



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC. CIVIL APPLICATION NO. 4 OF 2020

JOB MURIITHI WAWERU.....APPLICANT

VERSUS

MARY WARUGURU MUNENE.....RESPONDENT

RULING

By a Notice of Motion dated 3rd February 2020, brought under *Section 1A, 1B, 79 G and 95 CPA and Order 42 Rule 6, Order 51 Rule 1 CPR*, the Applicant sought the following orders:

(1) Spent.

(2) That there be a stay of further execution of the decree dated 9th May 2019 and issued on 17th June 2019 emanating from the judgment of Mr. E.O. Wambo (S.R.M) delivered on 9th May 2019 in Kerugoya Chief Magistrate's Court E.L.C Case No. 101 of 2018 pending the hearing and determination of this application and the proposed appeal.

(3) That pending the hearing and determination of this application, there be a stay of proceedings in Kerugoya Chief Magistrate's Court ELC Case No. 101 of 2018.

(4) That pending the hearing and determination of the intended appeal, there be a stay of proceedings in Kerugoya Chief Magistrate's Court E.L.C Case No. 101 of 2018.

(5) That the applicant be granted leave to appeal against the whole judgment of Hon. E.O. Wambo (SRM) delivered on 9th May 2019 and all consequential orders out of time.

(6) That the Notice of Appeal and Memorandum of Appeal annexed hereto be deemed as duly filed and served.

(7) That the costs of this application be provided for.

The application is supported by the affidavit of the applicant and grounds apparent on the face of the said application sworn and dated on 3rd February 2020. The supporting affidavit is further supported by numerous annexures. The application was brought under certificate of urgency. The application is opposed with a replying affidavit sworn by the respondent on 14th February 2020. The replying affidavit is supported with five annexures in further opposition to the said application. When the said application came up for hearing, the counsels appearing for the parties agreed to canvass the same by affidavit evidence and written submissions.

APPLICANT'S CASE

The applicant in the supporting affidavit deponed that the respondent sued him in the Chief Magistrate's Court ELC Case No. 101 of 2018 claiming half (½) share of his land parcel No. INOI/THAITA/2878 measuring 4 ½ acres. He stated that the said land parcel No. INOI/THAITA/2878 is a resultant from the sub-division of parcel No. INOI/THAITA/108 measuring 2.30 Ha. the applicant also stated that before sub-division, land parcel No. INOI/THAITA/108 was jointly registered in the name of the respondent's late husband Aurelius Ngari Karathe and himself as evidenced by a copy of a green card which he annexed as JMW 1. The applicant further stated that he took exclusive possession of land parcel No. INOI/THAITA/108 in or about the year 2000 when the same was jointly registered in his name and that of the respondent's deceased husband. He stated that upon the demise of the respondent's husband, his name was removed from the land register and he became the sole registered proprietor in accordance with the provisions of Section 49 of the Land Act and Section 60 of the Land Registration Act which embody the doctrine of Jus accrescendi or right of survivorship in the year 2018. The applicant also deponed that he subsequently sub-divided parcel No. INOI/THAITA/108 and disposed of the resultant portions and left for himself land parcel No. INOI/THAITA/2828 measuring 4 ½ acres.

He stated that from the aforementioned facts, the respondent's claim of half (½) share of his parcel of land No. INOI/THAITA/2878 has no basis in law. He stated that when he was served with summons, plaint and other accompanying documents relating to the case in the lower Court, he instructed the firm of A.N. Chomba & Co. Advocates to file a Memorandum of Appearance and defence and to act for him in defence of the respondent's claim. Pursuant to his instructions, the firm of A.N. Chomba filed a Memorandum of Appearance dated 25th September 2018. The applicant further stated that the said advocates later informed him that they had failed to file defence within the prescribed time in consequence of which the respondent obtained judgment. He stated that he instructed them to apply for setting aside of the default judgment. The applicant stated that his advocate later informed him that the application to set aside the default judgment was dismissed with costs on 24th October 2019. The applicant further deponed that after the dismissal of his application to set aside the default judgment, the respondent filed an application for order inter alia authorizing the Executive officer of the lower Court to execute all documents on his behalf to facilitate the sub-division of the suit land and transfer of 2 1/8 acres to the respondent. He filed a replying affidavit opposing the said application. However, he was informed by his advocates that the said application was dismissed.

The applicant stated that sometime in the month of December 2019, rumours started circulating of an impending sub-division of his land allegedly on the strength of a Court order and upon obtaining a copy of the green card, he was shocked to learn that the lower Court's judgment/decreed had been registered showing the respondent as owner of 2 1/8 acres of the suit land and on further inquiries, he established that the respondent is in the process of sub-dividing the land and causing 2 1/8 acres to be transferred to her. In conclusion, the applicant stated that his intended appeal has overwhelming chances of success and that unless the conservatory orders are granted, the intended appeal will be rendered superfluous.

