



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL SUIT NO. 949 OF 2007

PASTEUR DUKUZUMUREMYI.....APPLICANT

VERSUS

ANTHONY MILIMU LUBULELLAH T/A

LUBULELLAH & ASSOCIATES ADVOCATES.....1ST RESPONDENT

KIWAKA GENERAL MERCHANTS LIMITED.....2ND RESPONDENT

RULING

The Applicant herein (Pasteur Dukuzumuremyi) has moved this court by way of a Notice of Motion dated the 7th day of December 2015 under Article 159 of the Constitution, Order 50 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A and 75 of the Civil Procedure Act seeking orders that;

- 1. That this Honourable court be pleased to extend the time within which the Applicant herein can apply for leave to appeal against the Ruling and orders of Justice HPG Waweru dated 18th day of October 2013.*
- 2. That the Honourable court be pleased to grant leave to the applicant to appeal against the order of Justice HPG Waweru dated 18th day of October 2013.*
- 3. That the cost of this application be provided for.*

It is supported by the annexed affidavit of Peter Munge Murae and its premises on the grounds set out on the body of the same.

It is deponed that, on the 18th day of October, 2013 a ruling was delivered by Honourable Justice HPG Waweru in Misc. 949 of 2007 and the Applicant being dissatisfied with that ruling filed a Notice of Appeal dated the 24th day of October 2013, on the 28th October, 2013.

That due to an inadvertent oversight and mistake the leave to appeal was not sought at the delivery of the ruling hence the application herein for extension of time within which to do so.

The Applicant avers that the application is meritorious and he shall suffer irreparable harm as the property in question is very valuable and it is in the interest of justice that he be allowed to appeal against the ruling and that the inadvertent mistake of the advocate should not be visited upon the client.

That the applicant has already filed the Memorandum and Notice of Appeal against the said ruling.

The Respondents have opposed the application. In its Replying affidavit sworn by Wilfred Akhunya Mutubwa on 10th March, 2016, the 1st Respondent avers that a ruling was delivered on 18th October 2013 by Justice Waweru in this case whereby the Applicant's application to set aside the sale of the property to the purchaser was dismissed with costs. That the applicant being dissatisfied with the ruling filed a Notice of Appeal on the 28th October, 2013 but failed to serve both the 1st and 2nd Respondents contrary to Rule 77 (1) of the Court of Appeal Rules, 2010 which provides that such a notice ought to be served within seven days after it has been lodged.

The 1st Respondent avers that an Appeal does not lie as a matter of right from the ruling of Waweru J without the leave of the court as provided for under Section 75 of the Civil Procedure Act and no application for such leave was made orally or formally in court upon delivery of the aforesaid ruling. That the Notice of Appeal was filed without leave of the court and it is therefore defective, incompetent and an abuse of the court process.

The 1st Respondent urged that the application herein and the Appeal itself have since been overtaken by events, a resting order in favour of the purchaser having been issued on the 17th day of May 2011. That an application by the applicant herein for an injunction and stay of further proceedings pending Appeal was rejected/ dismissed by the Court of Appeal on the 6th day of June, 2014 and upon dismissal of the same, the transfer of the property was done long ago.

It is averred that the application is a belated afterthought for the reason that the substratum of the appeal setting aside of the sale of the property to the purchaser has long been overtaken by events since the property was long ago sold to the 2nd Respondent, a bonafide purchaser for value, on the 29th September, 2010 which sale was made absolute by the court on the 17th May, 2011 and the proceeds thereof used to satisfy the Decretal amount due to the 1st Respondent from the applicant and the residual balance was paid into court. The 1st Respondent contends that the application is tainted by laches and undue delay as the same has undoubtedly been filed approximately 26 months after the delivery of the ruling. He prays that the application be dismissed.

On its part, the 2nd Respondent filed a Replying affidavit on the 26th day of April, 2016, sworn by Stephen Kimani Kamau, in which he depones that the prayers sought in the application herein are frivolous, vexatious, an abuse of the court process, untenable and without merits. He denies that the applicant served a Notice of Appeal upon the 2nd Respondent as alleged. He confirmed that following the said ruling, the applicant filed Civil Appeal No. 325 of 2013 at the Court of Appeal seeking an injunction pending appeal but the same was dismissed.

