balance of convenience for all parties lies in granting the stay orders sought. **Order 42 Rule 6** provides that this court may grant a stay of execution subject to terms to be stated. I find that this is a deserving case for the grant of stay.

(3) Who should bear the costs of this application?

27. The applicant shall bear the costs of this application.

Conclusion

28. I therefore issue the following final orders:-

- 1. The application dated 30/7/2019 is allowed in terms of prayer (2) and (3) thereof.**
- 2. The applicant shall file and serve the Notice of Appeal within 7 days and prepare, file and serve his record of appeal within 45 days hereof and both periods mentioned in this order shall run concurrently.**
- 3. The applicant shall deposit into an interest bearing account held jointly between the plaintiff's advocate and the 2nd defendant's advocate within 45 days of this order the sum of Kshs.200,000/= being security for costs in the intended appeal.**
- 4. In default of the conditions set out in Orders Nos. (2) and (3) above either singly or cumulatively the orders of stay granted herein above shall stand automatically vacated.**

Dated, signed and delivered at Kitale on this 10th day of March, 2020.

MWANGI NJOROGE

JUDGE

10/3/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Karani for plaintiff/applicant

Ms. Ondari holding brief for Chebii for the 2nd defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

10/3/2020.