



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C MISC. APPLICATION NO. 7 OF 2020

NAOMI WANJUKI IRERI

*(Legal Representative of the Estate of IRERI MUIGAI).....***APPLICANT**

VERSUS

PAULINE MUTITU KIVUTI*(Legal Representative*

*of the Estate of NELSON NGARI WACHIRA).....***RESPONDENT**

(Being an application for enlargement of time and for leave to file an appeal out of time

against the judgement and decree of Hon. S.K. Mutai (Principal Magistrate) dated

and delivered on 26th March 2019)

RULING

A. INTRODUCTION

1. By a notice of motion dated 28th April 2020 brought under **Sections 1A, 2A, 3A and Section 79G of the Civil Procedure Act (Cap. 21), Order 9 Rule 9, Order 42 Rule 6 and Order 51 Rule 1** of the **Civil Procedure Rules** (the *Rules*), **the Constitution of Kenya and all other enabling provisions of the law** the Applicant sought the following orders:

a) Spent

b) *That leave be granted to the firm of M/s Robi Kerato Partners Advocates to come on record for Naomi Wanjuki Ireri (Legal Representative of the Estate of Ileri Muigai) being the Applicant herein in place of the firm of M/s Morris Njage & Company Advocates.*

c) Spent

d) *That pending hearing and determination of the appeal intended herein, this honourable court be pleased to issue an order of injunction restraining the Respondent by herself, her representatives, her agents and/or any other person acting under her authority/instruction from erecting any structures, alienating, dealing, subdividing, transferring and/or in any other way possible transacting with all the parcels of land known as Kagaari/Weru/12140 and/or Kagaari/Weru/12141 and/or Kagaari/weri 12142 all being sub-divisions of land parcel Kagaari/Weru/4599.*

e) *That this honourable court be pleased to enlarge time to file appeal, and grant the applicant leave to file an appeal out of time against the judgment delivered on 26th March 2019 by S.K. Mutai PM in Embu PMCC No. 134 of 1993 and the same be admitted for hearing once the record is ready.*

f) *That upon enlargement of time and grant of leave to the Applicant to file an appeal out of time, the memorandum of appeal lodged herein be deemed as duly filed and properly on record upon payment of requisite fees.*

g) *That this honourable court be pleased to issue any further and/or other orders as the court may deem fit to grant under the*

circumstances of the case.

h) That the costs of and incidental to this application be costs in the intended appeal.

B. THE APPLICANT'S CASE

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant on 28th April 2020. The Applicant stated that he was aggrieved by the judgment and decree of the Magistrates' court (*the trial court*) dated 26th March 2019 in *Embu PMCC No. 134 of 1993* hence he intended to appeal against it.

3. The Applicant contended that she did not participate in the hearing before the trial court and that her former advocates, Ms. Morris Njage & Co. Advocates, did not notify her of the judgement. She stated that she came to learn of the judgment when she saw prospective buyers inspecting the suit properties. She contended that her failure to file an appeal was not intentional but was a result of an inadvertent mistake on the part of her former advocates.

4. The Applicant further contended that the intended appeal raised arguable issues with overwhelming chances of success. It was contended that the trial court had proceeded to hear and determine the suit in error since it had earlier on ruled that it had no jurisdiction to entertain the suit. It was further contended that, in any event, the Respondent's cause of action was already statute-barred under **Section 4(1) (a) Limitation of Actions Act (Cap. 22)**.

C. THE RESPONDENT'S RESPONSE

5. The Respondent filed grounds of opposition dated 20th May 2020 raising the following objections:

*a) The application offended **Order 42 Rule 6** of the **Rules** in that there was no pending appeal.*

b) That execution of the decree had already been concluded and perfected hence there was nothing to be stayed.

c) That the application was in violation of the rules of natural justice in that the proprietors of two of the suit properties were not joined in the proceedings.

d) The Applicant had no locus standi to file the application.

e) That the application was bad in form and otherwise an abuse of the court process.

6. The Respondent also filed a replying affidavit sworn on 20th May 2020 in opposition to the said application. It was contended that upon execution of the decree dated 26th March 2019 the Respondent was registered as proprietor of *Title No. Kagaari/Weru/12142* whereas *Title Nos. Kagaari/Weru/12140* and *12141* were registered in the names of third parties who are not parties to the instant application.

7. It was contended that although the Applicant had based her application upon **Order 42 Rule 6** of the **Rules** there was, in fact, no pending appeal hence the court had no jurisdiction to entertain the application for injunction. It was further contended that the Applicant was at all material times aware of the decree dated 26th March 2019 and that her son, Francis Kariuki Ileri, had requested the Respondent to sell a portion of the suit properties to the Applicant's family sometimes in November and December 2019. The Respondent, therefore, considered that the application had not been filed without unreasonable delay.

