



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC MISC NO. 13 OF 2018

MORRIS ODHIAMBO OUMA.....APPLICANT

VERSUS

PETER MWAGA OMBURA.....RESPONDENT

RULING

1. The applicant who is represented by the firm of Oguttu, Ochwangi, Ochwal and Company Advocates has approached this court pursuant to various provisions of the law including Sections 1A, 1B, 3A 63 (e) and 79 G of the Civil Procedure Act (Cap 21 Laws of Kenya) as well as Articles 20 (1) 50 (1), 59 and 259 (a) of the Constitution of Kenya, 2010. In the application by way of a notice of motion dated 23rd August, 2018 and filed on 20th September 2018, the applicant is seeking the following orders:-

a) Spent

b) Spent

c) The Honourable Court be pleased to extend time and/or grant leave and/or permission to the applicant to lodge an Appeal out of time against the Judgment and Decree issued on the 20th June, 2018 vide **OYUGIS PMCC ELC No. 59 of 2011, between **PETER MWAGA OMBURA –V- MORRIS ODHIAMBO OUMA****

d) Consequent to prayer (3) above being granted, the applicant be at liberty to file the Memorandum of Appeal within 14 days and/or such shorter period as the Honourable court may deem fit and/or expedient.

e) The Honourable Court be pleased to grant an order of Stay of Execution of the Judgment and decree issued on the 20th June 2018 vide **OYUGIS PMCC ELC NO. 59 of 2011, between **PETER MWAGA OMBURA –V- MORRIS ODHIAMBO OUMA** pending the hearing and determination of the intended Appeal**

f) Costs of this application do abide the intended Appeal.

g) Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is anchored on grounds (a) to (c) on its face, a 26 paragraphed supporting affidavit of the applicant and the following documents annexed to the affidavit:-

a) A copy of judgment rendered on 20th June 2011 (M00-1)

b) A draft memorandum of Appeal dated 26th August 2018 herein (M00-2).

3. By a replying affidavit sworn on 3rd October 2018, the respondent who is represented by the firm of J. Soire and Company Advocates, opposed the application. He averred, inter alia, that there is no material placed before this court to show that the applicant ever instructed his former counsel, M/s Bana and Company Advocates as alleged in the application. That the applicant apparently instructed his counsel to file the instant application on or before 28th August 2018 but the application was filed on 20th September 2018, hence it delayed for about one month and that the orders sought in the application can not be granted as the appeal is yet to be filed.

4. The application was argued by written submission pursuant to court order of 4th October 2018; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction No. 33 (a) of the Environment and Land Court Practice Directions, 2014.**

5. By submissions dated 7th November 2018, learned counsel for the applicant made reference to the judgment and decree in Oyugis Principal Magistrate's court case number 59 of 2011 and that the applicant instructed his previous advocate on record, M/s Bana and Company Advocates to file an appeal against the judgment and decree. Counsel framed four (4) issues for determination namely:-

1. Whether the court has jurisdiction to grant leave to the applicant to lodge its appeal out of time?
2. Whether there was inordinate delay on the party of the applicant to file the intended appeal?
3. Whether the applicant has met the conditions set in granting orders for stay of execution?
4. Whether the plaintiff/applicant would suffer irreparable loss ?

6. Counsel submitted, inter alia, that the application has been brought in good faith and without inordinate delay. That the applicant's right to appeal ought not to be denied by the court as he has met the conditions under **Order 42 Rule 6 of the Civil Procedure Rules,2010** for the grant of orders of stay of execution.

7. Counsel further submitted that if the orders sought in the application are not granted, the intended appeal is likely to be rendered nugatory. That the respondent is out to dispossess the applicant of the suit land which was in held in trust for him by the respondent.

8. To buttress the submissions, the applicant's counsel relied on **Edward Njane Nganga and another –v- Damaris Wanjiku Kamau and Another (2016) eKLR, Imperial Bank Ltd (in Receivership) and Another –v- Alnashir Popat & Others 18 Others (2018) eKLR and Kenya Shell Ltd –v- Benjamin Karuga Kibiru and Another (1986) eKLR**, among other authorities.

9. In his submissions dated 15th November, 2018, learned counsel for the respondent urged this court to disallow the application. Counsel submitted on orders sought in the application and that the court has the discretion to grant or decline the orders. That the applicant has not placed any sufficient material before the court for the application to succeed.

