



REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA AT NYAHURURU

JUDICIAL REVIEW No 4 OF 2017

(FORMERLY JR 23 OF 2016)

IN THE MATTER OF APPLICATION BY KIBAIGA KIRANGU KIMIRI FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF MANDAMUS

AND

IN THE MATTER OF COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER LAIKIPIA COUNTY

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY LAND ADJUDICATION & SETTLEMENT

OFFICER-LAIKIPIA COUNTY.....1st INTERESTED PARTY

JOSEPH CHRIS RITICH CHEMASAS.....2nd INTERESTED PARTY

EX-PARTE

KIBAIGA KIRANGU KIMIRI.....SUBJECT

RULING

1. Vide a Judgment delivered on the 17th January 2019, the court granted the order of Judicial Review of Mandamus as prayed by the Ex-parte Applicant wherein it was ordered that 1st interested party do release the Discharge of Charge and Transfer for all that parcel of land known as Laikipia /Suguta (Ex P and D) 234 to Kibiaga Kirangu Kimiri and further that the costs of the Application for leave and this Application be borne by the Interested party.
2. It was upon delivery of the said judgment that the 2nd interested party herein being dissatisfied with the judgment filed his Notice of Motion vide certificate of urgency dated the 21st February 2019 seeking stay of execution of the decree pending the hearing and determination of the Appeal to which he sought for leave to file as well as for orders to extend time for filing the said Appeal against the said Judgment.
3. The application was served upon all parties wherein the Respondent and 1st interested party did not file their responses The application was heard on the 25th March 2019 wherein counsel for the applicant submitted that they had sought for orders of stay pending appeal and secondly, orders for leave to file their appeal out of time, for reasons that they had not been aware of the date the judgment was delivered as Counsel who held brief for them gave them a different date for when the same would be delivered being the 19th February 2019 instead of the 17th February 2019.
4. That it had been after he had perused the court file and he noted that the actual date given by the court for delivery of the Judgment had been on the 24th January 2019. Judgment was however delivered on an earlier date wherein notice had not been served upon them.
5. That their absence during the date of judgment and delay to file our appeal was not deliberate as they were not aware of the judgment date. That they had become aware of the same after the ex parte/applicant served them with an order for execution.

6. That it had been after they had been notified of the delivery of judgment, that they had requested for proceedings on the 20th February 2019 vide their letter and had subsequently filed the present application.
7. That although the response by the ex parte applicant to their application was that execution had already taken place and that they had been issued with the discharge, yet there was no evidence in support thereof. That other than the averment, they ought to have annexed the copy of the discharge. There having been no proof thereof, the applicants sought to be granted leave to appeal out of time as well as an order of stay.
8. That it was in the interest of justice that parties be given an opportunity to canvass their issues to the highest extent possible in court irrespective of whether the appeal would succeed or not. They sought that the 2nd interested party be given that opportunity and for their application to be allowed and costs be in the cause.
9. The application was opposed by the subject /2nd Respondent who relied entirely on their replying affidavit sworn on 13th March 2019. They submitted that the court had no powers to grant orders sought by the Applicant and particularly the order for extension of time to file and serve an appeal out of time which was the preserve of the court of appeal.
10. That the other prayers sought by the applicant flowed from the prayer of extension of time. Having submitted that the court had no powers, the subsequent prayers could not be sought at this stage.
11. That assuming that the court had powers, they submitted that the prayer for stay of execution had been overtaken by events. The first interested party having been served with the orders on 19th February 2019, had executed the orders by releasing a copy of the discharge of charge and transfer in respect of the suit property to the subject 2nd Respondent. The 1st interested party had not filed a response to this application to dispute that issue. There was therefore nothing to stay in this matter at this stage.
12. That the delay in filing the present application had not been explained by the Applicant and the submission to the effect that the date for ruling was mis-diarised was just but an afterthought. Counsel for the Applicant was aware that the judgment was to be delivered on 17th January 2019. That on the 22nd October 2018 the Applicant was duly represented by one Mr. Siglai advocate when the matter came for mention wherein a date for judgment was had been given for 17th January 2019 and the Applicant deliberately failed to attend court for judgment and as per their own admission, moved the court after the 1st interested party was served with the copy of the order.
13. That as per the copy of the order annexed as JCC 1, the same confirmed that the order was served upon them on the 19th February 2019 which prompted them to move court. That Counsel did not attend court on 19th February 2019 as alleged in the application.
14. Having confirmed that the order had been served upon the 1st interested party and no contempt of court orders had been taken out against the 1st interested party, was an indication that the order had been complied with. That they needed not prove by documents or otherwise that the orders of 17th January 2019 had not been complied with. That the horse had already bolted and it was too late to close the stable, as sought by the Applicant. They prayed for the application to be dismissed with costs.
15. In rejoinder, Counsel for the Applicant sought that the court deals with real issues and facts and not presumptions. That nothing could have been easier to annex documents to show compliance by the 1st interested party. Failure by the interested party to file documents did not mean compliance.
16. He submitted that no proof had been indicated and asked the court to refer to the proceedings of 22nd October 2018 when the matter had been given a judgment date. That they had explained the reasons for failure to be present on the Judgment day, the late filing of their application and reasons for leave to file an appeal out of time. He confirmed that the court had jurisdiction to hear and determine the application.

