



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 685 OF 2017 (OS)

(Formerly Machakos ELC No. 219 of 2012 (OS))

IN THE MATTER OF LAND REGISTRATION ACT 2012 SECTION 68 (II)

**IN THE MATTER OF LAND PARCEL NUMBERS: KAJIADO/ KITENGELA/ 6137; KAJIADO/
KITENGELA/ 23949; KAJIADO/ KITENGELA/ 23450; KAJIADO/ KITENGELA/ 23951;
KAJIADO/ KITENGELA/ 23952; KAJIADO/ KITENGELA/ 23953**

BETWEEN

DANIEL NGANGA NJOROGE.....1ST PLAINTIFF

JAMES GITEMA NJUGUNA.....2ND PLAINTIFF

VERSUS

LEMUTAKA OLE NTLALEI.....1ST DEFENDANT

NKASHEMA OLE SADURU.....2ND DEFENDANT

GIDEON LAMUTAKA.....3RD DEFENDANT

JACOB MALIT.....4TH DEFENDANT

RULING

What is before Court for determination is the Plaintiffs Notice of Motion application dated the 30th May, 2019 and the Defendants' Notice of Motion application dated the 26th July, 2019 respectively. In the application dated 30th May, 2019, the Plaintiffs seek for the following orders:

a) That this honourable Court do vary/review its decree from the judgement delivered on 19th March, 2019 and orders issued on 27th March, 2019 that the Kajiado Land Registrar do excise the Plaintiffs 30 acres from either the suit premises:

i. KAJIADO/ KITENGELA/ 23949 – 8.09 Hectares

ii. KAJIADO/ KTENGELA/ 23950 – 6.07 Hectares

iii. KAJIADO/ KITENGELA/ 23951 – 18.18 Hectares

The application is premised on the summarized grounds that the property Kajiado/ Kitengela/ 23952 has been further subdivided to many small plots with the proprietors and the further subdivided numbers not reflected in the Decree and hence the Land Registrar cannot effect the transfers to the Plaintiffs out of KAJIADO/ KITENGELA/ 6137. That the suit premises Kajiado/ Kitengela/ 23949; 23950; 23951 have adequate acreage to cater for the Plaintiffs' 30 acres portion. The application is supported by the affidavit of JAMES GITEMA NJUGUNA and SUSAN MUGURE NGANGA where they reiterate their claim above.

In the Defendants' Notice of Motion application dated the 26th July, 2019, it is brought pursuant to section 7 of the Appellate Jurisdiction Act; Sections 3 and 3A of the Civil Procedure Act; Order 9 Rule 9 (b) and Order 42 Rule 6 of the Civil Procedure Rules; Section 3, 16 and 19 (1) & (2) of the Environment and Land Court Act and Article 50 and 159 (2) (d) of the Constitution. The Defendants' seek for the following orders:

1. Spent.
2. That the firm of Messrs. Kariuki E & Co. Advocates, Kitengela Capital Centre, 2nd Floor, P.O. Box 15246 - 00100 Nairobi, Tel: + 254 720 293 346/ + 254 700 397 630, Email: KariukiKamau @ gmail.com, be allowed to come on record for the Applicant herein.
3. That the Honourable Court be pleased to stay execution of the whole Judgement delivered on the 19th March, 2019 and consequential orders issued thereto by this Honourable Court pending the interpartes hearing and determination of this application.
4. That the Honourable Court be pleased to stay execution and or any consequential proceedings pending hearing and determination of the intended appeal by the Defendants against the Judgment of this Honourable Court.
5. That this Honourable Court be pleased to grant leave to the Defendants to appeal out of time against the whole judgement made on the 19th March, 2019 in this matter.
6. That such other orders be made as this Honourable Court may deem fit or expedient.
7. That the costs of this Application be provided for.