He averred that in the said application, the incompetence of the applicant's appeal for want of leave and failure to serve Notice of Appeal on the parties was raised and therefore, the Applicant as early as in the year 2014 was aware of the want of leave but willfully failed, neglected and/or declined to move the court timeously for the same. He depones that given that the Court of Appeal has found the Appeal does not raise any arguable issues, compounded by the fact of the inexplicable, unexplained and inordinate delay in bringing this application, the same is incompetent, an afterthought, misconceived, ill willed and an abuse of the court process.

The deponent has also faulted the applicant for his failure to make material disclosure of the fact that he has indeed lodged an Appeal without leave being Civil Appeal No. 176 of 2015. Similarly, he has also failed to disclose that the Respondents herein have both filed applications to strike out the Notice of Appeal and the Record of Appeal for want of leave and thus the application is thus mischievous, mala fide and vitiated by misrepresentation and non disclosure of material facts and therefore the same should be dismissed as the Applicant has not come to court with clean hands.

It is further contended that the Respondents should have a right to enjoy the fruits of their judgment as the application herein is geared at delaying, obstructing and/or circumventing the course of justice and the realization of the Decree. He added that a consequential application having alienated the suit property to an entity namely African Telecom Solutions Limited vide a conveyance dated 3rd June, 2011 the applicant cannot stake any claim over the property or plead irreparable harm on account of the value thereof.

The deponent further avers that it is callous, untenable and indifferent of the applicant to feign mistake as the cause of failure to lodge the Application for leave for over two years without giving any specifics of the said mistake. That, whereas the mistakes of an Advocate ought not be visited on a client, the same is not a panacea for every act of impropriety especially in this case where the applicant has not demonstrated what measures he has taken to follow up on the matter and why so much time has been expended. That a case belongs to a litigant and not the advocate and therefore the applicant cannot hide behind the Advocate without showing the measures that he has taken in following up and expediting the Appeal process including but not limited to, seeking leave.

The application was canvassed by way of written submissions which the parties filed and which this court has duly considered together with the application and the affidavits both in support of and in opposition to the same. The court has also perused the judicial authorities relied on by the parties.

From the evidence on record, it is clear that the applicant required the leave of the court to file an appeal against the ruling of Justice Waweru delivered on the 18th day of October, 2013 which leave was not sought for within the required period and it is for that reason that the applicant has moved this court with the application herein.

There is no doubt that the court has powers to grant extension of time and the same is donated by Section 95 of the Civil Procedure Act and also by Order 50 Rule 6 of the Civil Procedure Rules.

However, though the power is discretionary the same should be exercised judicially. The factors to be considered by the court in exercising such discretion were considered by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission (IEBC) & 7 Others** Supreme Court Application No. 16 of 2014 which are:-

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis.
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- e. Whether there will be any prejudice suffered by the Respondents if the extension is granted.
- f. Whether the application has been brought without undue delay.

g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

The Applicant contends that he was keen on filing the Appeal as he filed the Notice of Appeal and the Record of Appeal on time, following the delivery of the judgment. The failure to seek leave to appeal at the delivery of the ruling was due to inadvertent mistake on the part of the counsel and he immediately made this application when it became known to their advocate that leave to appeal was necessary before instituting the Appeal. He has urged the court not to visit the mistake of his Advocate on himself and has relied on the case of **Philip Chemwolo & Another vs Augustine Kubende (1986) KLR 492** and that of **Murai vs Murai NO. 4 (1982) KLR**

He further submitted that enlargement of time will not in any way prejudice the Respondents as the suit property is in the hands of the purchaser and having served them with the Notice of Appeal and the Record of Appeal they were aware of his intention to Appeal against the ruling. He has argued that, to the contrary, it is him who will suffer irreparable loss as the property in question is very valuable, having been valued at Kshs 30 million and its only fair that the Appeal be heard on merits.

The 1st Respondent on his part submitted that the Notice of Appeal was filed without the leave of the court and it is therefore fatally defective, incompetent and an abuse of the court process. That the delay in filing the application was unreasonable and that the applicant has not come to court in good faith and has failed to disclose important material facts.

The 1st Respondent also argued that the Applicant has failed to satisfy the court that he deserves leave extending the time. He has relied on the case of **Attorney General vs Peter Ombuna Makori (2015) eKLR** and that of **Nicholas Kiptoo Korir Salat (Supra)**. On the issue of unreasonable and inordinate delay he cited the case of **Aviation Cargo Support Limited vs St Mark Freight Services Limited (2014) eKLR**.

