

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

LAND & ENVIRONMENT CASE NO.60 OF 2015

ZACKARIAH NYAMBANE.....
PLAINTIFF/APPLICANT

VERSUS

DAVID ONJIRI.....1ST
DEFENDANT/RESPONDENT

NATIONAL BANK OF KENYA LTD.....2ND
DEFENDANT/RESPONDENT

GEOFFREY COLLINS OMONDI T/A COLLINET INVESTMENTS.....3RD
DEFENDANT/RESPONDENT

RULING

[1] The plaintiff's application is dated 29th April 2015 and is brought under section 3A 3B and 95 of the Civil Procedure Rules and order 50 Rule 6 of the Civil Procedure rules and section 7 of the appellate jurisdiction.

The application seeks for extention of time to file an appeal out of time in the Court of Appeal against the ruling delivered by Justice A.C. Mrima on 12th March 2015. It also prays that the applicant do stay on the suit land until this application is dispensed with and until the hearing and determination of the appeal. Finally he asks for the stay of this case.

[2] The reasons advanced for such application is that the ruling was delivered on 15th March 2015 without any notice to the applicant. He says, that he wishes to appeal against the ruling given herein. That therefore he needs an extension of time to do so and that his appeal has high chances of success. He says that in the interests of justice, he should remain on the suit land until his application is heard, since disallowing his application would render the appeal nugatory and that he will never be compensated by damages.

[3] The application was opposed by 2nd and 3rd respondents who swore an affidavit through their Lawyer Juliet Adhiambo who says that the application is a gross abuse of the Court process, that the same is filed in bad faith and is to chiefly occasion miscarriage of justice on the part of the respondent.

She averred that the applicant acted as a guarantor for Stephen Kengara who took a loan from the 2nd respondent bank in 1990. The guarantee was backed by a charge registered over LR No. Kakamega/Soy/185 belonging to the plaintiff. That the land was sold in a public auction to the 1st respondent who obtained good title after due process was followed. That the 1st respondent has acquired good title in rem including right to excessive possession.

Counsel deponed that the applicant has filed several suits previously to wit Kitale HCCC No.57/2004 in which he was seeking injunctive orders against the plaintiff and restraining orders against the 2nd defendant from realizing the security. He obtained interim orders on 26/5/2004 and did nothing else. That the applicant failed to prosecute his application in the suit filed in Kitale as a result of which the suit was dismissed for want of prosecution and the interim orders made on 26/5/2004 were vacated. Upon

vacation the 2nd defendant bank proceeded to realise the security, received full payment and conveyed all necessary transfer instruments to the 1st defendant. It is averred that the applicant also filed Eldoret HCCC No.68 of 2012 praying for similar orders. The case is still pending.

Counsel argues that the 1st respondent who is the owner of the suit land cannot access his land. She argues that this application is brought in bad faith and is an abuse of the process of the Court and should be dismissed.

[4] I have carefully considered the application of the applicant herein. I have also perused the Court file herein. The Ruling against which the applicant wishes to appeal against was delivered on 12th March 2015 by Mrima J on behalf of Dulu J. There does not appear to have been any notice of the ruling on that date given by the Court to the applicant. He should have been notified. Since the ruling was not read on the initial date it was fixed to be delivered, there could have been no room to appeal, in my view, until the date he learnt that the ruling was delivered. The applicant argues that by that time the required time to appeal had expired, hence this application. His claim for extension of time is merited. I do hereby extend the same from the date hereof.

[5] The applicant prays that he remains in possession of the suit land until the hearing and determination of the appeal and that there be a stay of this case are not granted. From my perusal of this case, I note that this land has now changed hands, it was bought in a public Auction. The applicant filed a case in Kitale HCCC No.57 of 2004 against the 2nd defendant herein, he obtained injunctive orders and went to sleep. The suit was later dismissed for want of prosecution. He filed another case No.8 of 2012 in Eldoret, the case is still pending. I agree with my brother Justice Ndulu, when he says in his ruling, that the applicant is merely buying time seeking injunctive orders; he does not stand to suffer irreparable loss. Further, that, as per the dictum in Marco Mumive Kreti Vs Official Receiver and liquidator of Rural Urban Credit finance and another Nairobi Civil appeal No.164 of 2002, the remedy that is available to the applicant after the sale by the chargee is a claim in damages.

[6] I am therefore unable to order that he stays on the land and/or that this suit be stayed. The net result is that the applicant is granted leave to file an appeal out of time as prayed and all other prayers in the motion are dismissed with costs to the respondents.

It is so ordered.

DATED at BUNGOMA this 2nd day of December, 2015

S.N. MUKUNYA

JUDGE