The Application is premised on the grounds on the face of it and the affidavit of the 1st Defendant LEMUTAKA OLE NTILALEI where he deposes that due to their nomadic lifestyle, the Defendants had migrated in search of pasture owing to delayed long rains and this led to communication breakdown with their erstwhile advocates and only learnt that judgment had been entered after returning and re establishing communication with him. He claims the delay in lodging the Appeal was not intentional and or deliberate. He explains that the timeframe of filing the Appeal has since lapsed and there is need for the time to be enlarged to enable them do so. He avers that the Appeal raises numerous triable issues with a high probability of success. Further, that the Plaintiffs are likely to execute the Decree herein at any time and the intended Appeal would be rendered nugatory unless the Court grants the Applicants order for stay of execution pending the Appeal. He further explains that his erstwhile Advocate and the intended Advocate have recorded a Consent on representing them and prays that the intended Advocate be allowed to represent them. He reiterates that the Defendants are ready to furnish security for the due performance of the Decree and in furtherance of the Judgment delivered on the 19th March, 2019. Further, that the Plaintiffs will not suffer any prejudice if the orders sought are granted.

The Plaintiffs opposed the application and filed a replying affidavit sworn by JAMES GITEMA NJUGUNA and SUSAN MUGURE NGANGA where they depose that the Defendants did not put a Notice of Appeal though they were represented by an Advocate. They contend that the Defendants are

using delaying tactics as they have been doing for many years. They claim the Appeal has no chances of success as it is quite clear from records that the Defendants sold land to the Plaintiffs. They reiterate that there is an inordinate delay in filing the Appeal and so they should not be granted stay of execution. Further, that the Defendants' application is an afterthought, an abuse of the court process and should be dismissed with costs.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Plaintiffs' Notice of Motion dated the 30th May, 2019 and the Defendants' Notice of Motion dated the 26th July, 2019 including the parties' affidavits and submissions, the following are the issues for determination|:

- Whether the Decree issued on 27th March, 2019 as a result of the Judgment delivered on 19th March, 2019 should be reviewed.
- Whether the firm of messrs Kariuki E & Company Advocates should be allowed to come on record for the Defendants.
- Whether there should be a stay of execution of the Judgement delivered on 19th March, 2019.
- Whether time should be enlarged for the Defendants to lodge their Appeal.

As to whether the Decree issued on 27th March, 2019 as a result of the Judgment delivered on 19th March, 2019 should be reviewed.

The Plaintiffs sought for review of the said Decree claiming that upon presentation of documents before the Land Registrar, they were informed that land parcel number Kajiado/ Kitengela/ 23952 has been further subdivided to many small plots with the proprietors and the further subdivided numbers not reflected in the Decree and hence the Land Registrar cannot effect the transfers to the Plaintiffs out of KAJIADO/ KITENGELA/ 6137. In their submissions they have reiterated their claim and relied on the case of **Thugi River Estate Limited V National Bank of Kenya Limited & 3 Others (2015) eKLR** to buttress their arguments. The Defendants opposed the application for review of Decree and submitted that the Plaintiffs seek to introduce new evidence and there is no mistake or error on the face of record. They relied on **Civil Appeal No. 2111 of 1996 National Bank of Kenya V Ndungu Njau and Nuh Nassir Abdi Vs Ali Wario & 2 Others (2013) eKLR** to support their arguments. Section 80 of the Civil Procedure Act provides: **“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows: **‘ Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.’**

In the case of **MUYODI v INDUSTRIAL AN COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER** EALR (2006) EA 243, the Court of Appeal while describing an error apparent on the

face of record, held as follows:’ “ *In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.*”

In the current case, the Plaintiffs filed a suit and knew the Defendants had only subdivided KAJIADO/ KITENGELA/ 6137 into 23949, 23950 and 23951 respectively. Further, after entry of judgement and issuance of a Decree, at the time of execution of the said Decree, they discovered that Kajiado/ Kitengela/ 23952 has been further subdivided to many small plots and further subdivided numbers are not reflected in the Decree and hence the Land Registrar could not effect the transfers to the Plaintiffs out of KAJIADO/ KITENGELA/ 6137 which was the mother title, as had been directed by the Court. In the case of **ROSE KAIZA Vs ANGELO MPANJU KAIZA (2009) eKLR** the Court held that: ‘ **In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.**’ In associating myself with the two decisions as well as the legal provisions cited above, I deem the Plaintiffs’ realization that there were further subdivisions as indicated above of the suit land into smaller plots as discovery of new and important evidence and there was no remissness on their part when they were adducing evidence. In the circumstances, I opine that a review of a Decree herein is hence imminent. In the circumstance, I will allow the Plaintiff’s application for review of Decree.

