



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 638 OF 2015

RUTH WAKONYO KABUNDU.....1ST PLAINTIFF

KABUNDU HOLDINGS LIMITED.....2ND PLAINTIFF

- VERSUS -

PATRICK MUKIRI KABUNDU.....DEFENDANT

RULING

Introduction

1. On 19/3/2018, the defendant, Patrick Mukiri Kabundu (the **applicant**), brought an application dated 15/3/2018 seeking leave of this court to lodge an appeal against the order and ruling delivered by Gacheru J on 31/8/2017. Secondly, he sought an extension of time within which to lodge the appeal. Thirdly, he sought an order staying proceedings herein pending the hearing and determination of the intended appeal.

2. The application was supported by the applicant's affidavit sworn on 15/3/2018 in which he deposed that the impugned ruling was delivered in the absence of all the parties. He added that he was not served with a ruling notice and he only got to learn about delivery of the ruling through a letter dated 17/1/2018 from the plaintiff's advocates, M/s Ratemo & Company Advocates. He further deposed that through the said ruling, Gacheru J had dismissed his preliminary objection through which he had challenged the jurisdiction of the court to entertain the dispute in this suit and sought an order striking out the suit on the ground that the dispute herein had been adjudicated upon and determined by Ojwang J (as he then was).

3. The plaintiffs (respondents) opposed the application through a replying affidavit sworn by the 1st plaintiff on 30/5/2018. She deposed that she was aware the applicant intended to appeal against the material ruling. She added that the application was intended to delay the disposal of this suit. Further she deposed that the applicant ought to have been vigilant. She contended that the applicant had slept on his rights by not being vigilant. She added that the applicant was only seeking to deny the plaintiffs an opportunity to enjoy the fruits of the impugned ruling.

Applicant's Submissions

4. The application was canvassed through written submissions. The applicant filed his submission on 3/12/2018. He relied on **Carmella Wathugu Karigaca v Mary Nyokabi Kangaca [1997] eKLR** where it was held that where the court is asked to grant such leave, it must be satisfied that the application satisfies the conditions set out in Section 27(2) of the Limitation of Actions Act, since the issue of limitation is a jurisdictional issue. The applicant further submitted that the fact that the notice of appeal had not been served does not deprive the Court the power to extend time for filing the appeal. He relied on **Mugo and others v Wanjiru & Anther CA 17 of 1969**.

Respondents' Submissions

5. The respondents filed their submissions on 12/11/2015. They submitted that the applicant had not met the condition set out in **Nicholas Kiptoo Arap Korir v The Independent Electoral and Boundaries Commission and others Supreme Court application Number 16 of 2014** where it was held that: (i) extension of time is an equitable remedy that is only available to a deserving party at the discretion of the court; (ii) a party who seeks for extension of time has the burden of laying a basis to the subject of the court; (iii) whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis; (iv) whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; (v) whether there will be any prejudice suffered by the respondents if the extension is granted; (vi) whether the application has been brought without undue delay; and (vii) whether in certain cases like election petitions, public interest should be a consideration for extending time.

Determination

6. I have considered the application, the supporting affidavit, the replying affidavit, the parties' respective submissions as well as the relevant legal framework and jurisprudence. Lodging of appeals to the Court of Appeal are governed by Rule 75(1) and (2) of the Court of Appeal Rules, 2010 which provide as follows:

“75(1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the Superior Court.”

(2) Every such notice shall, subject to rules 84 and 97, shall be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

7. The tenor and import of the above regulatory framework is that no valid notice of appeal can be filed outside the 14 days period without leave of the court.

8. This court's jurisdiction to extend time within which an aggrieved party may lodge and serve a notice of appeal is granted by Section 7 of the Appellate Jurisdiction Act which provides as follows:

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 to 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 the sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

9. The Principles upon which this court's jurisdiction to extend time for lodging an appeal is exercised was spelt out by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission and Others Supreme Court Application 16 of 2014** as follows: (i) extension of time is an equitable remedy that is only available to a deserving party at the discretion of the court; (ii) a party who seeks for extension of time has the burden of laying a basis to the subjection of the court; (iii) whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis; (iv) whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; (v) whether there will be any prejudice suffered by the respondents of the extension is granted; (vi) whether the application has been brought without undue delay; and (vii) whether in certain cases like election petitions, public interest should be a consideration for extending time.

10. In the application under consideration, the court record shows that the preliminary objection was canvassed in open court at Nairobi on 3/10/2016 before Gacheru J. On the same day, the court reserved the matter for mention for directions on 24/11/2016. On 24/11/2016 the court reserved the matter for ruling on the preliminary objection on 10/3/2017. Both parties were in court on the day of reservation. Ruling was, however, not delivered on the reserved day. Secondly, there were no other proceedings until 31/8/2017 when the impugned ruling was delivered in the absence of the parties and their respective advocates. The court record reads thus:

“ the parties and their advocates are absent though defendant was in court at the beginning of the session. Parties to be notified that ruling has been delivered.”

11. It is noted that in early 2017, Gacheru J was transferred to Thika Environment and Land Court. Because the impugned ruling was pending before her and had been reserved for delivery on 10/3/2017, she carried the court file with her. She was not in Nairobi to render the ruling on 10/3/2017 because at that time, she was sitting in Thika, her new station.

12. There is no evidence of personal service of the ruling notice upon the applicant. Secondly, the respondents have not in any way controverted the applicant's contention that he was not aware that the ruling had been delivered. Thirdly, although the court noted that the applicant was spotted in court at the beginning of the session, the court record does not bear any coram to that effect. The coram captured on 31/8/2017 consist of Gacheru J as judge and Catherine as Court Assistant. It is therefore probable that the Judge could have spotted a person resembling the defendant but not necessarily the defendant.

13. The impugned ruling relates to a preliminary objection through which the applicant challenged the jurisdiction of this court to entertain this suit. The applicant is aggrieved by the decision of the court on the preliminary objection. He wishes to approach the Court of Appeal with a view to setting aside the said decision through the appeal platform.

14. In my view, the above circumstances warrant grant of both leave to appeal against the impugned decision and extension of time within which to file and serve a notice of appeal. I will however not grant an order of stay at this point. This is because, it would be premature to grant an order of stay in the absence of demonstrated measures to pursue an appeal. In any event, there is no imminent commencement of hearing of the present suit which would warrant grant of an order of stay at this point in time.

15. In light of the foregoing, I will grant the applicant leave to appeal. I will also grant him an extension of seven (7) days within which to file and serve a notice of appeal. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF FEBRUARY 2019

B M EBOSO

JUDGE

In the presence of:-

Mr Kabundu the defendant present in person

June Nafula - Court Clerk