



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 7 OF 2019

BENJAMIN KIBOR MINING.....1ST APPELLANT

STEPHEN KIPKORIR MAIYO.....2ND APPELLANT

-VERSUS-

VERONICA C. SEREM.....RESPONDENT

(Being an appeal from the Ruling of Hon. Alego, SPM, delivered on 12 March 2018 in Kapsabet SPM's Succession Cause No. 10 of 2010)

RULING

[1] This ruling is in respect of the two applications filed herein dated **14 January 2019** (the 1st application) and **12 March 2019** (the 2nd application). The 1st application was filed by the two appellants, **Benjamin Kibor Mining** and **Stephen Kipkorir Maiyo**, pursuant to **Article 165(6) and (7) of the Constitution, Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 22 Rule 52 and Order 51 Rule 1 of the Civil Procedure Rules**, for orders that:

[a] Spent

[b] Spent

[c] That the Court be pleased to grant a conservatory order preserving the subject matter, namely, **NANDI/KOYO/161 (the Suit Property)** from transfer, sale, partition, eviction or any dealing in the land pending the hearing and determination of this appeal.

[d] That the Court be pleased to grant stay of execution of the Confirmation of Grant, eviction, transfer or any other dealings in the land pending the hearing and determination of the appeal.

[e] That the Court be pleased to order that the file number **Kapsabet Principal Magistrate's Probate & Administration Cause No. 10 of 2010** be brought to this Court;

[f] That the Court be pleased to provide for costs.

[2] The application was premised on the grounds that the lower court delivered its ruling on **12 March 2018**; and that the applicants, being dissatisfied with that ruling filed this appeal. That in the meantime, the Respondent has proceeded and obtained a Certificate of Confirmation of Grant without involving them. They averred that they have an arguable appeal with a high probability of success. In support of the application, the applicants relied on the averments in the affidavit of **Benjamin Mining**, the 1st applicant herein, sworn on **14 January 2019** wherein it was averred that unless the orders sought are granted, the Respondent is likely to demolish their houses and structures on the Suit Property.

[3] The Respondent opposed the application and filed both Grounds of Opposition dated **4 February 2019** and a Replying Affidavit of even date. She contended thus in her Grounds of Opposition which were reiterated in her Replying Affidavit:

[a] That prayer 3 of the application is for orders of stay pending the hearing of an **Appeal No. 7 of 2019**;

[b] That there is no competent appeal on record;

[c] That the order complained of was issued by the Senior Principal Magistrate on **18 March, 2018**;

[d] That the appeal filed on **14 January 2019** after 1 year is incompetent;

[e] That there is no legal basis upon which an order of stay can be granted when there is no appeal.

[4] It is apparent that it was on account of the foregoing contentions that the applicants filed the 2nd application by way of the Notice of Motion dated **12 March 2019**, seeking that the Court be pleased to grant them leave to appeal the decision of **Hon. D. Alego, SPM**, delivered on **12 March 2018**. In the Supporting Affidavit annexed thereto, sworn by the 1st applicant, it was averred that the applicants were all along under the mistaken belief that their application before the lower court for leave dated **27 March 2018** had been allowed; and that they only came to learn of that leave had not been granted when they were supplied with a copy of the typed proceedings. They thus asserted that their application has been brought in good faith and in the interest of justice; and therefore ought to be allowed.

[5] In the premises, directions were given on **13 March 2019** that the two applications be canvassed simultaneously by way of written submissions. The parties thereafter filed and exchanged their written submissions for the Court's consideration. In their written submissions dated **16 May 2019**, the applicants narrated the events that preceded the filing of the 1st application and pointed out that the application is not new, as it is a replication of their application before the lower court dated **27 March 2018**. Counsel submitted, on the strength of **Kevin K. Mwiti & Others vs. Kenya School of Law & Others**, that a *prima facie* case has been made out herein to warrant the issuance of the conservatory order sought.

[6] It was further submitted by the applicants, that the prerequisites for stay under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** having been established, the orders sought ought to be granted in the interest of justice, bearing in mind the provisions of **Rule 73** of the **Probate and Administration Rules**.

[7] On behalf of the Respondent it was submitted that since the Memorandum of Appeal was filed out of time, there is no competent appeal to sustain the Notice of Motion dated **14 January 2019**. As for the 2nd application, Counsel for the Respondent urged the Court to find that it is an afterthought, and merely intended to further delay the proceedings. He further submitted that no reasonable explanation has been given by the applicants why an appeal was not filed for one year; and therefore that the 2nd application ought also to be dismissed with costs.

