REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC. APPLICATION NO. 8 OF 2020

JOSEPH JUSTIN MUTHEE.....APPLICANT

VERSUS

HENRY KINYUA MBUI.....RESPONDENT

RULING

Introduction

By a Notice of Motion dated 25th February 2020, the Applicant sought the following orders:-

(1) Spent.

(2) That the Honourable Court be pleased to grant the applicant leave to file an appeal out of time from a judgment given in Kerugoya CMCC No. 102 OF 2015.

(3) That the Honourable Court be pleased to grant stay of execution of the judgment delivered in Civil Case No. 102 of 2015 by Hon. S.M.S Soita.

(4) That the costs of this application be in the intended appeal.

The said application is premised on the following grounds:-

(a) That the applicant was aggrieved and dissatisfied with the judgment given in Civil Case No. 102 of 2015 and he intends to appeal against the same.

(b) That the applicant has good grounds of appeal.

(c) That the applicant did not file his appeal in time because the Court delayed in supplying him with certified copies of proceedings and judgment.

(d) That if stay is not granted, his appeal shall be rendered nugatory.

(e) That the respondent shall not suffer any prejudice should this application be allowed.

(f) That it is meet and just to allow this application.

Applicant's Factual Statement

The applicant in his supporting affidavit deponed as follows:-

(a) That judgment was entered against him in CMCC No. 102 of 2015 (Kerugoya) on 24/4/2019.

(b) That he was aggrieved and dissatisfied with the said judgment and he intends to appeal against the same.

(c) That he did not file his appeal on time because the Court delayed in supplying him with certified copies of proceedings and judgment.

(d) That still he had instructed his former advocate to file his appeal immediately but unfortunately he did not.

(e) That his advocate used to lie to him that the case was not over due to valuation and costing.

(f) That he believed his former advocate and therefore waited for costing and valuation to be done.

(g) That his former advocate used to use the same as delay tactic so that he cannot appeal.

(h) That when he decided to seek another advocate's legal advice, and he was advised the case was over and he became shocked.

(i) That he then decided to change his advocate since his former advocate had frustrated him.

(j) That infact his former advocate has refused to give him proceedings and he only managed to get them after he hired his current advocate.

(k) That that was also the reason for the delay of proceedings.

(l) That the mistake of his advocate should not be visited upon him.

(m) That when he instructed his current advocate to file an appeal, the matter was pending ruling on bill of costs and his new advocate was unable to access the file until the ruling was delivered.

(n) That his advocate then proceeded for maternity leave for three months; again the matter was delayed.

(o) That if the stay is not granted, his appeal shall be rendered nugatory.

(p) That the respondent shall not suffer any prejudice should his application be allowed.

Respondent's Factual Statement

The respondent opposed the said application and filed a replying affidavit sworn on 30th June 2020 on the following facts:-

(i) That the application dated 25th February 2020 is frivolous, vexatious and an abuse of the Court process.

(ii) That the judgment in CMCC No. 102 of 2015 was delivered on 24th April 2019 in the presence of the applicant's counsel and certified copies of the said judgment and decree thereof were ready for collection within reasonable statutory time since the respondent was able to secure his copies of decree on 4/6/2019 and judgment on 10/7/2019.

(iii) That the allegation that the lower Court failed to supply the applicant with certified copies of proceedings and judgment within time lacks any truth because there is no proof to support such since the applicant has failed to attach any letter requesting for the said documents or even a certificate of delay from the lower Court and that the application herein is a mere after thought.

(iv) That according to the judgment of the lower Court, the applicant was ordered to transfer a portion of 0.125 acres already occupied by the respondent out of L.R. No. INOI/KIMANDI/1159 within 90 days from the date of judgment and in default, he shall refund the purchase price paid plus interest thereon at Court rates from the date of agreement and value of all developments as assessed by a valuer upto date.

(v) That the applicant has not complied with any options of the judgment.

(vi) That vide a letter dated 30/7/2019, the applicant's counsel requested for a valuation report of the suit land and which was duly forwarded to him by a letter dated 4/9/2019 indicating that the value of developments is Ksh. 2,955,000/= to enable him satisfy the decree but later went to sleep yet he had all the time to either appeal or settle the decree.

(vii) That the respondent vide his Bill of costs dated 17/5/2019 sought for costs of the suit which was awarded at Ksh. 93,950/= vide a ruling dated 24/10/2019 in the presence of the applicant and counsel on record and he never indicated that he intends to appeal against the judgment all along.

(viii) That the application dated 25/2/2020 was filed after a period of over 10 months and which period he believes constitutes inordinate delay and which delay has not been reasonably explained.

(ix) That the allegations by the applicant blaming his then Advocates on record for not appealing in good time is a mere afterthought because there is no evidence tendered to show that he instructed M/S Ngigi Gichoya & Co. Advocates to lodge an appeal as no instruction fees receipt or letter has been attached and there is no affidavit from his former lawyer to support such an allegation.