8. The Respondent further contended that, in any event, the Applicant had not demonstrated why she was unable to file an appeal within time since the firm of Morris Njage & Co. Advocates had not filed any affidavit to support the Applicant's allegations. The Respondent considered that the delay of over one year in filing the instant application had not been satisfactorily explained.

9. The Respondent also denied that the trial court lacked jurisdiction to entertain and determine the suit as alleged by the Applicant. It was contended that the Applicant's preliminary objection on the jurisdiction of the court was overruled and that the Hon. S.K. Mutai who heard the suit was duly gazetted to hear and determine environment and land matters. The court was, therefore, urged to dismiss the said application for lack of merit.

D. THE APPLICANT'S REPLY

10. The Applicant filed a further affidavit sworn on 12th June 2020 in response to the Respondent's replying affidavit. The Applicant denied all the averments contained in the replying affidavit and reiterated the contents of her application and supporting affidavit. It was contended that there was a discrepancy between the judgement of the trial court and the decree as extracted by the Respondent. The Applicant considered the decree to have been fraudulently extracted hence null and void.

11. The Applicant stated that she sought an injunction instead of a stay because the decree had already been executed hence her interest could only be protected by an injunction. The Applicant relied upon **Order 42 Rule 6 (6)** which empowered the court to grant a temporary injunction in the exercise of its appellate jurisdiction.

12. The Applicant further challenged the mode of trial which was adopted by the trial court. The material on record indicates that by consent of the parties the court dispensed with an oral hearing and instead allowed the parties to rely on their witness statements, documents and

written submissions. She contended that she was not involved by her former advocates in the adoption of that mode of trial and that she could not have agreed to such mode because the suit involved very weighty matters.

E. DIRECTIONS ON SUBMISSIONS

13. When the application was listed for hearing on 26th May 2020 it was directed that the same be canvassed through written submissions. The Applicant was granted 14 days within which to file and serve her submissions whereas the Respondent was granted 14 days to file and serve hers upon the lapse of the Applicant's period. The record shows that the Applicant filed her submissions on 15th June 2020. However, the Respondent's submissions were not on record by the time of preparation of the ruling.

F. THE ISSUES FOR DETERMINATION

14. The court has considered the notice of motion dated 28th April 2020, the grounds of opposition dated 20th March 2020, the replying affidavit in opposition thereto, as well as the further affidavit sworn on 12th June 2020. The court is of the opinion that the following issues arise for determination in the matter.

- a) *Whether the Applicant is entitled to an order for change of advocates.*
- b) *Whether the application for injunction is incompetent under **Order 42** of the **Rules**.*
- c) *Whether the Applicant has made out a case for extension of time to file an appeal out of time.*
- d) *Whether the Applicant has made out a case for the grant of an injunction.*
- e) *Who shall bear the costs of the application.*

G. ANALYSIS AND DETERMINATIONS

a) Whether the Applicant is entitled to an order for change of advocates

15. The court has considered the submissions and material on record on this issue. It is evident that the said prayer is based upon **Order 9 Rule 9** of the **Rules** which stipulates as follows:

“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.”

16. It is also evident that such order for change of advocates may be granted upon application which application should be served upon the outgoing advocate. The material on record indicates that on 29th April 2020 the court directed the Applicant to serve the said application upon the firm of Morris Njage & Co. Advocates. There is, however, no affidavit of service on record to demonstrate that such service was effected. However, in view of the Applicant's right to be represented by an advocate of his choice the court shall allow the prayer for change of advocates.

b) Whether the application for injunction is incompetent under Order 42 of the Rules

17. The court has considered the submissions and material on record on this issue. The application for injunction is based upon **Order 42 Rule 6** which stipulates as follows in the relevant subsections:

“(2) 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

18. The Applicant submitted that the court has jurisdiction especially under **Order 42 Rule 6(6)** to grant an interim injunction pending appeal. However, the Applicant did not submit on the import of the proviso in the sub rule which stipulates that an applicant must have complied with the procedure for filing an appeal from the decision of the trial court or tribunal. The procedure for instituting an appeal against the decision of the Magistrates' court is stipulated in **Order 42 Rule 1** of the **Rules** as follows:

“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

19. There is no doubt that on the basis of the material on record that the Applicant has not filed a memorandum of appeal as required by law. In fact, one of the prayers she is seeking is leave to file the appeal out of time. The court is further of the opinion it can only grant an injunction pursuant to its appellate jurisdiction hence it cannot grant such an order in the absence of an appeal. Accordingly, the court finds and holds that the prayer for a temporary injunction is incompetent.

c) Whether the Applicant has made out a case for the grant of a temporary injunction

20. In view of the court's finding and holding on the competency of the prayer for injunction, it shall not be necessary to determine whether the Applicant has satisfied the requirements for the grant of an injunction. The court has already held that the jurisdiction to grant such an order is appellate hence the same cannot be exercised in the absence of an appeal. Accordingly, this issue is answered in the negative.

d) Whether the Applicant has made out a case for leave to appeal out of time

21. The court has considered the submissions and material on record on this issue. The Applicant has correctly cited the principles to be considered in such application for leave to file an appeal out of time. In the case of **Mwangi V Kenya Airways Ltd [2003] KLR 486**, the applicable principles were summarized as follows:

“Over the years, the court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance in Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi (Civil Application No. Nairobi 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 settled that in general the matters which this court takes into account in deciding whether to grant an extension are; first, the length of the delay. Secondly, the reason for the delay; third (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.”

22. The court has considered the length of delay in filing the instant application. There is no doubt that the decree sought to be challenged out of time was passed by the trial court on 26th March 2019. The instant application was filed on or about 28th April 2020 which more than one year after the lapse of the statutory period of filing an appeal. There is no doubt that such delay was prolonged.

23. The Applicant's explanation for the delay was that she was not aware of the judgement for a long time since her previous advocate did not notify her of the delivery thereof. The court has noted that the firm of Morris Njage & Co. Advocates did not file any affidavit to confirm the Applicant's explanation for the delay despite having continued to act for the Applicant at least until 10th March 2020 when they requested the Chief Magistrates' court to furnish them with certified copies of the proceedings and judgement for purposes of appeal. The court is thus not satisfied that an honest and reasonable explanation for the delay has been furnished by the Applicant.

24. Although, the chances of success of the intended appeal may be considered in some instances, it is not a mandatory requirement since such an evaluation may entail a premature consideration of the merits of the intended appeal with the risk that it may prejudice a fair hearing of the appeal should it finally see the light of day.

25. The court is, however, aware that in **Malindi Constitutional Petition No. 3 of 2016 – Malindi Law Society Vs Attorney General & 4 Others [2016] eKLR** it was held by the High Court that Magistrates' Courts had not jurisdiction to handle environment and land matters and that such jurisdiction rested exclusively with the Environment and Land Court. That judgement was ultimately reversed by the Court of Appeal in **Nairobi Civil Appeal No. 287 of 2016 – Nairobi Branch of LSK Vs Malindi Law Society & 6 Others [2017] eKLR** which held that the jurisdiction of the Environment and Land Court was not exclusive. Consequently, as at the time of trial the Hon. S.K. Mutai had jurisdiction under both **Section 9** of the **Magistrates' Court Act (Cap. 10)** and **Section 26** of the **Environment and Land Court Act** to entertain the suit. It was not contended that Hon. S.K. Mutai was not duly gazetted by the Hon. Chief Justice to handle environment and land matters.

26. The court has also taken note of the Applicant's complaint on the mode of trial. The Applicant sought to distance herself from the agreement of the advocates for the parties to dispose of the suit on the basis of the documents on record and written statements only without

calling any witnesses. The court is of the opinion that the Applicant is legally bound by all the actions of her former advocates on the mode of hearing before the trial court. It is doubtful if such a complaint can be an arguable point on appeal. The court is thus not satisfied that the intended appeal has any reasonable prospects of success.

27. The other aspect for consideration is the possible prejudice to the Respondent. The material on record reveals that the decree dated 16th March 2019 has since been fully executed and perfected. The original suit property has since been subdivided in consequence whereof the Respondent was registered as proprietor of *Title No. Kagaari/Weru/12142* whereas the other two parcels were registered in the names of third parties. The court is of the opinion that it would be unjust and prejudicial to re-open a matter more than one and quarter years after the decree was passed. The court is thus of the view that allowing the application for extension of time to file an appeal out of time would be prejudicial to the Respondent. Accordingly, the court finds and holds that the Applicant has failed to make out a case for the extension of time.

e) Who shall bear costs of the application

28. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21)**. As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Jammohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant should be deprived of costs. Accordingly, the Respondent shall be awarded costs of the application.

H. CONCLUSION AND DISPOSAL ORDER

29. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 28th April 2020 save for the prayer for change of advocates. Accordingly, the court makes the following orders for disposal of the application:

- a) Leave is hereby granted to the Applicant to change advocates from the firm of Morris Njage & Co. Advocates to Robi Kerato Partners Advocates after judgement.
- b) The rest of the orders sought in the notice of motion dated 28th April 2020 are hereby declined.
- c) Costs of the application to the Respondent.

30. It is so decided.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **2ND DAY** of **JULY 2020** and **DELIVERED** via Microsoft teams platform in the presence of Mr. Okongo for the Applicant and in the absence of the Respondent.

Y.M. ANGIMA

JUDGE

02.07.2020