



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 149 OF 2014**

**CLEMENT CHEMONGES.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN MASAL.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**WILLY KWARAT.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application dated **12/3/2019** and filed in court on the same date has been brought by the applicant seeking the following orders:
  - (1) .....spent
  - (2) .....spent
  - (3) **That there be temporary stay of execution of the judgment/decrees/orders pending hearing and final determination of the intended appeal.**
  - (4) **That the plaintiff/applicant be and is hereby granted leave to file Notice of Appeal out of time against the judgment and orders made on 24<sup>th</sup> September, 2018 by this court.**
2. The application is premised on 7 grounds set out in the application and is supported by a sworn affidavit, also dated **12/3/2019**. It is brought under the provisions of **Section 1A, 1B and 63(e), 79G of the Civil Procedure Act, Order 50 Rule 1 of the Civil Procedure Rules, Section 3, 3A, 3B and 7 of the Appellate Jurisdiction act Cap 9 Laws of Kenya, article 159 of the Constitution of Kenya.**
3. The grounds upon which the application is made are that the plaintiff/applicant having been dissatisfied with the orders of this court made on 24/9/2018 wishes to appeal against the same; that the plaintiff's appeal is meritorious; that the delay in filing notice of appeal is excusable and reasonable; that the defendants will not be prejudiced in anyway if the orders sought are granted; that the plaintiff is ready and will to abide by any reasonable condition(s) of stay as may be imposed by the court and that the plaintiff stand to suffer substantial loss unless the orders sought are granted on grounds that the intended appeal may be rendered nugatory. The plaintiff is said to have used the suit land since early in the 2000s to date.
4. The applicant has sworn an affidavit dated **12/3/2019** in support of the application. It reiterates the same grounds appearing on the face of the application.
5. The respondents herein oppose the application dated **12/3/2019** and seek its dismissal of the same with costs. They filed grounds of opposition on **25/3/2019** raising the following grounds:-
  - (1) **That the application is incompetent for having been filed by a firm of lawyers which is not properly on record.**
  - (2) **That a dismissal of a suit under Order 17 of the C.P.R. is not appealable as of right under Order 43 of the C.P.R. and no leave has ever been sought and obtained to appeal against the said dismissal.**
  - (3) **That in the absence of a "leave to appeal" the court cannot extend time within which to file a notice of appeal.**
  - (4) **That the suit was simply dismissed with costs and there is nothing to be stayed.**
  - (5) **That the application is misconceived and bad in law.**

6. The applicant's submissions on the application were filed on **18/4/2019** while the respondents' were filed on **29/4/2019**.
7. I have considered the application and the response.
8. The history of the application is that on **21/1/2015** the plaintiff in this case obtained an order of temporary injunction restraining the defendants from interfering with the two acres forming part of **Plot No. 42 Cheptenden Settlement Scheme** pending the hearing and determination of the suit.
9. On the next hearing date **2/6/2016** his counsel was absent from court and the matter was adjourned. On the following hearing date his counsel was again not in court and the matter was adjourned. On **6/3/2017** his counsel appeared and stated he was ready for the hearing of the suit while the defendants' counsel sought an adjournment on the basis that **Ndiwa Naibei** the late owner of the suit land had passed on and that it was in the interest of justice that the estate be represented in these proceedings. On that ground the court adjourned the matter and asked the respondents to place an affidavit on the record to demonstrate the action taken within 14 days.
10. On **5/4/2017** the affidavit dated **13/3.2017** sworn by the 1<sup>st</sup> defendant was brought to the attention of the court. In that affidavit it is deponed that an application had been filed seeking to revoke the grant issued to the plaintiff herein and that it had been allowed in **Kitale HC Succession Cause No. 20 of 2014**. Secondly it is deponed that the 1<sup>st</sup> defendant's uncle had filed a succession cause over the estate of **Ndiwa Naibei Namaswa** and grant had not been issued. It was averred that the 1<sup>st</sup> defendant's uncle intended to be enjoined in the suit since the estate of Ndiwa Namaswa is challenging the purported land sale to the plaintiff. On **25/6/2018** this suit came up in court when it was spared dismissal on the basis that some succession proceedings were pending in the High Court as evidenced by the affidavit dated **13/3/2017** and filed by the 1<sup>st</sup> defendant on the **4/4/2017**. On that date the court ordered the matter would be listed for hearing on **3/12/2018** and the plaintiff would have to serve that order upon the defendants within **7** days failure to which the suit would stand dismissed. The court reserved the matter for mention on **24/9/2018** to confirm compliance with the order as to service. On **24/9/2018** Ms. Nasike for the plaintiff sought **7** days to comply with the order on filing and service made on **25/7/2018**. The court did not grant her request and it marked the suit as dismissed for non-compliance with the court order of **25/7/2018** with costs to the defendants. That dismissal is the origin of the instant application which was filed on **12/3/2019**.
