



**REPUBLIC OF KENYA**

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

**AT EMBU**

**ELC MISC. 15 OF 2018**

**ANGELO NJERU.....APPLICANT**

**VERSUS**

**NGOROI MITA & OTHERS.....RESPONDENTS**

**RULING**

1. By a notice of motion dated 24<sup>th</sup> September 2018 brought under the provisions of **Order 42 Rule 6 (1) and Order 50 Rule 6 of the Civil Procedure Rules**, the Applicant sought the following orders;

a. *That this honourable court be pleased to grant leave to the Applicant to file appeal out of time.*

b. *That this honourable court be pleased to grant an order of stay of execution of the judgement of Hon S.K. Mutai, Principal Magistrate in Embu Civil Case No. 345 of 1998 delivered on 10<sup>th</sup> July 2018 pending the hearing and determination of this application and the intended appeal.*

c. *That costs be in the cause.*

2. The said application was based upon the grounds set out on the face of the motion and the supporting affidavit sworn by the Applicant on 24<sup>th</sup> September 2018. The gist of the application was that the delay in filing the appeal within the stipulated period was occasioned by the failure by the Magistrate's court to supply the Applicant with certified copies of the proceedings and the judgement. It was further contended that the Applicant had an arguable appeal and that it was in the interest of justice for the orders sought to be granted.

3. The Respondents filed a replying affidavit sworn jointly by the 4<sup>th</sup> and 10<sup>th</sup> Respondents in opposition to the said application. It was contended that the Respondents had been in occupation of the suit property since 1974 and that the instant application was merely a tactic to frustrate their enjoyment of the fruits of their judgement. It was contended that the Applicant had not offered any security for costs and that any order of stay would interfere with their proprietary rights.

4. When the said application was listed for hearing on 14<sup>th</sup> November 2018 it was directed that the same be canvassed through written submissions. The parties were granted 30 days within which to file and exchange written submissions. The record shows that the Applicant filed his submissions on 13<sup>th</sup> December 2018 whereas the Respondents filed theirs on 28<sup>th</sup> January 2019.

5. The court has considered the Applicant's said application, the Respondents' replying affidavit in opposition thereto as well as the written submissions on record. The court is of the opinion that the following two questions arise for determination;

a. Whether the Applicant has made out a case for an extension of time to file an appeal out of time.

b. Whether the Applicant has made out a case for the grant of an order of stay of execution.

6. The provisions of **section 16A of the Environment and Land Court Act 2011** on appeals from subordinate courts stipulates as follows;

**“(1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13 (2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order.**

**(2) An appeal may be admitted out of time if the Appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”**

7. The court has noted from the material on record that at all material times the Applicant acted diligently in requesting for copies of proceedings and the judgement from the trial court. There is also a copy of a certificate of delay which has been exhibited indicated that the documents sought were only available for collection on 22<sup>nd</sup> August 2018. The instant application was subsequently filed on 24<sup>th</sup> September 2018.

8. The court is satisfied that the Applicant has demonstrated good cause for an extension of time to lodge an appeal out of time. The Respondents have not demonstrated what prejudice, if any, they may suffer if the Applicant is allowed to file his appeal. The Respondents shall undoubtedly have an opportunity to oppose the appeal and defend the fruits of their judgement. As was held in the case of **Mwangi Vs Kenya Airways Ltd [2003] KLR 486** an assessment of the merits and demerits of the intended appeal is not mandatory. There is a risk of this court making observations or conclusions which may prejudice the fair hearing of the intended appeal. The court is of the view that as long as the intended appeal is not frivolous and merely fanciful, the Applicant should be allowed to exercise his undoubted right of appeal. The merits of the appeal should be ventilated at the right time and the right forum.

9. The court has also considered the Applicant’s prayer for an order of stay. It is not clear which orders are being sought to be stayed. The Applicant did not annex copies of the judgement and the decree. It would appear from the draft of the memorandum of appeal that the Applicant’s counterclaim was dismissed whereas the Respondents’ suit was allowed. Apart from a bare statement in the supporting affidavit there was no demonstration of how the intended appeal may be rendered nugatory unless a stay is granted. The court is thus not satisfied that the Applicant has satisfied the conditions for the grant of a stay under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules**.

10. The upshot of the foregoing is that the court finds that although the Applicant has made out a case for extension of time to file an appeal out of time, he has not made out a case for an order for stay of execution. Consequently, the court makes the following orders;

- a. The Applicant’s notice of motion dated 24<sup>th</sup> September 2018 is hereby granted in terms of Order 1 thereof.
- b. The prayer for stay of execution pending the hearing and determination of the intended appeal is hereby declined.
- c. Costs of the application shall be costs in the appeal.

11. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **28<sup>TH</sup>** day of **MARCH, 2019**.

In the presence of Ms Kiai holding brief for Mr Kathungu for the Applicant and in the absence of the Respondent.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**28.03.19**