



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI
MILIMANI LAW COURTS - FAMILY DIVISION
CIVIL SUIT NO. 32 OF 2014
BETWEEN
J M MRESPONDENT
AND
J N GAPPLICANT
RULING

INTRODUCTION

The Chamber Summons Application dated 8th September, 2015, is the subject of this Ruling. The Applicant seeks the following orders:

(1) ...

(2) ...

(3) The Court be pleased to grant leave to the Defendant/Applicant to appeal out of time against the Ruling delivered on 30th April, 2015.

(4) The said leave do operate as a stay of proceedings and or execution of the order dated 30th April, 2015 pending the outcome of the intended appeal.

(5) The costs of this Application be provided for.

The facts giving rise to the present Application are largely undisputed. The Respondent, J M M, filed an Originating Summons Application dated 5th May, 2014 seeking the following orders:

(1) A declaration and/or order that the properties both moveable and immoveable acquired and/or developed during the subsistence of the marriage and by joint efforts of the parties herein (hereafter called 'matrimonial property') are owned jointly by the Applicant and Respondent namely:

a) KJD/KajiadoNorth/[...]

b) Dagoretti/Waithaka/[...]

(2) That an order do issue declaring that 50% of such other proportion of the matrimonial properties aforesaid, is held by the Defendant in trust and for the beneficial interest of the Plaintiff.

(3) That an order do issue declaring that the Defendant is accountable to the Plaintiff in respect of all the information about the aforementioned property including producing the title documents if/when requested.

(4) That an order do issue declaring that the properties and/or the income from the aforementioned properties be settled at a 50:50 ratio or in such other proportion as the Court may order.

(5) That the Defendant be restrained from alienating, destroying, damaging or otherwise interfering with the said matrimonial properties until the properties thereof are determined and apportioned.

(6) That the Court be pleased to make further orders as the justice of the case may so demand.

(7) That costs of this Application be borne by the Defendant.

The matter was fixed for hearing on 13th November, 2014 but it failed to proceed because the Respondent's Counsel had a medical emergency. Subsequently, a hearing date of 19th February, 2015, was taken by consent by the representatives of both Parties' Counsels. On the said date however, neither the Applicant nor her Counsel appeared for the hearing and hence the matter proceeded ex parte, with the Court taking evidence from the Respondent, and a Ruling date was reserved by the Court. On that particular day however, the Applicant, through her advocate, filed an Application seeking to set aside the ex parte proceedings but the same was dismissed. As a result, the Applicant has filed the present Application seeking leave to file an appeal out of time in regard to the decision rendered by this Court on 30th April, 2015 pertaining to the Originating Summons Application dated 5th May, 2014.

THE APPLICANT'S CASE

The Applicant's case is contained in the Affidavit in support sworn by one Dr. Njoroge O. Kimani on 8th September, 2015 and Written Submissions dated 15th April, 2016.

It was her case that the present suit came up for hearing on 17th July, 2014, wherein she requested for seven days to file her Affidavit in reply to the Originating Summons dated 5th May, 2014, and the said Application was to be heard on 13th November, 2014, where the Respondent's advocate had a medical emergency of his father and in that regard, she indulged them.

That another hearing date was fixed by consent by both advocates' representatives on 19th February, 2015 when the Respondent proceeded ex parte with the hearing to her exclusion. Further, that the advocate then in conduct of the matter, one Mr. Kiunga, filed an Application under Certificate of Urgency seeking to set aside the ex parte proceedings of 19th February, 2015, but the same was rejected on the ground that the matter had been fixed for a Ruling date.

The Applicant contended further that the Court denied her a chance to be heard and defend the claim against her property and the orders that were granted as per the Originating Summons dated 5th May, 2014 are to her detriment. Additionally, that the said order is as a result of manufactured evidence, exaggerated testimonies and malicious fabrication of information by the Respondent and that in any event, she was never served with a Ruling date which was scheduled for 30th July 2015.

In the Applicant's view, the Respondent maliciously served her with a copy of the order on 14th August, 2015, being the last day of exercising the right of appealing the said decision as per the law and as such,

before she could lodge her appeal, the period lapsed and hence she was prejudiced.

The Applicant also averred that the conducting of the matter ex parte in her absence was prejudicial to her constitutional right and that the only relief available to her at the moment is to appeal to the Court of Appeal. Furthermore, that following the lapse of time for appealing, the present Application is warranted and hence, it is in the interest of justice that the Application be allowed for her appeal to be heard on merits.

In her Written Submissions dated 31st March, 2016, the Applicant argued that **Section 95** of the **Civil Procedure Act** and **Order 50 Rule 6** of the **Civil Procedure Rules, 2010** grants this Court discretionary and unfettered powers to enlarge the time prescribed for appealing a decision even where such timelines have lapsed.

It was her submission that the present Application was filed without any inordinate delay and her intended appeal raises triable issues that ought, in the interest of justice, to be determined on merits upon a full trial.

The Applicant placed reliance on **JOHN PETER KIRIA AND ANOTHER VS PAULINE KAGWIRIA [2013] eKLR** for the proposition that it is fair and just in the circumstances that she be given an opportunity to file its appeal and have the matter heard on merits pursuant to **Article 50** of the **Constitution**.

While relying further on **DEPOSIT PROTECTION FUND BOARD VS WETHE LIMITED [2009] eKLR**, she submitted that the failure on her part to appear in Court on 19th February, 2015 was due to an inadvertent, excusable mistake or error on the part of her Counsel and that error ought not to be visited upon her.

