REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL MISC. APPLN NO. 110 OF 2019

KENNEDY KABURU JOSEPH .....APPLICANT

VERSUS

AGRICULTURAL FINANCE CORPORATION ..... RESPONDENT

R U L I N G

1. On 19/9/2019, the applicant lodged a Motion on notice under ***sections 3, 3A, 63(e), and 79G and 95 of the Civil Procedure Act and Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules 2010*** seeking, *inter alia*, leave to file an appeal out of time against the ruling delivered on 17/7/2019 in **Nkubu PM ELC No. 19 of 2019.**

2. The applicant also sought the following prayers: -

> ***"a That this honorable court be pleased to stay execution of the ruling-decree and all the consequential orders thereof in Nkubu PM ELC No. 19 of 2019 pending the hearing and determination of this application and the intended appeal***
>
> ***b That this honorable court be pleased to reinstate the injunction orders of 27/3/2019 granted in Nkubu ELC No. 19 of 2019 pending the hearing and determination of this application***
>
> ***c That the draft memorandum of appeal be deemed as properly filed and served***
>
> ***d That this honorable court be pleased to issue further orders as it deems fit and just in the circumstances.***
>
> ***e That costs for this application be provided".***

3. The application was based on the grounds on the face of the Motion and on the supporting affidavit of **Kennedy Kaburu Joseph** He deposed that the ruling in **Nkubu PM ELC 19 of 2019** was delivered on 17/7/2019 in his absence and his former advocate kept him in the dark. That he got wind of it via a local newspaper that his property **LR. NKUENE/KATHERI/2222** ("the said property") was scheduled for public auction. That the respondent had instructed Viewline Auctioneers to sell the said property but he was never served with a proclamation notice. That if a stay of the said ruling is not made then he will be rendered homeless, destitute and a squatter as he has no other place to call home.

4. The applicant swore that if the orders sought are not granted, it would render his intended appeal nugatory. In addition, he contended that would not be able to continue his business operation and would be forced to shut down rendering over 20 employees jobless. He sought to be allowed to settle the respondent's debt on monthly instalments. He concluded that if the execution is effected he would suffer irreparable loss and damage.

5. When the application was referred to this Court by the ELC on 7/10/2019, this Court ordered, *inter alia,* that the applicant serve the application forthwith and notify the respondent of the directions made on that day. The directions were 6 in number and they related to the filing of a response to the application and filing of submissions. The Court emphacized that the applicant comply with the said directions and file evidence of such compliance.

6. The applicant filed his submissions on 14/10/2019 but there is no evidence on record to show that the application was ever served upon the respondent as ordered or whether he notified the respondent as directed by the court. It is therefore clear that the applicant is in violation of an express direction of this Court and is not entitled to a hearing. On that ground alone, the Motion is for dismissal.

7. There being no evidence of either service of the application or notification of this court's directions as aforesaid, the applicant wants to be heard ex-parte. He intends to steal a march against the respondent. That is very unfortunate. Be that as it may, I propose to consider the Motion on merit. I have considered the supporting affidavit and the submissions of Counsel for the applicant.

8. ***Section 79G of the Civil Procedure Act*** provides that:-

> ***"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."***

9. In this regard, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal out of time must show that he has a good reason for having delayed to lodge the appeal within time. In **Mwangi v Kenya Airways Ltd [2003] KLR**, the Court of Appeal set out the factors to consider when exercising discretion to extend time to file an appeal out of time. *These are the period of delay, the reason for the delay, the arguability of the appeal, the degree of prejudice which could be suffered by the respondent if the extension is granted, the importance of compliance with time limits to the particular litigation or issue and the effect, if any, on the administration of justice or public interest involved if any.*

10. The ruling which is sought to be appealed against was delivered on 17/7/2019. The present application was filed on 19/9/2019 making the period of delay to be two months and 2 days. The applicant stated that the delay was caused because he was not present during the ruling and his former advocate kept him in the dark and that he only found out about it when auction of his property appeared in a local newspaper.

11. Firstly, the applicant has not disclosed who his former advocate was. Secondly, he has not told the Court when he last heard from his alleged former advocate. It is not clear from the record, whether the applicant knew when the application was argued before the trial Court and whether he or his alleged former advocate knew of the ruling date.

12. In this court's view, when an applicant wishes to blame his hitherto advocate for a wrong such as inaction that leads to his prejudice, that advocate should be served with such allegations for him to respond thereto if at all. Court business is serious and honest business. A litigant cannot hide behind a "sinful advocate" to win the Court's sympathy and exercise of discretion without first giving such an advocate an opportunity to be heard on "his sins". Such application should serve the Advocate who has committed the wrong and file evidence of such service with the court.

13. In the present case, not only did the applicant fail to disclose who his farmer advocate was, but he also failed to serve him with the present application. In such a scenario, it becomes difficult for the court to discern the honesty of an applicant and exercise its discretion accordingly.

14. Applications for stay and/or injunctions pending appeal are governed by ***Order 42 Rule 6 of the Civil Procedure Rules***. The conditions to be met by an applicant are that the application should be made timeously, the applicant must establish that he will suffer substantial loss if the stay is not granted and he must give security for the performance of the decree that may ultimately be binding on him.

15. In view of the foregoing, I find that the applicant has not satisfied this Court why he delayed to lodge the appeal for over 2 months. By failing to disclose who his advocate was and how he failed to advise him of the outcome of his injunction application, the applicant was not being candid with the Court.

16. On injunction pending appeal, I think still the principles that rule in the **Giella vs Casman Brown** are still applicable in the circumstances.

17. In **Gatirau Peter Munya Kithinji & 2 others, Application No. 5 of 2014; [2014] eKLR,** the Supreme Court of Kenya considered the principles that should guide the court in deciding whether a stay of execution should issue in the following terms:-

> ***"The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:***
>
> > ***(i) the appeal or intended appeal is arguable and not frivolous; and that***
> >
> > ***(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.***
> >
> > ***These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:***
> >
> > ***(iii) that it is in the public interest that the order of stay be granted."***

18. The applicant has not established that the intended appeal is arguable. Firstly, this Court does not know the nature of the dispute between the parties before the trial Court. The pleadings before the trial Court were not exhibited or produced before this Court for the court to discern the nature of the dispute. secondly. the alleged proceedings that delayed the filing of the appeal as well as the present application have not been exhibited or produced for the court to gauge the arguability or otherwise of the appeal.

19. To this Court's mind, it is not possible to discern what the dispute between the parties before the trial Court to decipher the chances of the applicant's appeal.

20. In the premises, I am not satisfied that the application is meritorious. I dismiss the same.

DATED and DELIVERED at Meru this 14th day of November, 2019.

A. MABEYA

JUDGE