REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 300 OF 2009

(FROM THE ORIGINAL CIVIL SUIT MILIMANI CMCC NO. 3834 OF 2005)

1. **ESTATE OF THE LATE JOHN KANG'ETHE KABURU (MRS. KANG'ETHE)**
2. **NEW ROYSAMBU HOUSING CO. LIMITED……….................APPELLANT**

V E R S U S

STEPHEN MBURU NJUGUNA…………..………..............……RESPONDENT

RULING

This is an appeal from the order of the lower court dated 21st July 2008. That order was made pursuant to an application by chamber summons dated 30th June, 2008 made by the defendants (the Appellants in this appeal). In it they sought the main orders of reinstatement of the application dated 29th September 2006 seeking to set aside *ex-parte* judgment entered on 7th September 2006 in favour of the Respondent. That application also sought leave to file defence and setting down the suit for hearing afresh.

There are five grounds of appeal. They all amount to one main complaint, and that is, that the Learned Senior Resident Magistrate, erred in law and in fact in dismissing the appellants' application due to the lack lustre performance of the appellants' previous advocates.

The Court has considered the submissions of the learned counsel appearing and also carefully perused the record of the lower court, both the original one and the typed proceedings. In their submissions the Respondent's Counsel contended that the appeal is incompetent, reason being the Learned Magistrate purported to enlarge time when he allowed the chamber summons application dated 19th December 2008 which sought enlargement of time within which the appellants could file their appeal.

The law that governs the filing of appeals from decisions of the lower courts to the High Court is contained in ***S.79G of the Civil Procedure Act*** *(the* ***Act)*** which states as follows:-

> ***"Every Appeal from a subordinate court to the High Court shall be filed within a period of thirty 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 the preparation and delivery to the appellant of a copy of the decree or order:***
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> ***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 in time".***

From these provisions, it is clear that any party aggrieved by a judgment or order of a subordinate court must file an appeal to the High Court within 30 days from the date the decision challenged on appeal was made. The proviso to ***Section 79G*** however, leaves no doubt that this court has wide and unfettered discretion to extend the time within which to file or admit an appeal filed outside the prescribed time, if the applicant satisfied the court that he had good and sufficient cause for not filing the appeal within time. In this case, the appeal was admitted out of time by the lower court and not by this Court as provided for in the Act.

However, to decline to strike out the appeal for this reason as sought by the Respondent is in keeping with the overriding principle of Sections 1A and 1B of the Act. The Court of Appeal in the case **NICHOLAS KIPTOO ARAP KORIR SALAT -VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013]eKLR** declined to strike out the appeal and in discussing the overriding principle stated as follows -

> ***"I will demonstrate this paradigm shift by citing three recent decisions of this Court. In Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. & 6 Others, Civil Appliation No. Nai. 173 of 2010 where a notice of appeal was served on the Respondent out of time and without leave of the court, upon being asked to strike it out, the Court (Omolo, Bosire and Nyamu JJ.A) observed that:-***
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> ***'The overriding objective in civil litigation is a policy issue which the Court invokes to obviate hardship, expense, delay and to focus on substantive justice ….'***
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> ***In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159(2)(d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."***

Turning to the merits of the appeal, the plaintiff (who is the Respondent in this appeal) sought injunctive reliefs against the Appellant who was interfering with his quiet possession of his parcel of land and disputing its ownership. It also sought orders for the 1st Defendant to issue clearance certificates and transfer forms to the Plaintiff to enable him process title in his name. It appears that the Defendants did not enter appearance or file defence. The plaintiff filed a request for judgment. The matter appears to have then been set down for "formal proof". It came up for such "formal proof" on 26th June, 2006 when the plaintiff and one (1) witness testified. On 7th July, 2006 judgment was entered for the plaintiff with costs and interest.

The Defendants then filed an application by chamber summons dated 26th September, 2006. This application was dismissed on 30th October 2006 for non-attendance of the Defendants' Advocate. When a warrant of attachment and sale was issued on 16th November 2006 and subsequently a warrant of arrest on 30th October 2007 the 2nd Defendant sought in a chamber summons dated 11th June 2008 orders that the warrants of arrest be set aside and that the Defendants' application dated 29th September 2006 be reinstated for hearing. He would subsequently seek the same orders in a chamber summons dated 30th June 2008.

This later application is the one that was heard and ruling delivered which is subject of this appeal. Counsel for the defendants should have sought to withdraw the earlier application in order to proceed with the latter application on the ground that the latter application was filed while the former was still in the court record, and that therefore the latter application was incompetent and not properly before the court. The court should have struck it out though it is clear that this was not brought to its attention.

Be that as it may, it is very clear from the chronological events that the Defendants have sought to delay this matter as much as they could by giving flimsy excuses on why they did not pursue their applications. The Learned Magistrate was right in stating that the Defendants had set themselves out to deliberately to delay the course of justice and were as such not deserving of the court's discretion.

In the event this appeal is hereby dismissed. The orders of the lower court of 21st July 2008 are hereby upheld. The Respondent shall have the costs of this appeal.

Orders accordingly.

Dated, signed and delivered at Nairobi this 7th day of July, 2015

A. **MBOGHOLI MSAGHA**

JUDGE