As to whether the firm of messrs Kariuki E & Company Advocates should be allowed to come on record for the Defendants. I note the erstwhile advocate and the firm of messrs Kariuki E & Company Advocates entered into a consent for the same firm to come on record for the Defendants. Order 9 Rule 9 of the Civil Procedure Rules provides that: ‘ **When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.’

Since the Advocates entered into a Consent, and in relying on the provisions of Order 9 Rule 9 of the Civil Procedure Rules, I will proceed and allow the firm of Messrs. Kariuki E & Co. Advocates, to come on record for the Defendants herein.

As to whether there should be a stay of execution of the Judgement delivered on 19th March, 2019. The Defendants have sought for a stay of execution of the Judgment pending appeal, which application is opposed by the Plaintiff. **The Defendants’ aver that they are ready to offer security.**

Order 42 Rule 6(2) provides that:’ **No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’**

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:’

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.’

However, they do not deny having sold land to the Plaintiffs and what steps they are taking to partially implement the Decree. Based on the standards set in the aforementioned decision and in applying them to the circumstances at hand, I find that the Defendants have not met the threshold of stay of execution and decline to grant the said orders.

As to whether time should be enlarged for the Defendants to lodge their Appeal.

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.’**

Further, Section 95 of the Civil Procedure Act provides as follows:’ **Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.’**

While Order 50 Rule 6 of the Civil Procedure Rules stipulates that: **‘Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.’**

The Defendants in their supporting affidavit annexed a draft memorandum of Appeal wherein they highlighted their reasons for the appeal and contended that they have an arguable appeal. The Plaintiffs insist the Defendants have not demonstrated the arguability of the Appeal. In the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR**, the Learned Judge stated that:’ **Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:**

a. The period of delay;

b. The reason for the delay;

c. The arguability of the appeal;

d. The degree of prejudice which could be suffered by the Respondent is the extension is granted;

e. The importance of compliance with time limits to the particular litigation or issue; and

f. The effect if any on the administration of justice or public interest if any is involved.....

Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is *not* required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.'

In the instant case, judgment was entered in favour of the Plaintiffs. The Defendants have not lodged an Appeal and not indicated what security they can provide. Further, they have not provided proper reasons why they failed to instruct their erstwhile advocate to lodge a Notice of Appeal on their behalf, within the requisite time. I note the Defendants' main contention in their memorandum of Appeal is the Court's reliance on the decision of the Land Disputes' Tribunal which was adopted by the SRM's Court. They have not indicated if they appealed against the said decision but as it is, the said Decree is still in existence. They have further not demonstrated what prejudice they stand to suffer and to my mind the Defendants have not met the standard set for enlargement of time to lodge their intended Appeal. In the circumstances, I will decline to grant the prayer sought for enlargement of time to lodge their Appeal.

It is against the foregoing that I find the Defendants' Notice of Motion dated the 26th July, 2019, unmerited, except for the prayer allowing the firm of messrs Kariuki E & Company Advocates to come on record for them. I will hence proceed to dismiss prayers Nos. 3,4,5,6, and 7 of the said Notice of Motion, with costs to the Plaintiffs. As for the Plaintiffs' Notice of Motion dated the 30th May, 2019, I find it merited and will allow it in the following terms:

a) The Decree from the Judgement delivered on 19th March, 2019 and Orders issued on 27th March, 2019 be and are hereby reviewed and the Kajiado Land Registrar directed to excise the Plaintiffs' 30 acres of land from either of the following suit premises:

i. KAJIADO/ KITENGELA/ 23949 – 8.09 Hectares

ii. KAJIADO/ KTENGELA/ 23950 – 6.07 Hectares

iii. KAJIADO/ KITENGELA/ 23951 – 18.18 Hectares

instead of KAJIADO/ KITENGELA/ 6137.

Dated signed and delivered via email this 23rd April, 2020.

CHRISTINE OCHIENG

JUDGE