



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 336 OF 2015

MARGARET WANGUI WAMBUGU: Legal representatives of the estate of

HANNAH WANJIRU WANGAI (Deceased).....PLAINTIFF

VERSUS

SIMON KAGIRI.....DEFENDANT

RULING

(Application for extension of time to file a Notice of Appeal out of time; application filed after close to 2 years from the date of judgment; the delay not adequately explained; application dismissed).

1. The application before me is that dated 8 October 2018 filed by the defendant. The application is said to be brought pursuant to the provisions inter alia of Section 7 of the Appellate Jurisdiction Act, Cap 9, Laws of Kenya, Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya, and Order 50 Rule 6 of the Civil Procedure Rules. The main prayer in the application is for an order to extend time to the applicant for lodging a Notice of Appeal against the judgment delivered on 18 October 2016. The application is opposed and before I go to the gist of it, I will give a little background, so as to put the application into context.

2. This suit was commenced through a plaint which was filed on 20 November 2015. The original plaintiff (who is now deceased) was the mother of the defendant/applicant. In the suit, the plaintiff claimed that the applicant fraudulently obtained registration as proprietor of the land parcels Nyandarua/Sabugo/1080 and 3271 which were previously in her name. She sought orders to have the titles of the applicant cancelled and for the proprietorship to revert back to her name. The suit was resisted and proceeded for hearing and I delivered judgment on 18 October 2016. I found in favour of the plaintiff. I ordered the cancellation of the titles of the applicant and directed that the same do revert to the proprietorship of the plaintiff.

3. It will be seen that through this application, the applicant wishes to be allowed to file a Notice of Appeal out of time. In support of the application, the applicant has averred inter alia that judgment was delivered when the plaintiff had died; that after the judgment he engaged the law firm of M/s Lawrence Mwangi & Company Advocates on 27 October 2016 to file an appeal but the said advocates did not execute his instructions; that on learning that he had been duped, he appointed the law firm of M/s Ochieng' Gai & Company Advocates on 29 January 2018 but again they failed to act as instructed; that he then engaged the law firm of M/s Mwangi, Mukira & Company Advocates on 15 July 2018 to take over the matter but yet again they failed to act on his instructions. He has annexed some payment receipts for legal fees to the said law firms to support his allegations.

4. After the plaintiff died, an application for substitution was made and allowed by one Hannah Wanjiru Wangai. She is the administratrix ad litem of the estate of the deceased plaintiff. She has responded to the application by filing a replying affidavit vide which she has deposed inter alia that firstly, her mother died after judgment was delivered; that this court is now functus officio after delivering its judgment; that the titles have already reverted back to the name of the deceased plaintiff; that there has been unreasonable delay of some 2 years; that the applicant can still stake his claim in the succession cause of his deceased mother and that this application ought to have been filed in the Court of Appeal.

5. At the hearing of the application, Mr. Kiburi, learned counsel for the respondent, dropped the objection that the application ought to have been filed in the Court of Appeal and that this court has no jurisdiction to entertain this application. He however opposed the application on the other grounds and particularly on the element of delay. Ms. Wanjiru for the applicant was of the opinion that the delay is explained and that the applicant was only let down by the counsel that he had instructed but who did not act.

6. I have considered the application. The application is premised on the provisions of Section 7 of the Appellate Jurisdiction Act which provides as follows :-

7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

7. It will be seen from the above that the court has discretion to enlarge time, but as in all other discretions, the same must be exercised judiciously taking into consideration all relevant factors. One of the important elements when considering such an application is the element of delay. If there is considerable delay without a plausible explanation being offered, the application may be refused.

8. In the instance of this case, judgment was delivered on 18 October 2016. This application was filed on 8 October 2018, which is just about 2 years from the date of the judgment. In the meantime, the decree has already been executed and the titles are now in the name of the deceased plaintiff awaiting distribution in a succession matter. There is argument that judgment was delivered after the plaintiff had died, but that is neither here nor there. First, I note that the plaintiff died on the same date that judgment was delivered and I cannot tell if she died before or after delivery of the judgment. But that is really a red herring, for it is not one of the issues that the applicant seeks to rely on as having caused him delay in filing the Notice of Appeal. What the applicant has stated is that he proceeded to engage various firms of advocates but they did not proceed to file the Notice of Appeal despite being instructed to do so. He has annexed a receipt of Kshs. 100,000/= dated 27 October 2016, paid to M/s Lawrence Mwangi & Mwangi Advocates, which states that it is payment for "legal fees." It is difficult for me to conclusively find that this was payment for filing of a Notice of Appeal, for the receipt does not indicate so, but if I am to give the applicant the benefit of doubt, and assume that this payment was for filing the Notice of Appeal, no Notice of Appeal was ever filed, and the next record that I have of him following up on the matter is 29 January 2018, when he states that he engaged the law firm of M/s Ochieng' Gai & Company Advocates. More than one year had lapsed since the time he claims to have engaged M/s Lawrence Mwangi & Mwangi Advocates, and the applicant has not said what efforts he made to follow up with his advocates within the year 2017, or indeed what other efforts he made to ensure that the Notice of Appeal is filed, given that the said law firm had not acted. This period between October 2016 to January 2018 is certainly not explained at all. If the applicant felt that the advocate was not acting, knowing that the issue was urgent, he could have engaged another counsel to file the Notice of Appeal, but it is apparent that he did not, and the whole of the year 2017 lapsed.

9. In my own assessment, the applicant is guilty of laches. The delay of 2 years is considerable and not well explained.

10. For the above reasons, I am unable to exercise my discretion in favour of the applicant and this application is hereby dismissed with costs.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 28th day of February 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Murimi holding brief for Mr. Kiburi for the plaintiff/respondent .

Ms. Ngugi holding brief for Mr. Waichungo for the defendant /applicant.

Court Assistant : Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU