



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC APPLICATION NO. 38 OF 2015

HELENA WANJA GIKUBI.....1ST APPLICANT

ROSEMARY WAMBUI MUTUGI.....2ND APPLICANT

VERSUS

EMILY NJOKI GIKUBE.....RESPONDENT

RULING

The applicant herein namely **HELENA WANJA GIKUBE** (1st applicant) and **ROSEMARY WAMBUI MUTUGI** (2nd applicant) filed this Notice of Motion on 8th October 2015 seeking the following orders:-

1. *That this Honourable Court be pleased to grant leave to the applicant to file appeal out of time.*
2. *That this Honourable Court be pleased to issue inhibition orders against the title of land parcel No. MUTIRA/KIANJEGE/852 pending the further orders of this Court.*
3. *That the costs of this application be provided for.*

The application is based on the grounds set out on the face of the same and the supporting affidavit of the 2nd applicant and what I glean from those pleadings are that the applicants were dissatisfied by the judgment of the Senior Principal Magistrate Kerugoya Court delivered on 9th April 2015 in Civil Case No. 226 of 2011 and wishes to file an appeal therefrom. However, they were not able to do so in time because it was not until 8th September 2015 that they were supplied with the judgment after numerous attempts. They therefore seek that order to file appeal out of time and also to preserve the suit property.

The 2nd applicant filed a further affidavit in which she annexed a receipt of a deposit paid for the typed proceedings on 13th April 2015, a letter from their counsel then on record dated 9th April 2015 applying for proceedings and judgment and an application made in the lower Court to change their advocate.

In opposing the application, the respondent **EMILY NJOKI GIKUBE** filed a replying affidavit in which she deponed inter alia, that she had sued the applicants and judgment was entered in her favour on 9th April 2015 and there is no sufficient material to demonstrate that the applicants made numerous attempts to get the certified copies of proceedings and there is no certificate of delay, exhibited and therefore there is no basis upon which this Court can exercise its discretion and further, the applicants were in Court when the judgment was delivered. That land parcel No. MUTIRA/KIANJEGE/915 and 916 have since been consolidated as per the said judgment and a new title deed issued and therefore this application for the issuance of an inhibition order against title No. 85 MUTIRA/KIANJEGE/852 cannot be granted.

Submissions have been filed by counsel with Mr. Kagio appearing for the applicants and Mr. Ngigi for the respondent.

I have considered the application, the rival affidavits and annextures thereto and the submissions by counsel.

This application seeks two orders:-

1. *Leave to appeal out of time, and*
2. *Inhibition orders against the title of land parcel No. MUTIRA/KIANJEGE/852 pending further orders of this Court.*

The principles that guide a Court considering an application to file an appeal out of time are:-

1. *Extension of time is not a right of a party but an equitable remedy only available to a deserving party and at the discretion of the Court.*
2. *A party who seek such extension has the burden of laying a basis to the satisfaction of the Court.*
3. *Such extension can only be exercised by the Court in its discretion on a case to case basis.*
4. *Where there is delay, the same should be explained to the satisfaction of the Court.*
5. *Whether there will be any prejudice suffered by the respondents if extension is granted.*
6. *Whether the application has been brought without un-due delay.*
7. *Whether the case is such that public interest should be considered in extending time.*
8. *Is the intended appeal arguable – see SUPREME COURT OF KENYA, CIVIL APPLICATION No. 35 of 2014 FAHMIN YASIN TWAHA VS TIMAMY ISSA ABDALLA & TWO OTHERS. See also BAGAJO VS CHRISTIAN CHILDREN FUND INC 2004 2 K.L.R 273.*

In this matter now before me, it is clear that the judgment sought to be appealed was delivered on 9th April 2015. It is also clear from the letter by the applicants' then advocate (**A.P. KARIITHI & COMPANY ADVOCATES**) which is annexure **RWM 1** in the further affidavit of the 2nd applicant, that a request for the certified copy of the proceedings and judgment in **KERUGOYA SENIOR PRINCIPAL MAGISTRATE CIVIL CASE No. 226 of 2011** was made on the same day that the judgment was delivered. It is not clear what the response to that letter was. What is clear from a copy of that judgment however is that a certified copy of the same was made on 8th September 2015. This application was filed on 8th October 2015. While there is no certificate of delay issued by the trial Court, it is common knowledge that the applicants applied for the proceedings and judgment on the same day of delivery and even paid for the same on 13th April 2015 i.e. four days later. That could only mean that the applicants were informed how much to pay after receipt of that request. A certificate of delay was obviously important but in the circumstances of this case, the documents speak for themselves and they demonstrate that the applicants expressed their desire to appeal the judgment on the same day that it was delivered. The delay has therefore been explained to my satisfaction and no prejudice will be caused to the respondent.

I also take into consideration that this dispute involves land which is an important matter and further the jurisdiction of the trial magistrate is being questioned thus making the appeal arguable. It is my view therefore that this is a proper case to exercise my discretion in favour of allowing an extension to file the appeal out of time.

With regard to the prayer of inhibition against title to land parcel No. MUTIRA/KIANJEGE/852, the respondent has deponed in paragraph 8 of her replying affidavit as follows:-

8 *“That land parcel Number MUTIRA/KIANJEGE/915 and 916 have been consolidated as per the judgment of 19th April 2015 and a title deed issued thereof as confirmed by the applicant's annexure ‘RWM 3’ ”*

There is indeed a copy of the certificate of official search in respect of land parcel number MUTIRA/KIANJEGE/852 annexed to the 2nd applicant's supporting affidavit in which she confirms in paragraph 7 that the suit property has now been consolidated into one being parcel number MUTIRA/KIANJEGE/852 which is the parcel sought to be inhibited. **Section 68 (1) of the Land**

Registration Act gives the Court powers to inhibit dealings in registered land. It states:-

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge”

An order of inhibition, just like a prohibitory injunction, restricts the registered owner or any other person from having their transactions on the land in dispute registered. Before the Court issues such an order, it must be satisfied that the land in dispute is at a risk of being disposed or alienated to the detriment of the applicant, that a failure to issue such an order would render the applicant’s suit nugatory and that the applicant has an arguable case. In the circumstances of this case, I am persuaded that an inhibition is important to preserve land parcel number MUTIRA/KIANJEGE/852 because if it is alienated to third parties before the appeal is heard and determined, then the applicant’s appeal would be rendered nugatory and an exercise in futility. Besides, no prejudice will be caused to the respondent who remains the registered owner thereof.

Having considered all the matters herein, I am satisfied that this is a proper case in which to exercise my discretion to grant the applicants leave to appeal out of time and orders of inhibition against title number MUTIRA/KIANJEGE/852. I therefore allow the applicants Notice of Motion dated 7th October 2015 in the following terms:-

- 1. The applicants are granted leave to file their appeal from the judgment in Kerugoya Senior Principal Magistrate’s Civil Case No. 226 of 2011 out of time. The same to be filed within 45 days of this ruling.***
- 2. An order of inhibition is issued inhibiting the registration of any dealings with land parcel number MUTIRA/KIANJEGE/852 pending the hearing and determination of the appeal or until further orders of this Court.***
- 3. Each party shall meet their own costs.***

B.N. OLAO

JUDGE

3RD JUNE, 2016

Ruling dated, delivered and signed in open Court this 3rd day of June 2016.

Mr. Rurige for Mr. Ngigi for Respondent present

Mr. Githuka for Mr. Kagio for Applicants present.

B.N. OLAO

JUDGE

3RD JUNE, 2016