(x) That he has been advised by his Advocates on record which advice he believes to be true that the allegations by litigants blaming their former Advocates for non-compliance with legal issues has a limit and it is not enough for the applicant to state that the

mistakes of his advocates should not be visited upon him without tendering proof of such negligence as in this case.

(xi) That on 24/10/2019, the applicant appointed M/S Tess Kimotho & Co. Advocates to represent him in the lower Court instead of M/S Ngigi Gichoya & Co. Advocates when the matter came up for hearing of Bill of costs and yet since 24/10/2019, the current Advocates failed to file an application seeking leave to appeal out of time and its now six months down the line which shows that the applicant is not serious in appealing but want to delay this matter and block the respondent from enjoying the fruits of his judgment unlawfully.

(xii) That from the draft Memorandum of Appeal annexed to the supporting affidavit, he believes that the same raises no reasonable grounds with any probability of success and hence the same shall not be rendered nugatory if stay of execution is not granted.

(xiii) That the applicant has not demonstrated what substantial loss he may incur if stay is not granted and has also failed to offer any security for the Appeal.

(xiv) That he is not a man of stray and in the unlikely event that the applicant's proposed Appeal succeeds, he will be ready and capable to refund the decretal sum in the decree herein as he has settled on the suit land since the date of the sale agreement herein.

Applicant's Submissions

The applicant through the firm of M/S Tess Kimotho & Co. Advocates cited the case of *Butt Vs Rent Restriction Tribunal (1982) K.L.R 417* where the superior Court gave guidance on how a Court should exercise its discretion in an application for stay pending appeal. The applicant also submitted that they entered into a sale agreement with the respondent which was breached and that he was willing to refund the purchase price. However, he submitted that he is not willing to pay the respondent the cost of the development since they did not agree on the developments. He submitted that the respondent constructed a building while this case was ongoing before the lower Court.

The applicant further submitted that he has an arguable appeal with high chances of success. The applicant cited the following cases in support of the application:-

(1) Mwangi Vs Kenya Airways Ltd (2003) K.L.R.

(2) Samuel Mwaura Muthambi Vs Josphine Wanjiru Njagi & Another (2018) e K.L.R.

(3) Nairobi Womens' Hospital Vs Purity Kemunto (2018) e K.L.R.

Respondent's Submissions

The respondent through the firm of Kiguru Kahigah & Co. Advocates submitted that the application dated 25/5/2020 lacks merit and is an abuse of the Court process which does not meet the legal threshold for the grant of the orders sought. He further submitted that after judgment in the lower Court was delivered on 24/4/2019 in the presence of all parties and their advocates, the applicant never applied for certified copies of proceedings, judgment and decree thereof until 25th October 2019 when a period of over 6 months had expired. He further submitted that even after being supplied with the certified copies of proceedings, the applicant went to slumber until 25th February 2020 when he filed the current application. He averred that it is trite law that an application for leave to appeal out of time and also stay of execution pending the hearing of the intended Appeal must satisfy several conditions including the period of delay and reasons for such delay since the same must be made without inordinate delay. The respondent also submitted that the applicant took a period of over 6 months from the time the judgment was delivered on 24th April 2019 upto 25/10/2019 when he applied for copies of the proceedings and judgment yet a certified copy of judgment was available by 10th July 2019 and copies of decree were available as at 4th June 2019. He submitted that the period of six (6) months is inordinate and no explanation has been given. The respondent also submitted that the applicant blames his former Advocates alleging that they refused to prefer an appeal within the statutory time lines yet there is no evidence by the applicant that he instructed the former Advocates to file an Appeal on his behalf as no copies of legal fees were annexed to the supporting affidavit and the former Advocates have not sworn any affidavit in support of the allegations. The respondent also submitted that the current Advocates failed to act within reasonable time for failing to secure certified copies of decree which was available as at 4th June 2019 and certified copies of judgment was available as at 10th July 2019 but they also never acted accordingly until 22nd February 2020 when the current application was filed. He further submitted that the Honourable Court never issued the applicant with a certificate of delay yet he blames the Court for delay in supplying him with certified copies of proceedings and judgment.

It is also submitted that it is trite law that a litigant cannot cure her lapses to prosecute her case expeditiously by blaming the mistakes on her former counsels and such failure cannot be cured by instructing a new Advocate as has happened in this case. He cited the case of *Republic Vs University of Nairobi Ex-parte Lazarus Wakoli Kunani & 2 others (2007) e K.L.R* and the case of *Savings and Loans Limited Vs Susan Wanjiru Muritu – Nairobi (Milimani) HCCC No. 397 of 2002*. The respondent also cited the decision by this Court in *ELC Appeal No. 17 of 2015 (Kerugoya) Between Maganjo Joshua Kago Vs Rose Njeri Mbuiimbwe*.

