



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL CASE NO.1 OF 2018**

**SEA TURLE LIMITED**

**COLLIN STUART .....PLAINTIFF**

**VERSUS**

**EQUITY BANK (KENYA) LIMITED.....DEFENDANT**

**RULING**

1. Vide a notice of motion dated 29<sup>th</sup> April, 2019, the plaintiff/Applicant seeks orders for;

(a) spent;

(b) spent;

(c) The Honourable court be pleased to extend time within which the plaintiffs may file and serve a Notice of Appeal in the intended appeal against the ruling and orders of this court delivered on 11<sup>th</sup> March, 2019 and the Notice of appeal filed with this application be deemed as duly filed.

2. The application is premised on the grounds on its face and supported by the supporting affidavit of COLLINS STUART as follows;

(a) That Honourable court delivered its ruling without notice and in the absence of the plaintiff's previous advocate on record dismissing the plaintiff's notice of Motion dated 12<sup>th</sup> January, 2018 and allowing the defendant to proceed with the selling of the suit property.

(b) That the 2<sup>nd</sup> plaintiff was unaware of the court's ruling until or about 26<sup>th</sup> March, 2019 when the previous advocate brought the same to his attention.

(c) Dissatisfied with the court's findings, the 2<sup>nd</sup> plaintiff inquired from the previous advocates whether there was room to challenge the same by way of appeal

(d) The said advocates indicated that they required to raise further fees and raise substantial amounts of monies as security if any appeal was to be pursued and withheld information from them on the possibility of an appeal. They were unable to comply with this directive on such short notice as the amount was enormous.

(e) That following the court's ruling of 11<sup>th</sup> March, 2019, the defendant through Messrs. Antique Auction Agencies issued the plaintiff/Applicant with a 45 days Redemption Notice together with a notification of sale indicating that the suit property No.KWALE/MCHINGIRINI/379andNo. KWALE/MCHINGIRINI/380 would be sold by way of public auction or of private treaty on 31<sup>st</sup> May, 2019.

(f) That the delaying in filing and serving notice of appeal is excusable by this court as the same was unintentional.

(g) The plaintiff/applicant avers that the intended appeal has arguable points and is apprehensive that if the orders he seeks are not granted, the same will be rendered nugatory.

3. The Respondent opposed the motion by way of grounds of opposition dated 2<sup>nd</sup> May, 2019;

**(1) There is no reasonable explanation offered for the delay in filing the Notice of Appeal within time. No evidence is presented to support the standoff that allegedly led to the delay nor to explain the impossibility in instructing the new advocates in good time.**

**(2) The delay of over thirty (30) days is inordinate and inexcusable given the basic and elementary nature of a Notice of appeal.**

**(3) The plaintiffs are in any event not entitled to the equitable order since they have deliberately given excuses that are fundamentally contradictory to wit;**

**(a) Whether the plaintiff became aware of the ruling on 22<sup>nd</sup> March, 2019 or 26<sup>th</sup> March, 2019.**

**(b) Whether the plaintiffs sought and obtained legal advice or their right of appeal from their former advocates on record or whether that advice was sought and denied.**

**(c) Whether the plaintiffs attempted to comply with their former advocates' demand before seeking alternative representation or did not attempt to comply and simply sought alternative representation.**

**(4) The intended appeal is plainly frivolous seeing as it even intends to call for additional evidence at the court of appeal to repair the deficiencies in the case before the High Court.**

**(5) In any event, the intended appeal, would not be rendered nugatory even if the injunction is denied and the charged land sold. Any loss to the plaintiffs would be adequately compensated by an award of damages.**

**(6) It would be inequitable, and greatly prejudicial to the defendant, given the circumstances of the case, to grant an unconditional injunction pending appeal.**

4. The counsel for the parties dispensed the application via oral submissions on 8<sup>th</sup> May, 2019, each having filed a list of authorities in support of their said submissions.

5. According to the Applicant/Plaintiff's counsel, they have brought the application under section 7 of the Appellate Jurisdiction Act, sections 1A.1B 3 and 3A, all of the Civil Procedure Act and Articles 48, 50 (1) and 157 (2) all of the Constitution of Kenya, 2010. By the time of urging the application, the Applicants/Plaintiffs' counsel is seeking orders with regard to prayers No.3 4, 5 and 6 of the same. He referred to the grounds set out on the face of the application and supporting affidavit of COLINS STURART verbatim to emphasize the basis upon which they are seeking courts leniency for ;

**(a) A temporary injunction pending hearing and determination of an appeal.**

**(b) Extension of time for filing an appeal.**

**(c) Validating the notice of appeal as filed.**

6. He cited the case of **GEORGE GAKIO KINOVA VRS ANNAH WAMAITHA GITHINJI (2019) e KLR** where Justice R. Nambuye recognized that a tussle between a litigant and their advocate are common place in litigation and can delay in the appellant process.