11. No Notice of Appeal was filed by the plaintiff in this matter after the dismissal. Under **Order 42 Rule 6(4)** one of the vital considerations while determining an application for stay is the presence of an appeal and an appeal shall be deemed to have filed when under the rules of the Court of Appeal a notice of appeal has been given. Failure to attach a notice of appeal is fatal to such an application. However the applicant is vide the instant application seeking to be granted leave to file a notice out of time against the judgment and orders dismissing his suit.
12. He avers that the statutory period of limitation with regard to the filing of an appeal against the impugned orders has expired. He blames his erstwhile advocates on record for not informing him of the requirement of the court order made on **25/7/2018** and the statutory limitation period fixed in respect of appeals and urges that the mistake of the counsel should not be visited on him, an innocent litigant. He avers that the delay in filing of a notice of appeal is neither inordinate inexcusable nor unreasonable. He avers that the defendants have commenced execution of the orders issued on **24/8/2018** and that he stands to suffer irreparable loss and the intended appeal would be rendered nugatory. He cites the case of **Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi civil Application No. 255 of 1997** on the breadth of the court's discretion to extend time to file a notice of appeal. He submits that the delay in the instant case is not intentional and that the respondents would not suffer any prejudice if the orders of extension of time are issued.
13. It is the applicant's submission also that the intended appeal has high chances of success. Citing the case of **Samuel Mwaura Muthumbi -vs- Josphine Wanjiru Ngugi & Another [2018] eKLR** the plaintiff submits that all that he has to demonstrate at this stage is the arguability of the appeal.
14. Citing **Njuguna -vs- Magichu & 3 Others [2003] eKLR** he states that the courts discretion to extend time is unfettered and that the main concern of the court is to do justice between the parties.
15. Regarding mistakes of his counsel he relies on **Kenya Industrial Estate Limited -vs- Samuel Sand and Another [2008] eKLR**.
16. The plaintiff also cited **Butt -vs- Rent restriction Tribunal [1982] eKLR 417** and **Re - the estate of Zakayo Kipkoech Kitui (deceased) [2014] eKLR** on how a court should exercise discretion in an application for stay.
17. Citing **Article 159 2 (d)** of the **Constitution of Kenya 2010** and the case of **Branco Arabe Espanol -vs- Bank of Uganda [1999] 2 EA page 22** and **Philip Chemwolo and Another -vs- Augustine Kubende [1986] eKLR** he urges the court not to restrict itself to the technicalities of procedures raised by the respondents in their grounds of opposition.
18. He urges that it is trite law that procedural or adjectival law is the handmaiden of substantive law and should not abstract the administration of justice since procedures are not an end in themselves. He sums this up by citing **Microsoft Corporation -vs- Mitsumi Computer Garage Limited [2002] EA 460**. He makes a powerful case on his behalf by submitting that equity is part and parcel of the law of Kenya having been received vide **Section 3(1) (c)** of the **Judicature Act Cap 8 of the Laws of Kenya**.
19. The respondents submission emphasis on the five and half months delay in bringing the instant application and cite **Nakuru ELC no. 335 of 2012 Loise Chemutai Ngurule and Another -vs- Wilfred Leshwali Kimungen and 2 Others** and **Nairobi HC JR. 226 of 2016 Nasibwa Wakenya Moses -vs- University of Nairobi and Another**.