On the issue of stay pending Appeal, the respondent submitted that the application fails to meet the strict legal conditions stipulated under *Order 42 Rule 6 (1) and (2) CPR* in that the applicant has not demonstrated what substantial loss he will suffer unless stay order are granted or even offering any security thereof. He cited the case of *Kenya Shell Limited Vs Benjamin Karuga & Another (1986) e K.L.R* and the *case of Ndege Kabibi Kimanga Vs Karinga Gaciani & 12 others ELC No. 220 of 2013 (Kerugoya) unreported.*

Legal Analysis

I have carefully considered the Notice of Motion dated 25th February 2020, the supporting affidavit and the annextures. I have also considered the replying affidavit sworn by the respondent and the submissions by the counsels. ***Section 79 G of the Civil Procedure Act*** provides 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;*
>
> *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.*

The first prayer in this application is for leave to file appeal out of time. The ***Civil Procedure Act*** sets out the conditions an appellant must establish for the grant of such an order. An aggrieved party is granted automatic leave to file appeal within 30 days from the date the decree and/or order was given. The impugned judgment sought to be appealed against was given on 24/4/2019. The appellant stated at paragraph 4 of the supporting affidavit that he did not file appeal on time because the Court delayed in supplying him with certified copies of proceedings and judgment. However, the appellant did not attach a copy of a letter requesting to be supplied with certified copies of the alleged proceedings and judgment.

This Court takes judicial notice that proceedings and judgment can only be issued to a party upon request. The appellant could not have been supplied with the said documents unless he requested for the same. The appellant has not also annexed a copy of certificate of delay from the lower Court being certified as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order under ***Section 79 G***. The appellant also seems to lay blame on his former advocate for failing to file the appeal within the stipulated period. This Court has pronounced itself and it is worth repeating that disputes belong to parties and not their advocates. It beholves every litigant to follow up his/her case with an advocate to ensure that pleadings in the case are filed in real time. It is also an overriding objective under ***Section 1A and 1B of the Civil Procedure Act Cap. 21 laws of Kenya*** that advocates appearing on behalf of litigants assist the Courts to further the overriding objective by participating in the processes of the Court and complying with directions as may be given from time to time. Assuming the appellant instructed his former advocate to file the appeal immediately after judgment was delivered, he did not make a follow up to confirm that the lawyer did file the appeal as alleged. There is no evidence of payment receipt indicating that indeed he instructed his former advocate to lodge the appeal.

Kimaru J. was faced with a similar conundrum in the case of ***Savings and Loans Limited Vs Susan Wanjiru Muritu Nairobi (Milimani) HCCC No. 397 of 2002 (U.R)*** and expressed himself as follows:-

> ***"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant*** (Emphasis added)".

The circumstance of this case apply to the above decision. The appellant cannot be heard to blame his former Advocate as the case belongs to him and not the advocate. In yet a similar decision by this Court in the case of ***Peter Muigai Kihara Vs Chairman, Secretary and Treasurer of P.C.E.A Muteero Congregation Karen Parish, Milimani South Presbytery & 2 others ELC No. 35 of 2016 (Kerugoya)*** and reported in ***(2019) e K.L.R, I*** referred to the decision by the Court of Appeal in the case of ***Tana and Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakio & 3 others (2015) e K.L.R*** where the superior Court had cited the case of ***Kettaman & others Vs Hansel Properties Ltd (1988) 1 All E.R. 38*** where Lord Griffith held as follows:-

> "*Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequence of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings…."*.

I agree with the decision by the superior Court. I hasten to add that with the enactment of ***Section 1A and 1B of the Civil Procedure Act***, the demand by the general public is that the overriding objective of the Act is that Court business must be conducted in an expeditious, efficient and timely manner. The overriding objective of resolving disputes cannot be achieved by allowing such applications as before me.

The second limb of the prayer is for stay of execution pending the intended Appeal.

Order 42 Rule 6(2) provides as follows:-

> "*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 decree or order as may ultimately be binding on him has been given by the applicant".

The requirements for the grant of stay pending appeal is that the applicant must prove that he will suffer substantial loss unless the order is granted. Substantial loss was defined in the case of ***Kenya Shell Limited Vs Kibiru (1986) K.L.R 410*** where **Platt, Ag. J.A** (as he then was) held as follows:-

"It is usually a good rule to see if Order XLI Rule 4 (similar to the current Order 42 Rule 6(2) CPR) can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented;

Therefore without this evidence, it is difficult to see why the respondent should be kept out of their money".

The applicant in this case has not substantiated how he will suffer substantial loss unless the orders of stay pending appeal are granted. On that first principle, I find that the applicant has failed the test.

On the second principle, the impugned judgment was delivered on 24th April 2019. Other than blaming his former counsel, the applicant has not given any sufficient reasons for the delay in filing the Appeal or the application for leave for ten (10) months. Such a period of ten (10) months without any sufficient explanation in my view is inordinate and unacceptable. The applicant has also failed to provide security or give an undertaking to abide by any terms this Honourable Court may given for the due performance of the decree as may ultimately be binding on him. On the second and third principles, I also find that the applicant has fallen short of the same.

Conclusion

For all the reasons I have given herein above, I find the application dated 25th February 2020 lacking in merit and the same is hereby dismissed with costs. It is so ordered.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 13th day of November, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Wanjiru holding brief for Mr. Kahigah for Respondent

2. Mrs. Mwakazi for the Applicant

3. Mbogo – Court clerk.