7. He also cited the case of **NANCY WEANJIRA MWAURA VRS JENNIPHER WAIRIMU NJOGU AND THREE OTHERS (2019) e KLR** to buttress the same point. The applicant /Plaintiff counsel also submitted that a court that dismisses an interlocutory application has wide discretion to grant an injunction pending appeal against its on ruling so as not to render the appeal nugatory in the event it succeeds. (See **ERINFORD PROPERTIES LTD VRS CHESHIRE COUNTY COUNCIL (1974 )2 All E.R 448.**

8. He further submitted that the applicants intended appeal has an arguable appeal as set out in the supporting affidavit, the main one being that the Defendant/Respondent's right to sell the suit property in exercise of a statutory power of sale has not accrued, that the Defendant /Respondent delayed in the implementation of the letter of offer, and that at the time of the ruling, the defendant had not filed a statement of defence to controvert the facts as pleaded by the plaintiff in their paint, hence there can be no joinder of issues. He hence seeks to have this court protect the integrity of the appeal.

#### **RESPONDENT'S SUBMISSIONS.**

9. Mr. Kongere, learned counsel for the respondents opposed the application vide grounds of opposition dated 2.5.2019. He submitted that the principle of extension of time is not a right but a discretion so that a party who seeks such order ought to satisfy the court with a basis upon which he bases the same. He argues that reason given by a party seeking extension of time must be honest, plausible, and not contradictory. He noted that the application does not provide any documents to support or demonstrate good faith on the reason why it has taken long for them to file the application within good time.

10. On the issue of whether this court can grant an injunction, Mr Kongere submitted that while he does not doubt this court's jurisdiction on this, the applicant's case does not merit the same as its intended appeal is frivolous since the issue of whether there was proper service of the three statutory notices was resolved by the court in its ruling.

11. Also, that to grant the injunction sought will inflict a lot of hardship on the defendant than it will avoid since the default which continues to subject only results into an accrual of both normal and default interest as long as the loan remains due and owing.

12. He then submits that the Plaintiff/Applicant offered their home as security with full knowledge of what the consequences of default could be. He, however concluded by submitting that if the court is inclined to allow the applicant's application, then the same be conditional in that the applicant be ordered to deposit at least half of the outstanding amount, and the auctioneer's costs.

13. He cited the following in support of his argument in opposing the application by the applicant.

**1. DONALD RABALLA VRS JUDICIAL SERVICE COMMISSION AND ANOTHER 2018 AT PAGE 4**

**2. MADHUPAPER INTERNATIONAL LIMITED VRS KERR (1985) e KLR a page 11**

**3. FRANCIS J K KHATHA V HOUSING FINANCE COMPANY OF KENYA LTD 2009 at page 18**

**4. MUKUA TUTUMA VRS CO-OPERATIVE BANK OF KENYA LTD (2008) e KLR at page 22**

**5. MWATHI NYUTU VRS SAVINGS AND LOANS KENYA LIMITED (20150) e KLR at page 27**

14. I have read through the notice of motion application dated 29<sup>th</sup> May, 2019 the ground upon which it is premised, the grounds of opposition and submission by both parties presented before court to support each party's stand. I find two issues stand out for determination. They are;

**(i) Whether time may be extended for the Plaintiff/Applicant to file and serve its notice of appeal for its intended appeal.**

**(ii) Whether the orders of stay pending appeal can be issued for the applicant.**

15. With regard to the first, the applicant is seeking court's leniency to extend time and validate the notice of appeal as filed since it ran out of time to file a notice of appeal. The applicant explains their predicament and places the former advocate who they alleged failed to inform them of the ruling in good time and inform them that they needed to file a notice of appeal within 14 days of the same. They had to source for funds so as to engage a new advocate.

16. Section 7 of the Appellate jurisdiction Act, Cap 9 is drawn as follows:-

**“Power of the 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.”**

Rule 4 of the Court of Appeal Rules, 1972 provide as follows;

**“ 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 or reference in these Rules to any such time shall be construed as a reference to that time as extended”.**

17 An application for extension of time to lodge a Notice of Appeal was filed in the High Court and the High Court declined to hear it, and instead asked the Applicant to file the application in the court of appeal. This is the case of **KENYA AIRPORT AUTHORITY & ANOTHER VRS TIMOTHY NDUVI MUTONGI, COURT OF APPEAL CIVIL APPLICATION NO NAIROBI 165 FO 2013 (UR 113/2013) (2014) e KLR**, where Githinji, JA, had this to say on that point;

**“ The application for 10<sup>th</sup> December, 2012 ( the application for extension of time to lodge Notice of Appeal ) , was properly made in the High Court as High Court has power to extend time for giving notice for 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) of the Appellate Jurisdiction Act set down)... since the application or extension of time for lodging a notice of appeal made in the High court was competent and which the High Court should have determined ....”**