10. Counsel for the respondent also cited **Section 7 G of the Civil Procedure Act (Cap 21)**. Learned counsel submitted that the applicant has not met the principles set out under **Order 42 Rule 6 of the Civil Procedure Rules,2010** for the grant of the orders in the application.

11. I have studied with care the entire application, the replying affidavit and the submissions by counsel for the respective parties in this matter. I note issues (i) to (iv) for determination framed by the applicant's counsel in submissions. Quite plainly, the issues for determination are whether the applicant is entitled to extension of time to lodge an appeal, stay of execution and that costs to a bid to intended appeal as sought in the instant application.

12. On the issue of extension of time to lodge an appeal, the applicant attached a draft memorandum of appeal (MOO-2) to the application. The grounds of appeal encompass issues of law including trust and adverse possession which beg for the attention of the intended appeal on merit. The intended appeal clearly is arguable and if the application for stay of execution refused, the appeal, if successful, would be rendered nugatory.

13. Grounds on the face of the application and the applicant's affidavit in support of it, reveal that the applicant instructed his previous counsel to file appeal from the decision of the trial court. That on or about 31st July 2018, the applicant got surprised when the said counsel failed to advise him on the status of the appeal. In the case of **Patel –v- Highway Carriers (1986) LLR 258 (CAK), Sir William Duffus,P**, held that a litigant should not suffer for his advocate's mistakes.

14. The instant application was filed exactly three (3) months after judgment of the trial court was rendered. Therefore was the delay inordinate?

15. In the case of the **Chairman of Kenya National Union of Teachers (KNUT) –v- Henry Inyangla and 2 Other (2018) eKLR**, the Supreme Court of Kenya was approached for extension of time. The applicant failed to give reasons for fifteen (15) months delay and the application was dismissed accordingly. In the present case, three (3) months delay was accessioned by mistake of counsel which can not be visited on the applicant and I am of the view that the delay is not inordinate in the circumstances.

16. With regard to stay of execution, **Black's Law Dictionary 10th Edition**, has defined the term "**stay**" also termed as "**stay of execution**" thus:

“An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding.”

17. Under **order 42 Rule 6 of the Procedure Rules,2010** and applicant who is seeking a stay of execution pending appeal must demonstrate that :-

- i. Substantial loss may result to the applicant unless the order is made;
- ii. The application has been made without undue delay;
- iii. Such security as to cost has been given by the applicant.

18. The appellant contended that the intended appeal, raises salient and pertinent issues of law which include breach of fiduciary duty (trust). That the respondent intends to dispossess him of the suit land hence render him homeless and destitute.

19. The respondent asserted that stay of execution can not be granted unless and until an appeal has been filed by applicant. However, in **Imperial Bank case (supra)**, it was held that a party may apply for extension of time either before or after taking the action in respect of which extension of time is sought.

20. The respondent stated that he should be left to enjoy the fruits of his Judgement and that the application is premature and also an abuse of the court process. However, the applicant has shown by way of his affidavit that he may be exposed to suffer substantial loss and or prejudice, if the application is declined.

21. In the case of **Blue Shield Insurance Co. Ltd –v- Mahinda (2009) KLR 551 at 561**, it was held inter alia,

“ We are satisfied that if the application is not allowed, the intended appeal will not only be rendered nugatory, but also that the applicant is likely to suffer great hardship in the nature of financial loss which would be out of proportion to the loss that the respondent is likely to suffer.....” (Emphasis added)

22. Borrowing from the foregoing authorities and by applying the relevant law, I am constrained to exercise this court’s discretion in favour of the applicant. I find that the application is meritorious.

23. Accordingly I allow the application dated 23rd August, 2018 in terms of **Orders 3,4 and 5** sought therein.

24. Costs of the application shall be costs in the intended appeal.

25. The stay of execution so granted by order No. 5 in the application shall be subject to the applicant making a deposit of **Kshs. 100,000/=** being security for the performance of decree, within the next 14 days from the date hereof in default the application stand dismissed with costs.

26. The appeal by the applicant shall be filed and served within the next 14 days from the date hereof.

27. The parties are at liberty to apply.

DELIVERED, SIGNED and DATED in open court at MIGORI this 23rd day of JANUARY, 2019.

G. M. A. ONGONDO

JUDGE

In the presence of:

Ms. Okota holding brief for learned counsel Oguttu Mboya for the applicant.

Tom Maurice, Court Assistant