



REPUBLIC OF KENYA

High Court at Nakuru

Miscellaneous Civil Application 151 of 2012

AMRAN AHMED MUSA.....PLAINTIFF

VERSUS

SIKANY LENGENY.....DEFENDANT

SILAS KAMAU.....INTERESTED PARTY

RULING

These are the Plaintiff's applications by way of Notice of Motion, one dated 17th May 2012 under section 79(a) of the Civil Procedure Act and order 51 Rules 1 by the Civil Procedure Rules plus all other enabling provisions of the Law, and another dated 16th November 2012 under Order 40 Rules 1(a), 2(1), 4(1) and 10(1) of the Civil Procedure Rules.

In the first application dated 17th May 2012, the Applicant is seeking she be granted leave to file an appeal out of time arising from a judgement and decree in **Narok SPM Civil Case No.74 of 2010 (AMRAN AHMED MUSA VS SIKANY LENGENY)** delivered on 10th November 2011.

The application is based on the following grounds. That:

1. the failure to file this suit within the prescribed time was occasioned by the Applicant's former advocates who were acting on behalf of the Applicant in the lower court, and by the time the Applicant became aware of the judgment in the **Narok SPM Civil Case No.74 of 2010 (AMRAN AHMED MUSA VS SIKANY LENGENY)** the 30 days for appeal had already lapsed.
2. The applicant was ready and willing to proceed with the Appeal and thus ought not to suffer for circumstances that resulted not out of her own fault, but out of her previous lawyers' mistake .

This application is supported by the affidavit of Amran Ahmed Musa sworn on 12th May 2012 who deponed that she instructed the firm of Ochego Onduso & Co Advocates to act on her behalf in **Narok Senior Principal Magistrate Civil Case No 74 of 2010** but her advocates did not inform her when the judgement was read on 10th November despite several visits to their office. She made personal efforts and went to court where she was informed that judgement was read in her absence. She immediately appointed another lawyer now on record who informed her that her time to file an appeal had lapsed and that she could only appeal with leave of the court. She further states that she has not been indolent in pursuing her right of appeal; that the appeal would not occasion any prejudice on the Respondent and that she has a *prima facie* case against the Respondent with a high possibility of success.

The second application dated 16th November 2012 is under a certificate of urgency seeking an order of temporary injunction restraining the Respondents by themselves, their agents, their servants and their workers from dealing with, interfering with erecting any structures or building, digging trenches and foundations or in any manner dealing with **Plot No.234 Block 6 Narok Town**, as well as costs of this application.

The application is based on the following grounds. That:

1. The Applicant is the lawful and legitimate allottee of the subject plot of land herein.
2. Vide a judgement delivered on 10th November 2011 in Narok SPMCC No.74 of 2010 the Applicant's suit against the Respondent herein was dismissed. The Applicant is aggrieved by the said judgment and has applied to be allowed to file an appeal out of time before this Honourable Court.
3. The interested Party herein is interfering with the use of an occupation of the dispute parcel of land herein, and unless he and the Respondent are stopped the intended appeal herein will be rendered nugatory.
4. The interested party's actions had been curtailed vide an order issued in Nakuru **HC Civil Case No.170 of 2012** but the same was dismissed in 2nd November 2012.
5. If this application is not allowed, the Applicant will suffer irreparable loss and damage, and it is in the best interest of justice that this application should be allowed.

This application is supported by the affidavit of Ahmed Musa Ismael sworn on 11th November 2012 who deponed that he was the lawful allottee of plot 234 Block 6 Narok town and had faithfully paid all the land rates but the interested party, Silas Kamau, was interfering with his use and occupation of the said land.

These are the applications that came up for hearing before me on 22nd November 2012, when Mr Kurgat appeared for the Applicant and Mr Githui appeared for the Respondent.

In his submission, Mr Kurgat asked the court to allow the two applications, preserve the property until it delivered its ruling and grant the applicant leave to appeal. The application dated 16/12/2012 sought injunctive reliefs against the respondents pending the hearing and determination of the first application which was seeking leave to file an appeal out of time against a judgement from a lower court. This was necessitated by the fact that the Respondent had sold the land to the interested party who was now interfering with the plaintiffs use and occupation of the land.

In his application for leave pending appeal, he submitted that the Applicant did not contribute to the failure to file the appeal on time and the court should be guided by section 79G of the Civil Procedure Act and Article 159 (2)(d) of the Constitution of Kenya 2010 which states that justice shall be administered without undue regard to procedural technicalities.