[8] I have carefully considered the applications, the affidavits filed and the written submissions relied on by learned Counsel for the parties. A pertinent issue was raised in the nature of a preliminary point, as to the competence of the appeal, and it is whether leave to appeal, for purposes of **Section 75** of the **Civil**

Procedure Act, as read with **Order 43 Rule 1(2)** of the **Civil Procedure Rules**, was obtained by the appellants from the lower court. A consideration of the record shows that, following the delivery of the impugned ruling, the applicants filed an application for stay of execution dated **27 March 2018**; and that one of the prayers therein was a prayer for leave to appeal, per prayer 4 thereof.

[9] The record of the lower court further shows that that, though that application was, on the **27 March 2018**, fixed for hearing on **16 April 2018**, the same was never heard. However, the proceedings of **2 July 2018** clearly show that the lower court did grant leave to appeal from the ruling. It appears that it was pursuant to that leave that the instant appeal was filed by the two applicants. In the premises, the Notice of Motion dated **14 January 2019** is competently before the Court and is worthy of consideration on its merits. However, granted the nature of the two applications, and the prayers sought thereby, I propose to consider the 2nd application first, for its outcome will have an impact on, and effectively dispose of the 1st application.

The 2nd application for extension of time:

[10] The applicant's 2nd application simply prayed for leave to appeal the ruling dated **12 March 2018** without mentioning that it was seeking enlargement of time within which to appeal. Hence in the Supporting Affidavit, a great deal of effort was made to show that it was the fault of the lower court that the applicant's application for leave dated **27 March 2018** was not heard and determined. As pointed out herein, the lower court did grant leave to appeal; and the real issue is why no appeal was filed within time. In this regard, **Section 79G** of the **Civil Procedure Act** provides as follows:

"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 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."

[11] Clearly therefore, the Court does have the discretion to enlarge time where necessary; the only consideration being whether sufficient cause has been shown for the exercise of the discretion under the aforementioned provision. And, it is now settled that some of the guiding principles to consider in such circumstances are:

[a] That there be a good and reasonable explanation for the delay;

[b] That the application be brought without undue delay;

[c] That no prejudice will be suffered by Respondent.

[12] It is manifest that the ruling of the lower court was delivered on **12 March 2018**; and that the appeal was not filed until **14 January 2019**. It is obvious that there was inordinate delay, not only in filing the appeal, but also in bringing the instant application; and therefore the question to pose is whether a good and reasonable explanation has been given for the delay. As has been pointed out herein above, the explanation offered by the 1st applicant in the Supporting Affidavit annexed to the 2nd application is that they were all along under the mistaken belief that their application before the lower court for leave dated **27 March 2018** had been allowed; and that they only came to learn of that leave had not been granted when they were supplied with a copy of the typed proceedings. They thus asserted that their application has been brought in good faith and in the interest of justice; and therefore ought to be allowed.

[13] Completely missing from the Supporting Affidavit is any attempt to explain the inordinate delay between **12 March 2018** and **14 January 2019** when the appeal was filed. As noted herein above, leave to appeal was granted on **2 July 2018** and therefore an appeal ought to have been filed, at the very latest,

by **2 August 2018**. No documents have been annexed to the Supporting Affidavit to show that there was delay in supplying typed copies of the lower court proceedings. Accordingly, I would take the view that the delay was not only inordinate, but also totally unjustified. It is noteworthy that, in the meantime, the Respondent has been issued with a Certificate of Confirmation of Grant and would in my view be prejudiced by any further delay in the matter, which began before the lower court in **February 2010**.

[14] Accordingly, I find no merit in the 2nd application dated **12 March 2019** and would dismiss it with costs. That being the case, it would follow that the appeal is itself incompetent for having been filed out of time; and therefore that the orders prayed for in the 1st application cannot issue. Thus, the orders that commend themselves to me in respect of the two applications are as hereunder:

[a] That the 2nd application for leave to file an appeal be and is hereby dismissed with costs as it is devoid of any merit;

[b] The appeal is incompetent for having been filed out of time without leave and is hereby struck out with costs along with the 1st application dated **14 January 2019**.

[c] Costs of the two applications are hereby awarded to the Respondent.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER 2019

OLGA SEWE

JUDGE