On his part, the 2nd Respondent submitted that the Applicant is guilty of inordinate delay which delay has not been explained. He has relied on the case of **Kenya Airports Authority vs Silas Obengele**, Civil Application No. 297 of 2004 (unreported) as cited in the case of **Reliance Bank Limited (in Liquidation vs Grandways Ventures Limited vs 2 Others & Anothr (2007) eKLR**. On the overriding objective, he contended that failure to follow laid down procedure was held to be substantive and not mere procedural technicalities as was stated in the case of **Republic vs Kikuyu Divisional Land Dispute Tribunal & 2 Others Exparte Livingstone Gichanga Kareng & Another (2012) eKLR**.

The court has considered those submissions and the authorities cited. On the issue of delay, the application herein was filed over two (2) years after the ruling was delivered on 18th October 2013. The delay has been attributed to inadvertence on the part of the counsel for the Applicant.

In his submissions he stated that the application herein was filed when it became known to his advocates that leave to appeal was necessary before instituting the Appeal. Order 43 Rule 1 (B) provides in mandatory terms as follows:-

“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order was made or within fourteen days from the date of such order.”

As the Court of Appeal held in the case of **Aviation Cargo (Supra)**... what is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case herein, the applicant waited for too long before bringing the present application and no reasonable explanation has been given to this court. The delay was indeed inordinate. A delay of more than two years is unwarranted and unreasonable.

The Applicant has sought an equitable remedy, it is trite that Equity does not aid the indolent but the vigilant. The applicant slept on his rights for too long and thus acquiesced for a great length of time.

The applicant has sought refuge in the overriding objective under Sections 1A and 1B of the Civil Procedure Act. As was stated in the case of **City Chemist (Nbi) & Another vs Oriental Bank Limited Application No. 302 of 2008 UR 199 OF 2008** as cited in **Aviation Cargo Support Limited vs St. Mark Freight Services Limited (2014) eKLR**.

“...The overriding objective does not however facilitate the gravity of orders seeking leave or extension of time to file record of appeal where the applicant has not shown to the satisfaction of the court that the delay is not inordinate or has been explained to the satisfaction of the court. In the instant application, the applicant is guilty of inordinate delay and has failed to explain it to the satisfaction of the court. Consequently, I am unable to exercise my discretion in favour of the applicant as his application lacks merit.

Similarly, in dismissing an application for leave to appeal the Court of Appeal in the case of **Machira t/a Machira & Co. Advocates vs Mwangi & Another (2002) 2 KLR** rendered itself as follows:-

“The consideration for the grant or refusal of an application for leave to appeal is a matter for the discretion of the court

The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospect of an unrealistic argument is not sufficient.

The Applicant has not demonstrated that his appeal has a prospect of succeeding. As the Court of Appeal reasoned in its ruling in Civil Application No. 325 of 2013 (UR 239 of 2013), in order for the application to succeed he has to satisfy that he has an arguable appeal that is

not frivolous and in so doing, the applicant is not obliged to establish a multiplicity of arguable grounds; even a single arguable issue will suffice. See **Transouth Conveyors Limited vs Kenya Revenue Authority & Another** Civil Application No. 37 of 2007 (Unreported).

Nor is the applicant to show that the appeal would definitely succeed or that the appeal has very high chances of succeeding. It is sufficient, if it can show that it has serious questions of law or a reasonable argument, deserving of consideration by the Court. In its ruling in the above matter, the Court of Appeal clearly stated that it has an arguable appeal which will be rendered nugatory if they granted the orders sought before them.

The applicant herein did not even venture to address the court on whether his appeal has realistic prospects of success.

On the issue of prejudice, I am persuaded by the submissions by the 2nd Respondent that he stands to suffer more prejudice than the applicant having purchased the subject property i.e Land Reference Number 1/1151 (original number 1/58/27) on the 29th September, 2010 and the sale was made absolute by the court on 24th day of November, 2010. With the litigation constantly hanging over his head he remains highly prejudiced and cannot enjoy the fruits of the court process.

In the premises, I find that the application is devoid of merits and the same is dismissed with costs to the Respondents.

Dated, signed and delivered at **NAIROBI** this **3RD** day of **OCTOBER, 2019**.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the 1st Defendant