



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC APPEAL NO. 9 OF 2018

ISAAC OLANG SOLONGO.....APPELLANT

VERSUS

GLADYS NANJEKHO MAKOKHA

(Being the Administrator of the Estate of

ANTONINA MAKOKHA (Deceased).....1ST RESPONDENT

ELIYA MAKOKHA.....2ND RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrate's Court at Kitale (Hon. M.I.F. Morang'a, SPM) delivered on 23rd July, 2018 in Kitale Chief Magistrate's Court Land Case No. 96 of 1996)

BETWEEN

ANTONINA MAKOKHA *Suing through*

GLADYS NANJEKHO MAKOKHA *Administrator*.....PLAINTIFF

VERSUS

ELIYA MAKOKHA.....DEFENDANT

ISAAC OLANG SOLONGO.....APPLICANT

RULING

1. On 2nd October 2018, the applicant filed a memorandum of appeal dated 1/10/2018 and contemporaneously with that memorandum filed an application dated 1/10/2018 seeking the following orders:-

(1)spent

(2) That leave be granted to the appellant/applicant to appeal out of time against the whole of the Ruling delivered on 23rd July, 2018 by Hon. M.I.G. Morang'a (SPM) in Kitale Chief Magistrate's Court Land case No. 96 of 1996 and the orders arising therefrom.

(3) That the Memorandum of appeal filed by the appellant herein be deemed as duly filed and served upon the respondents.

(4)spent

(5) That the execution of the eviction order given on 1st February, 2017 by Hon. C.C. Kipkorir (SRM) in Kitale Chief Magistrate's Court Land case No. 96 of 1996 be stayed pending hearing and determination of this appeal.

(6) That the costs of this application abide the outcome of the appeal.

2. The grounds upon which the application is sought are that the appellant/applicant is dissatisfied with the Ruling delivered in the subordinate court by Hon. M.I.G. Morang'a (SPM) on **23rd July, 2018** in which the learned Senior Principal Magistrate dismissed the applicant's application dated **4th April, 2017** which application sought, inter alia, setting aside the eviction order given on **1st February, 2017** by Hon. C.C. Kipkorir (SRM); that the failure to file the appeal in time was not deliberate and is excusable as the applicant has lost his mobile phone and could not be reached in good time by his Advocates in order to give them instructions to appeal; that the appellant has an arguable appeal with overwhelming chances of success; that the 1st respondent's advocates have written to the Officer Commanding Kitale Police Station asking him to execute the said eviction order; that the appellant has no other home or any means of livelihood other than the suit land from which he may be evicted any time; that appellant shall suffer substantial loss if he is evicted from the suit land and his arguable appeal ultimately succeeds and that this application has been made in good faith.

3. The application is supported by the sworn affidavit of the appellant dated **1/10/2018**. It is brought under the provisions of **section 79G** of the **Civil Procedure Act, Orders 42 Rule 6** and **51 Rule 1** of the **Civil Procedure Rules**.

4. The 1st respondent filed her replying affidavit dated **30/10/2018**. In that affidavit she depones that the application is merely an attempt to deny her the fruits of her judgment; that no valid reasons have been given explaining the delay in lodging the application for extension of time and there are no extenuating circumstances to warrant the exercise of the court's discretion in favour of the applicant. Further it is stated that the applicant failed to make the application in the lower court as required by **order 42 rule 6**.

5. The appellant expressed his preference not to file any submissions on the application. The 1st respondent filed her submissions on **21/2/2019**.

6. The 2nd respondent did not file any documents.

7. **Section 79G** of the **Civil Procedure Act** provides as follows:

"79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

8. It is clear that this court has jurisdiction in deserving cases to grant an order of extension of time to appeal out of time where merited. An appeal from the subordinate court is to be filed within **30 days** from the date of the decree or order appealed from, the computation of which excludes:

"...such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order"

9. The order dismissing the applicant's application in the subordinate court in **Kitale Chief Magistrate's Court Number 96 of 1996**, being the order appealed from here was issued on **23rd July 2018**. The applicant depones in the supporting affidavit that he only came to learn of the dismissal of that application on **24th September 2018** when his advocates informed him of it by phone. The applicant avers that he had lost his phone in **July 2018** and replaced it on **22nd September 2018**, and that during the period he had no phone his advocates had unsuccessfully attempted to reach him to inform him about the ruling.

10. Does this amount to a sufficient cause for not filing the appeal out of time for the purposes of **Section 79(G)**? Obviously the applicant's advocates could not proceed to file an appeal without the applicant's instructions. It is not disputed that there was no communication between the applicant and his advocates prior to **24th September 2018** that could have informed the applicant of the impugned ruling. The period between the date of that information and the date of filing of the application for extension of time is **8 days**. I am inclined to exercise my discretion in favour of the applicant for the reason that the period he took to file the application after being informed of the ruling does not amount to inordinate delay. I would allow **prayer (2)** of the application.

11. I will now address the issue of stay of execution.

12. **Order 42 rule 6** of the **Civil Procedure Rules** states as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless -

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

13. Regarding the issuance of execution against the applicant, due to the observation that extension of time will be granted the court will consider one of the conditions that need be satisfied in **Order 42 Rule 6** to have been so satisfied, namely that there is an appeal on the record.

14. I have already found that there was a good explanation for not filing the appeal within the required time. Besides satisfying **Section 79(G)** of the Act, it is my view that that finding also satisfies the provisions of **Order 42 Rule 6(2) (a)** regarding delay in filing the instant application.

15. The only other ground to be considered under that rule is whether

“...the court is satisfied that substantial loss may result to the applicant unless the order is made.”

16. The evidence in the sworn affidavit of the applicant is to the effect that the 1st respondent has initiated the process of execution by requesting in writing that the officer commanding Kitale Police Station to execute the eviction order. He avers that he has no other home or any other means of livelihood other than the suit land. This is not disputed by the respondents. I have no reason to disbelieve the applicant when he states that he would suffer irreparably if eviction issued. Consequently I find that the order of stay of execution pending sought is merited on this ground.

17. In the final analysis I find that the applicant’s application has merit.

18. I therefore grant **prayers Nos. 2, 3, 5 and 6** of the motion dated **1/10/2018**.

19. The stay of execution is granted on condition that the applicant files and served his record of appeal in the matter within **30 days** in default of which the orders of stay of execution herein shall automatically lapse.

20. This appeal shall be listed to confirm compliance and for direction on **9/4/2019** at **9:00 a.m.**

It is so ordered.

Dated, signed and delivered at Kitale on this 13th day of March, 2019.

MWANGI NJOROGE

JUDGE

13/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga for appellant

Mr. Magut holding brief for Chebii for respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

13/03/2019