Analyses and determination.

17. *I have considered the submissions both for and against the application to grant leave to file the Applicant's Appeal out of time.*
18. *Indeed from the court record, it is clear that on the 22nd October 2018 the court gave a date for the delivery of judgment for the 24th January 2019. However the same was delivered on an earlier date being the 17th January 2019 when there was no appearance for Counsel for the Applicant. The court noted that there was no notice issued to the Applicant for the said date. To this effect thereof, the court concedes to the Applicant's submission that they had no notice of the judgment date.*
19. That notwithstanding, the Applicant filed their Notice of Appeal on 20th April 2019 as well as the present application.
20. In opposing the said application, one of the grounds raised by the Respondent /subject was that this court had no jurisdiction to grant orders sought by the Applicant and in particular, the order for extension of time to file and serve an appeal out of time which was in their view, the preserve of the court of appeal.
21. As the issue of the jurisdiction of this court to grant the orders sought is capable of determining the issues raised in the instant application preliminarily, I will determine it first.
22. In the case of **Loise Chemutai Ngurule & Another v. Winfred Leshwari Kimung'en & 2 Others (2015) eKLR** Munyao J held as follows:

“It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of Simon Towett Martim v Jotham Muiruri Kibaru, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004)eKLR. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.

With respect I disagree with the above decision. Section 7 of the Appellate Jurisdiction Act, CAP 9, is drawn as follows:-

Section 7 Power of High Court to extend time

The High Court may extend the 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:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

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.

Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned. That provision is drawn as follows:-

Rule 4: Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by the 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.

In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the Court of Appeal Rules which provides as follows:-

One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.

The matter indeed arose in 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. In the case, an application for extension of time to lodge Notice of Appeal was filed in the High Court and the High Court declined to hear it, instead asking the applicant to file the application in the Court of Appeal. Githinji JA, had this to say on that point:-

“The application of 10th December, 2012, was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal Rules (sic) (clearly meant Section 7 of the Appellate Jurisdiction Act) which provides:-(Section 7 of the Appellate Jurisdiction Act set down)... Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined...”

It will be observed that the Court of Appeal did hold that the application for extension of time to lodge a Notice of Appeal out of time had been filed properly in the High Court and the High Court ought to have determined it.

I do not therefore agree with the argument that this court has no jurisdiction to entertain the present application in so far as it seeks extension of time to lodge a Notice of Appeal out of time...”

23. I associate myself with the sentiments of the Hon judge herein above.

24. Having determined that this court has jurisdiction to hear and determine the application, I now turn to the merits of the application.

25. In the case of Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015)eKLR the court as follows:-

“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that

he is entitled to the discretion being exercised in his favour.

26. The parameters for the exercise of such discretion were clearly set out in the case of *Thuita Mwangi vs Kenya Airways Ltd*, [2003] eKLR where the court of appeal held as follows:

“For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

27. The court went on to state that:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.....

28. From the above finding, it can be said that for such an application to be allowed, it is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent.

29. Lord Romilly MR explained in *Haywood vs Cope*, (1858) 25 BEAV 140:

“... the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so.”

30. I have considered the peculiar circumstances of this case. The judgment appealed from was delivered in the absence of the applicant and his counsel; there was no inordinate delay in bringing the application; other than arguing that this court lacks jurisdiction to grant the orders sought, the Respondents have not demonstrated what prejudice, if any they would suffer if the application is allowed.

31. In the instant case on opposition of the applicant, the Respondent herein submitted that the first interested party having been served with the orders on 19th February 2019, had executed the orders by releasing a copy of the discharge of charge and transfer in respect of the suit property to the subject 2nd Respondent. No evidence was adduced in support of the said allegation.

32. In the decided case of *Monica Malel & another v Republic & 2 others* [2009] eKLR the court held as follows:

When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show. Also the averment in the affidavit about financial constraint should have come from the applicants and counsel's deponent on it amounts to hearsay.

33. I am, therefore, inclined to exercise the discretion vested in this court in favour of the Applicant as no substantial prejudice will be occasioned on the Respondent.

34. I therefore make the following orders:

- i. The time within which the Applicant ought to have filed an appeal to the Court of Appeal is extended by **forty-five (45)** days from the date of this ruling.
- ii. If the Applicant has not been supplied with the documents required to prepare the record of appeal, the Applicant's counsel to liaise with the Deputy Registrar of this court and ensure that the same are supplied within **fifteen (15)** days of this order.
- iii. If the applicant does not file the appeal within the time stipulated in (i) above, the window granted to file the appeal shall automatically lapse.
- iv. *Costs be in Cause.*

Dated and delivered at Nyahururu this 11th day of June 2019.

M.C. OUNDO

