



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL APP NO. 95 OF 2017

PAUL N P MUVITIYE.....APPLICANT

VERSUS

PIUS NJAGI KARIUKI.....RESPONDENT

R U L I N G

1. This is a ruling on the application dated 31/08/2017 seeking for leave to file an appeal out of time against the judgment of the Chief Magistrate Embu delivered on 9/05/2016.
2. The grounds supporting the application are that the applicant's advocate applied for proceedings and judgment on 10/05/2016 for purposes of filing the appeal. The proceedings were certified after a long period, that is on 28/08/2017.
3. The respondent opposed the application in his replying affidavit on grounds that it was filed over one year after judgment; that the applicant did not require the proceedings to file a memorandum of appeal; and that the appeal has no chances of success.
4. The respondent further states that he has already obtained registration of the land since the applicant failed to obtain stay of execution. It is further deposed that the suit PMCC NO. 206 of 1992 has been in the courts pending determination for a period of 26 years since 1992.
5. The respondent did not file submissions herein despite being granted time to do so.
6. The applicant explains as per the supporting affidavit that the proceedings delayed after he applied for them. He sent a reminder on 13/02/2017 but to no avail. It was not until one year later that the proceedings were provided.
7. The case of **Nicholas Kiptoo arap Salat Vs IEBC & 7 Others [2014] eKLR** was relied on which laid out the principles to be applied in determining an application for leave to appeal out of time as follows: -
 - a) *The length of the delay; or*
 - b) *The reason for the delay.*
 - c) *The chances of the appeal succeeding.*
 - d) *The degree of prejudice upon the respondent.*
8. In regard to the length of delay, the applicant filed this application on 4/07/2017 which was over one

year after judgment was delivered. The applicant states that his counsel applied for proceedings only one day after the judgment, on 10/05/2016 and paid the requisite fees.

9. The reminder letter is dated 13/02/2017 which was about eight (8) months after the proceedings were applied for. This was quite a long period after proceedings were applied for. The question is why the applicant took so long if he was still keen in filing the appeal. The proceedings were certified on 28/08/2017 and collected on 29/08/2017 and a certificate of delay obtained.

10. For over one year of waiting for proceedings, the applicant sent only one reminder. It is my view that although a certificate of delay was issued, the applicant was not in a hurry. If some serious follow up was done the proceedings would have been obtained earlier than 29/08/2017.

11. The time for lodging the appeal was 30 days which had elapsed by the 8th June 2017. The lapse of time would have motivated the applicant to use due diligence in following up the proceedings. However, the applicant seems to have lost interest in this pursuit.

12. Even if the applicant was to be accommodated for his delay of over one year, he has an obligation to satisfy this court that he has an appeal with good chances of success.

13. It was explained by the respondent which was not denied that the suit, based on a land sale agreement was in possession of the respondent since 1979. The consent for transfer had been obtained thus placing the respondent at an advantage over the applicant in the said suit. It is the non-disclosure of the applicant that he had placed charge over the land, that prevent the transfer from being executed at its planned time.

14. Further, the failure to apply for stay of execution of the judgment, coupled with the delay of filing the appeal has its impact on the status of the parties after the judgment. The respondent has already obtained registration of the land and is the registered owner.

15. The degree of prejudice on the respondent in the event that the judgment is reversed on appeal would be devastating in way of funds already spent on registration. This would also affect the respondent in that it is not economical in way of time while the whole process would have been put on hold by orders for stay.

16. I am in agreement with the respondent that the applicant would have filed the memorandum of appeal and at least obtained a copy of the judgment for the application for stay to be heard and determined as he waited for the proceedings. This basically means that the applicant did not need the proceedings to file the appeal and to apply for stay.

17. My view is that the applicant is an indolent litigant who has come to court a bit late in the day. He has failed to satisfy the court to the reasons for delay. Neither has he shown that his appeal has any chances of success based on the advanced stage of the land sale transaction.

18. The degree of prejudice tilts in favour of the respondent, that he would be greatly and adversely affected by the reversal of the execution of the judgment.

19. Consequently, I find no merit in this application and dismiss it with costs to the respondent.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF SEPTEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Maina for Kathungu for Applicant

Ms. Muthoni Mboi for Respondent