



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C.A NO. 36 OF 2018**

**ITA NGURU.....1<sup>ST</sup> APPELLANT**

**SELINA MUTHONI ITA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSPHAT NJUE.....RESPONDENT**

**RULING**

1. By a notice of motion dated 7<sup>th</sup> December 2018 brought under the provisions of **sections 13 (4) and 16A (2) of the Environment and Land Court Act, 2011; section 79G of the Civil Procedure Act (Cap 21); Order 42 Rule 6; Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010** and **all other enabling laws** and filed under certificate of urgency, the Appellants sought the following orders;

- a. The application be certified urgent and be heard ex-parte in the first instance.*
- b. Execution of the order granted on 14<sup>th</sup> December 2017 be stayed pending the hearing and determination of this application.*
- c. Time of filing appeal against the order granted on 14<sup>th</sup> December 2017 be enlarged and the appeal hereof be admitted and deemed to be filed within time.*
- d. Costs of this application be provided for.*

2. The said application was based upon the grounds set out on the face of the motion. It was stated that the Appellants were aggrieved by the ruling and order of the Magistrate's Court in Siakago *SPMCC No. 80 of 2017* dated 14<sup>th</sup> December 2017. It was further stated that the initial appeal they had filed was struck out because it was time-barred due to their previous advocate's erroneous computation of time.

3. The said application was supported by an affidavit sworn by the 2<sup>nd</sup> Appellant on 7<sup>th</sup> December 2018 and the various annexures thereto. The Appellants expounded on the grounds contained in their notice of motion and urged the court to grant the orders sought. It was contended that the delay of about 6 days in filing the earlier appeal was not inordinate.

4. The Respondent filed a replying affidavit sworn on 16<sup>th</sup> January 2019 in opposition to the said application. It was contended that an order for stay of execution could not lie in the absence of a competent appeal in existence. It was further contended that the Appellants do not reside on the Respondent's parcel of land known as *Title No. Mbeere/Kirima/2985* but on *Title No. Mbeere/Kirima/2999*. It was also contended that upon obtaining some interim orders of stay in the earlier appeal, the Appellants had invaded the Respondents property and maliciously destroyed some property thereon supposedly on the basis of the stay order.

5. When the said application was listed for *inter-partes* hearing on 21<sup>st</sup> January 2019, the advocates for the parties agreed to canvass the same through written submissions. The Appellants also sought leave to file a further affidavit. It was consequently ordered that the Appellants shall file and serve a further affidavit and written submissions within 14 days whereas the Respondent was to file and serve his submissions within 7 days upon service. By the time of preparation of the ruling, however, the Appellant had filed neither the further affidavit nor submissions. The record shows that the Respondent filed his submissions on 8<sup>th</sup> February 2019.

6. The court has considered the Appellants' said application, the Respondent's replying affidavit in opposition thereto as well as the Respondent's submissions on record. The court is of the view that the two main issues which arise for determination are the following;

- a. Whether the Appellants have made out a case for extension of time to file an appeal out of time.

b. Whether the Appellants have made out a case for an order of stay of execution.

7. The factors to be considered in granting or declining an application for extension of time were summarized in the case of **Mwangi Vs Kenya Airways Ltd [2003] KLR 486 at page 489** as follows;

**“Over the years, the court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance in Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1997 unreported), the court expressed itself thus;**

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also settled that in general the matters which this court takes into account in deciding whether to grant an extension are; first, the length of the delay. Secondly, the reason for the delay: third (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted.”**

8. The court has considered that the period of the initial delay was about 6 days only. The period of the subsequent delay in filing the instant application was about one and a half months. The court does not consider such delay to be lengthy and unreasonable. It must be borne in mind that where there is a change of advocates, it may take time for the new advocate to prepare and familiarize himself with the matter before drawing and filing the necessary application.

9. The court has also considered the explanation tendered by the Appellants for the late filing of the initial appeal which was ultimately struck out. The alleged error in the computation of time by their former advocates is not entirely new in the legal profession. It happens from time to time. Advocates do make mistakes. So, the Appellants’ explanation is not unreasonable. The court is inclined to accept it.

10. In the case of **Philip Chemwolo & Another Vs Augustine Kubede [1982 – 88] KAR 103 Apaloo JA** (as he then was) observed as follows;

**“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”**

11. The Respondent has not demonstrated what kind of prejudice, if any, he may suffer if the extension of time is granted to enable the Appellants ventilate their intended appeal. The Respondent’s apprehension that the Appellants intend to utilize his parcel of land in the next planting season cannot constitute prejudice in the legal sense. The Respondent’s fear is that the Appellants may invade his property or damage his property cannot do either. Any unlawful or criminal actions on the part of the Appellants can be dealt with by law enforcement agencies and the criminal justice system. Any financial or economic loss the Respondent may suffer can always be remedied by an award of costs or damages at the opportune moment.

12. The court is, therefore, satisfied that the Appellants have demonstrated a case for the extension of time to enable them file their appeal out of time. Accordingly, the draft memorandum of appeal filed with the application shall be deemed as fully filed within time.

13. The second issue for consideration is stay of execution. Although the Appellants cited **Order 42 Rule 6** on the face of the motion, the only prayer sought is for stay of execution pending the hearing and determination of the application. That prayer was granted on 21<sup>st</sup> January 2019 meaning that it shall be spent upon delivery of the ruling. The court has considered whether the Appellants may have intended to refer to stay pending the hearing and determination on the intended appeal. However, the court has ruled out such possibility for the reason that the entire affidavit in support of the Appellants’ application makes no reference to a stay whatsoever. In the circumstances, the court shall not consider and determine the issue of stay of execution pending the hearing and conclusion of the appeal.

14. The upshot of the foregoing is that the court finds merit in the notice of motion dated 7<sup>th</sup> December 2018. The same is accordingly allowed in terms of order No. 3 thereof. Costs of the application shall be in the appeal.

15. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 14<sup>th</sup> day of FEBRUARY, 2019.**

In the presence of Mr. Gachuba for the Appellants and the Respondent in person.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**14.02.19**