RESPONDENT'S CASE

The respondent filed a replying affidavit sworn on 14th February 2020 in which she stated that this Honourable Court granted substantive orders in prayers No. 1, 2, 3 & 4 of the Notice of Motion herein without giving her an opportunity to be heard contrary to the rules of Natural justice. The respondent also deponed that she instituted a case before the lower Court being MCL & E Case No. 101 of 2018 and the applicant entered appearance through the firm of A.N. Chomba & Co. Advocates. She stated that the applicant failed to file defence within the stipulated period and the matter was set down for formal proof. She deponed that after judgment was delivered, the applicant refused to transfer the land and she instructed her advocate to file an application to enforce the judgment/decreed of the lower Court. By a Notice of Motion dated 20th June 2019, she sought to enforce the decreed of the Court which the applicant opposed with a replying affidavit sworn on 4th July 2019. The respondent stated that before the Notice of Motion dated 20th June 2019 could be heard and determined, the applicant filed a Notice of Motion dated 4th July 2019. She stated that they took directions that the said Notice of Motion dated 4th July 2019 be canvassed by way of written submissions. On 24th October 2019, the Court delivered its ruling in respect of the Notice of Motion dated 4th July 2019 by dismissing the same. The respondent stated that the applicant herein had been granted a chance to be heard but never took serious the business of the Court. She stated that the application herein has been brought after an inordinate delay, judgment having been delivered on 9th May 2019 and that the reasons for the delay has not been explained. She stated that litigation has to come to an end.

ANALYSIS AND DECISION

I have considered the Notice of Motion dated 3rd February 2020, the affidavit evidence and the submissions by counsels. I have also considered the applicable law. The applicant's application is brought under *Order 42 Rule 6* seeking for stay pending an intended appeal. The applicant is also seeking leave to appeal against the judgment of the lower Court issued by Hon. E.O. Wambo on 9th May 2019 in CMCC No. 101 of 2018 (Kerugoya). The principles for stay pending appeal are set out under *Order 42 Rule 6 CPR* as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decreed or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decreed or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (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 decreed or order as may ultimately be binding on him has been given by the applicant.

My understanding of the provisions of the law is that in order to grant a stay pending appeal, an applicant must demonstrate that he/she will suffer substantial loss. The applicant must also bring the application for stay without unreasonable delay and finally the applicant must give security for the due performance of the decreed or order as may ultimately be binding on him. The superior Courts have pronounced itself in numerous decisions on the test for the grant of stay pending appeal.

On the first ground of substantial loss, **Justice Gikonyo** in the case of *James Wangalwa & Another Vs Agnes Naliaka Cheseto Misc. Application No. 42 of 2011 (2012) e K.L.R* stated as follows:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs Chesoni (2002) 1 K.L.R 867, and also in the case of Mukuma Vs Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting a stay of execution, under Order 42 of the CPR and Rule 5 (2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:-

“... the issue of substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory “.

Again in the case of *Peter Rugu Gikanga & another Vs Weston Gitonga & 10 others (2014) e K.L.R H.C. at Nakuru Civil Case No. 148 of 2010 Justice Enyara Emukule* stated as follows:-

“It is clear from the replying affidavit of Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of the Court. The majority do not live on the land, but are said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This with respect, is no ground for granting a stay of execution.....”.

In respect of the instant case, the applicant has not stated in his supporting affidavit that he will suffer any substantial loss unless the orders sought are granted. As regards the second issue, whether the application has been brought without unreasonable delay, the appeal defined what constitutes unreasonable delay in the case of *Jaber Mohsen Ali & Another Vs Priscillah Boit & Another E & L No. 200 of 2012 (2014) e K.L.R* where it was held as follows:-

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the Court and any order given thereafter. In the case of Christopher Kendagor Vs Christopher Kipkorir, Eldoret ELC 919 of 2012, the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days to vacate the suit land. The application was denied, the Court holding that, the application ought to have come before expiry of the period given to vacate the land”.

The applicant in this case is blaming his hitherto advocate M/S A.N. Chomba & Co. Advocates for failing to file defence within the stipulated period and also failing to inform him of the dismissal of the application he had sought to set aside the interlocutory judgment. He stated that he did not contribute to the faults, mistakes or negligence resulting in the orders which has resulted to his current position leading to this application. The applicant admits that he instructed his former advocates M/S A.N. Chomba & Co. Advocates to Enter Appearance and file defence in the lower Court Case No. 101/2018 (Kerugoya). However, his lawyer only filed Memorandum of Appearance dated 25th September 2018. At paragraph 12 of his supporting affidavit, the applicant stated as follows:

“That the said advocates later informed me that they had failed to file defence within the prescribed time in consequence of which the respondent had obtained judgment and instructed them to apply for the setting aside of the default judgment and leave to defend but the said application was dismissed with costs thereby completely denying me a hearing in the emotive matter of land though my said advocates did not inform me of the ruling and I later, upon obtaining the lower Court’s proceedings learnt that the ruling dismissing my application was delivered on 24th October 2019 in their absence”.

Again at paragraph 13 of the supporting affidavit, the applicant deponed as follows:-

“That after the dismissal of my application to set aside the default judgment, the respondent filed an application which sought several orders including an order authorizing the Executive officer of the lower Court to execute all documents on my behalf to facilitate the sub-division of the suit land and transfer of 2 1/8 acres to the respondent and I was advised by my advocates on to swear a replying affidavit which I did but again, the advocates never informed me that the application had been dismissed”.

These averments by the applicant on oath is a clear admission that his advocate was negligent in prosecuting his case and advising him appropriately. *Section 1 A (3) CPA* provides as follows:

“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.

The applicant cannot be heard to lay blame on his advocate whom he

instructed to act for him. The actions and omissions of an advocate duly instructed are deemed to be acts of commission and/or omission by the principle. In the case of *Velji Shahmad Vs Shamji Bros. and Popatlal Karman & Co. (1957) E.A 438*, the Court held:

“In the interest of the public, the Court ought to take care that appeals are brought before it in proper time and before the proper Court or registry and when a judgment has been pronounced and the time for appeal has elapsed without an appeal, the successful party has a vested right to the judgment which ought, except under very special circumstances, to be made effectual. And the legislature intended that appeals from judgments should be brought within the prescribed time and no extension of time should be granted except under very special circumstances”.

The hitherto firm of A.N. Chomba & Co. Advocates have not filed an affidavit stating why they failed to file defence within the stipulated period. They have not also given reasons why they failed to attend Court during the ruling of the application to set aside the interlocutory judgment. The overriding objective of the **Civil Procedure Act** and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes in our Courts. The advocates who are officers of the Court are enjoined to assist towards that end. Failure to give satisfactory explanation for failure to file defence and appeal within the prescribed period is fatal to the applicant. In the case of **Berber Alibhal Mawji Vs Sultan Hasham Lalji & 2 others (1990 – 1991) E.A 337**, the Court held thus:-

‘Inaction on the part of an advocate as opposed to error or a slip is not excusable. Therefore, pure and simple inaction by counsel or a refusal to act cannot amount to a mistake which ought not to be visited on the client’.

Again in the case of **Apa Insurance Limited Vs Michael Kinyanjui Muturi (2016) e K.L.R**, the Court stated as follows:-

“The power of the Court to grant leave to file an appeal out of time as stipulated in Section 79 G of the Civil Procedure Act is discretionary which discretion nonetheless be exercised judiciously and depending on the circumstances of each case as no two cases are the same; and as leave itself is not a matter of right. Therefore, the applicant must satisfy the Court by placing before it material upon which such discretion may be exercised in their favour”.

The applicant’s hitherto advocate M/S A.N. Chomba have not placed any material why they failed to file defence and appeal within the timelines stipulated in law. It will therefore be difficult for this Court to exercise its discretion in the absence of grounds explaining why the advocate on record failed to do what he was expected by his client.

In the case of Trust Bank Vs Portway Stones (1993) Ltd and others Nairobi (Milimani) HCC No. 413/1997; LLR 1310 (CCK) (2001) 1 EA 269, Ringera J. held as follows:-

“There are no reasons why errors of commission and omission by a duly instructed advocate who is obviously the agent of the instructing party should not be visited on his principal. If the acts and omissions of the agent with actual or ostensible authority in other spheres of life are not without consequences to their principals, why should it be to the legal profession?”.

I cannot agree more with the decision of the learned Judge. The last ground is in relation to an applicant giving security for the due performance of the decree and/or order that would be binding on him. The applicant has not given security or an undertaking to abide by any conditions that this Honourable Court may give.

In the final analysis, I find the application dated 3rd February 2020 lacking merit and the same is hereby dismissed with costs to the respondent.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 3rd day of July, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Muchiri for the Applicant
2. Mr. Makori holding brief for Ms Makworo for the Respondent
3. Okatch - Court Assistant.