For the foregoing reasons, it was her argument therefore that it is in the interest of justice and fairness that she be granted leave to lodge an appeal out of time and that leave does operate as a stay of the execution of the order dated 30th April, 2015 pending the outcome of the intended appeal.

THE RESPONSE

The Respondent opposed the present Application through his Written Submissions dated 15th April, 2016. It was his submission that the present Application is defective in form and bad in law as the Applicant ought to have filed another Application seeking substantive orders. In his view, an Application seeking leave, as a matter of practice, ought to be distinct and separate from any other Application seeking other orders, as stipulated under the **High Court (Practice and Procedure) Rules** under the **Judicature Act, Chapter 8 of the Laws of Kenya**.

He contended further that the Application lacks in merit in that it is premised on the grounds that the Ruling was delivered out of ex parte proceedings. Further that the Court records herein confirm that the matter came up for hearing on several occasions and dates taken by consent of the Parties. However, on the material date of the hearing, the Applicant's advocate did not attend Court on the allegations that there was an error in their office diary but there is no explanation offered as to the reason why the Applicant never attended Court in person on the material day. In that regard, it was his assertion that the reasons advanced by the Applicant for non-attendance are a sham as even if her advocates could have attended, he/she could not have been able to proceed with the matter due to lack of witnesses. It was his submission therefore that the Application ought not to be granted as the Applicant elected not to attend Court on the day of the hearing.

According to the Respondent, the Applicant merely asserts that she has a defence which raises triable issues and yet, she does not articulate the said defence in any way. As such, it was his argument that the Applicant has no defence and if any was afforded, the same is not triable as alleged.

The Respondent also submitted that whereas the Applicant mainly seeks leave to appeal out of time, she has not annexed any grounds of appeal and as such, the present Application is defective and unmerited. He stated that he would be highly prejudiced if the orders sought herein are granted. That in the event that the Court is inclined to find for the Applicant, she should be ordered to deposit titles to the suit property as a condition for granting the orders sought.

It was his final submission that he has encountered difficulties in trying to execute the Judgment as the Applicant has disposed of some of the properties to third parties.

For the above stated reasons, the Respondent urged the Court to strike out the Application with costs.

DETERMINATION

I have carefully considered the Parties respective pleadings and the key issue for determination is whether this Court should allow the present Application which seeks leave to have an appeal filed out of time. In that regard, **Section 95 of the Civil Procedure Act** is to the effect that:

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.

In **NICHOLAS KIPTOO ARAP KORIR SALAT VS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 7 OTHERS, SUPREME COURT APPLICATION NO. 16 OF 2014**, the Supreme Court addressed its mind on the Court's powers and guiding principles in Applications for granting leave to file appeals out of time. The Apex Court observed thus:

“From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- 1. 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;***
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***
- 6. Whether the application has been brought without undue delay; and***
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

Similarly, in **LEO SILA MUTISO VS ROSE HELLEN WANGARI MWANGI, CIVIL APPLICATION**

NO. NAI. 255 OF 1997 (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

It follows therefore that the grant of an extension is a matter of judicial extension which ought to be exercised by considering the special circumstances of each case before the Court. It entails striking a balance between the Parties’ respective rights while closely examining the reasons adduced by a Party seeking an extension of time. Such reasons should be genuine, honest, acceptable and satisfactory to the Court to warrant the extension sought.

While this Court appreciates the right to access justice under **Article 48** of the **Constitution** entails the hearing of both Parties in proceedings each case has to be examined in its own special circumstances. Instances may arise in which a Party by their own omission blatantly ignores or chooses not to attend the hearing and does not avail sufficient reasons for such failure. The Courts cannot turn a blind eye to such situations which litigants may choose to waste judicial time by frustrating other Parties using tactics that seek to delay or prolong trials. Such actions by themselves are an impediment to the right to access justice.

In the present case, it will be noted that the Applicant’s main reason for not attending Court on the hearing date is that her Counsel, who was handling the matter, failed to attend the said hearing due to an error in the office diary. No evidence has however been adduced in that regard and the Applicant has neither explained the nature and type of the said error. It will be noted further, that the said hearing date had been taken by consent of both Counsels’ representatives and hence, it cannot be that the Applicant and her Counsel were not aware of the hearing date.

As to the delay in lodging the intended appeal, the Applicant has contended that she was never served with a Ruling date which was scheduled for 30th July, 2015 and that the Respondent herein maliciously served her with a copy of the order on 14th August 2015, being the last day of applying for the right to appeal. The Court however notes that whereas the Applicant was served with the said order on 14th August, 2015, the present Application was filed on 14th September, 2015, barely a month after being aware of the said order. That delay manifests some laxity on the Applicant’s part and if she intended to indeed appeal the decision, she could have acted promptly and filed the present Application as soon as possible as opposed to waiting for a month or so. The grant of leave to file an appeal out of time being an equitable remedy, the Court is hereby not satisfied that the Applicant has made out a case to warrant the grant of the orders sought in the instant Application and I hereby find the Application unmerited.

As I conclude, I must reiterate the equitable maxim that delay defeats equity and since the Applicant did not lodge the present Application promptly upon having notice of the same, the delay is prejudicial to the Applicant.

DISPOSITION

Based on my reasoning above, I am inclined to dismiss the Application dated 8th September, 2015.

Let each Party bear its own costs.

DATED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2016

M. W. MUIGAI

JUDGE

In presence of:-

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