18 The principles that guide a court in considering an application for leave to file an appeal out of time were laid down by the court of Appeal in the case of **STANLEY KAHORO MWANGI & OTHERS VRS KANYAMWI TRADING COMPANY LTD(2015) e KLR**, this

**“The principles guiding the court on an application for extension of time premise upon rule 4 of the Rules are well settled**

**and there are several authorities on it. The principle 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”.**

19. It is trite law that in an application for extension of time, the while period of delay should be declared and explained satisfactorily to the court. Further the Supreme Court has settled the principles that are a guide in the existence of discretion to extend time. In **NICHOLAS KIPTOO KORI ARAP SALAT VRS INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 7 OTHERS (2014) e KLR**, the court delineated the following as the underlying principles that a court should consider in exercise of such discretion;

**(i) 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;**

**(ii) a party who seeks for extension of time has the burden of laying basis to the satisfaction of the court;**

**(iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**

**(iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**

**(v) Whether there will be any prejudice suffered by the respondents if the extension is granted;**

**(vi) Whether the application has been brought without undue delay and ;**

**(vii) Whether a certain case, like election petitions, public interest should be consideration for extending time”.**

20. This discretion for a court to extend time for a party to file an appeal is one of main stays for access to justice for parties and a guarantee for the right to be heard on the merits as entrenched under Article 159 A of the Constitution ,2010. And why unfettered? So that a litigant who has a deserving case is not locked out of the corridors of justice. But it is absolute that an application seeking such order must sufficiently explain and justify the delay to the satisfaction the court.

21. The Applicants main ground in this application is that the ruling was delivered without the parties knowledge and or notification by the Deputy Registrar of the ruling date. The Applicant only found out that the ruling had been delivered 11 days later when their advocate on record thus received a letter from the defendants advocate notifying them of the same. Also, the applicant alleges that its former advocate withheld information from them and demanded for further payment of fees immediately as a security deposit for any appeal.

22. I have considered the circumstances of the case in view of the applicant’s arguments. The ruling intended to be appealed from was delivered in the absence of the applicant and his counsel. Also, I find that there has been no inordinate delay in bringing the application and from the respondent’s response, the prejudice that they would suffer if the prayer for extension of time is allowed has not been demonstrated by them. In the circumstance, I exercise the discretion vested in this court in favour of the applicants as no substantial prejudice will be occasioned to the respondent.

23. The second issue for determination is whether the orders of injunction can be issued pending an appeal. Having articulated itself in the ruling that was delivered on the 11<sup>th</sup> March, 2019 and since the current application is not an application for review of this court’s order, then I find no basis of departing from the same since the court already expressed itself on the issue of temporary injunction restraining the defendant/Respondent from selling the suit property herein. Article 50 (1) of the Constitution provides;

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.**

24. The defendant /Respondent opted not to file a replying affidavit to the application dated 29<sup>th</sup> April, 2018 but filed grounds of opposition in response thereto. In view of this, the averments in the applicant’s supporting affidavit remain unchallenged, and therefore the defendant/respondent has not demonstrated the prejudice it stands to suffer, if an injunction pending appeal is granted.

In the case of **MOHAMMED & ANOTHER VRS HAIDARA (1972) E.A 166 at page 167, F H SPRY V** considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows;

**“The respondent made no attempt to reply to these allegations and they therefor remain unrebutted.....here, the respondent’s affidavit gives no material facts and the only real evidence of facts is that contained in the appellants’ affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied”.**

25. In fact, in the case of **KENYA AKIBA MICRO-FINANCING LIMITED VRS EZEKIEL CHEBII & 14 OTHERS (2012) e KLR**, the court stated as follows;

**“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for the matter”**

26. In analysis, I find that the Defendant/Respondent will not suffer any prejudice if an injunction pending the hearing and determination of

the intended appeal against the ruling of this court delivered on 11<sup>th</sup> March 2019, since it has in its possession the certificates of title of the two suit properties and the plaintiff/applicants having already been ordered to pay the auctioneers fees by this court. For this court, that is adequate security.

27. In the upshot, the Plaintiff/Applicant's application dated 29<sup>th</sup> April, 2019 succeeds and a temporary injunction restraining the Defendants/Respondents its employees, servants, and or agent or any other wise assigns from alienating, advertising for sale offering for sale, selling taking possession of leasing, transferring, charging or otherwise in any manner whatever interfering with parcels of land title number KWALE/MCHINGIRI/379 and NUMBER KWALE/MCHINGIRI/380 to issue pending the lodging, filing and hearing of the intended appeal at the court of appeal.

28. The applicant be and is hereby ordered to lodge the said appeal within 60 days for this date.

Costs shall be in the cause.

**Delivered, signed and dated this 7th day of June, 2019.**

**LADY JUSTICE D. O. CHEPKWONY**