Mr Githui in his response stated that extension of time was a matter purely for the court to exercise its discretion based on the period and reason for the delay. He averred that the Plaintiff made the application for extension of time six months after judgment was delivered which period to him is too long- a fact that would unduly prejudice the interested party as the transfer only took place due to the Plaintiff's failure to appeal. The Plaintiff in his view had also not offered an explanation by way of affidavit by counsel admitting the mistake as alleged. To him the Plaintiff was indolent as she had picked the proceedings in March but did not file an appeal until May and although section 79G of the Civil Procedure Act and Article 159 (2)(d) of the Constitution of Kenya 2010 state that justice shall be administered without undue regard to procedural technicalities, courts should also hear cases on merit.

In submitting for the application dated 16th November 2012, Mr Githui urged the court to dismiss

application with cost and stated that every application for injunction as per Order 40 Rule 1 of the Civil Procedure Rules must be made in a substantive suit. In this instance there is no pending suit. He also raised the issue of jurisdiction stating that the High Court lacked jurisdiction in granting an injunction pending appeal and that Rule 5(2) (a) of the Court of Appeal Rules only apply to the Court of Appeal.

Mr Kurgat in his response disagreed and stated that Order 42 of the Civil Procedure Rules gave the High Court jurisdiction to grant an injunction pending appeal. According to him, the Civil Procedure Rules are not meant to be conclusive and the court should be guided by its inherent duty to do justice as per section 3A of the Civil Procedure Act.

The questions before this court are:-

1. Whether this court can grant an injunction where there is no subsisting suit?
2. Whether this court has jurisdiction to issue an injunction at this stage.
3. whether the court will exercise its discretion and grant the Plaintiff leave to appeal out of time.

Before I delve into the questions raised, I am disturbed by the way the Plaintiff's name has been presented through the pleadings. In the undated and unsigned memorandum of appeal and application of notice of motion dated 15th May 2012 the Plaintiff is identified as Amran Ahmed Musa. However, in the notice of change of Advocates drawn by Kiplenge and Kurgat Advocates dated 10th October 2012, the certificate of urgency, application for notice of motion dated 10th November 2012 and the replying affidavit dated 20th November 2012, the Plaintiff is identified as Ahmed Musa Ismael. I am at this point unable to establish whether we are dealing with two different Plaintiffs or the same person.

Now to address the questions before court.

First there is no substantive suit filed in this matter. An injunction can only be granted if it is sought within a subsisting suit as is clear in order 40 rule. I am also aware that another suit, **HC Civil Suit No 170 of 2012** has been filed by the Plaintiff against the interested party. In my opinion this suit involves the same suit property and the reliefs sought, if granted, will address the Plaintiff's problem.

Secondly on whether the court has jurisdiction to grant an injunction pending appeal and exercise its discretion to grant the Plaintiff leave to appeal out of time were addressed in **Venture Capital & Credit Ltd v Consolidated Bank of Kenya Ltd (Civil Application No. 349 of 2001 (Nairobi))**. It was held that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be exercised judicially and not in a whimsical or arbitrary fashion. Thus, there are certain principles which the court must follow in granting such an injunction, as ably explained by Visram J (as he then was) in **High Court Civil Appeal No.492 of 2004, Patricia Njeri & 2 Others v National Museum of Kenya (unreported)**. They are:

- (a) The discretion will be exercised against an applicant whose appeal is frivolous
- (b) The applicant must state that a reasonable argument can be put forward in support of his appeal
- (c) The discretion should be refused where it would inflict greater hardship than it would avoid
- (d) The applicant must show that to refuse the injunction would render his appeal nugatory

The Court should also be guided by the principles in **Giella v Cassman Brown & Company Ltd (1973) EA 358**

It must however be noted that the criteria used in determining whether leave to file an appeal out of time is well explained in **Niazons (K) Ltd v China Road& Bridge Corporation (K) Civil Application No.109 of 2000 (Nairobi)** where the Court of Appeal stated that the decision on whether or not to extend time for appealing is essentially discretion, but the court ought to take into account:

- (1) The length of the delay.
- (2) The reason for the delay.
- (3) The chances of the Appeal succeeding if the application is granted
- (4) The degree of prejudice to the Respondent if the Application is granted

In this case, the reason for the delay has been put down to the failure of the advocates to file the appeal once the judgement was read. This is however, not a sufficient reason. If at all it is the advocates' fault that the appeal was delayed, then the applicant has a remedy in suing the advocates in negligence, as held in **Nimron Wanguhu v A.F.C. & Another (HCC 50/02 Kitale)**

For the above reasons I find the applications dated 17th May 2012 and 16th November 2012 unmerited and dismiss both of them. I also direct that his matter be mentioned alongside **HC Civil Suit No 170 of 2012** to take directions from counsel on how they wish to proceed with both files.

Dated and delivered this 1st day of February 2013

**L WAITHAKA
JUDGE**

Present

N/A for the plaintiff
N/A for the respondent
CC: Stephen Mwangi

**L N WAITHAKA
JUDGE**