20. The respondents submit that a delay of **169** days is inordinately long. They submit that the delay has not been explained at all and recite the history of the matter prior to the dismissal, which I had also set out earlier hereinabove.

21. Faulting the applicant's submission on the need to protect him from the consequences of the mistake of the counsel they cite **Malindi HCC No. 138 of 2010 Harun Rashid Khator -vs- Sudi Hamisi & 11 Others**.
22. They also submit that no treatment notes were exhibited nor drugs receipts or hospital bill payments in respect of the plaintiff in support of the allegation of his sickness.
23. On the question of whether the intended appeal is arguable it is submitted that not even a draft of memorandum of appeal has been exhibited in the application and that it is not sufficient to merely state that the plaintiff is aggrieved by an order of this court.
24. Regarding stay the court is urged to consider that no positive order was made and that only a dismissal order was issued which cannot be stayed; for this they cite **Western College of Arts and Applied Sciences -vs- Oranga and Others [1976] KLR 63** and **Nairobi Civil Application No. 273 of 2007 Peter Anyang Nyong'o and 2 Others -vs- The Minister for Finance and Safaricom Limited**.
25. Finally it was urged that the Firm of **Kiboi Tuwai & Co. Advocates** are not properly on record since no notice of change of advocate in accordance with the mandatory provisions of **Order 9 rule 6** of the **Civil Procedure Act** has been filed and signed. It is urged that this is not a technicality but an issue of jurisdiction and that all the pleadings filed by an advocate who has not complied with that order should be struck out.
26. I will commence examining the issue of competence of the advocates to represent the applicant and filed documents in this matter since it appear that it may dispose of the entire application.
27. **Tigogo & Co. Advocates** filed the suit on behalf of the plaintiff on the **13/10/2014**. It is evident that upto **25/7/2018** they were acting for him in this matter. Come **24/8/2018 Ms. Nasike** appeared for the plaintiff with no explanation as to whether she was holding brief for **Mr. Tigogo** and under her watch this suit was dismissed. The firm of Tigogo never appeared at the taxation on **6/12/2018**.
28. The first appearance in this matter by the Firm of Kiboi Tuwai and Company was made on **4/3/2019** when a consent order executed by Tigogo & company and Kiboi Tuwai & Company Advocates executed on **1/3/2019** was filed thereafter the instant was filed on **12/3/2019**.
29. **Order 9 of the Civil Procedure Rules** provides that where there is a change of an advocate after judgment has been passed such change shall not be effected without an order of the court upon an application with notice to all the parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. In my view the consent filed by the outgoing counsel and the incoming counsel in this matter is sufficient and I consider that Kiboi Tuwai & Co. Advocates are properly on record. That ground of objection to the instant application is not valid.
30. I must also consider the delay in lodging the application. I do subscribe to the holding in **Philip Chemwolo case (supra)** and so I must consider the general context of this matter including the lifespan of the suit and the conduct of the parties herein and the respective merits of the suit because in my view this is a court of justice. The respondents urge me to consider that the issue of delay is not sufficiently explained.
31. In the affidavit in support to the application the deponent who is the plaintiff avers that his erstwhile advocate did not inform him about the requirements of the court order issued on 25/7/2018. If he was not informed then that remains the mistake of counsel. He also avers that he was unwell since 2016 and that as he required constant medical attention communication between him and his erstwhile advocate broke down. He attached a letter indicating that he has been receiving treatment at an Eldoret hospital since 2016.
32. Flogging the applicant at the moment for that mistake remains futile, for it will not alter the fact that he was not informed by the counsel. What this court requires to focus on is what remedy may exist in view for that mistake.
33. I have noted the case law cited by the applicant's counsel in respect of mistakes of counsel. Counsel for the respondents would have this court believe that a suit always belongs to a litigant and not the counsel and that where a litigant does not show the efforts that he made to find out the status of the suit the court should be slow in exercising its discretion of setting aside judgment in his favour on the ground of mistake of counsel.
34. However I am alive to the complicated nature of the advocate-client situation in this country and the almost universally accepted norm of reliance not on written communication but on the spoken word when the matter involves non-corporate clientele. It is not an ideal situation, or one that may be encouraged but this court must take notice of it. Further I note that many other "background programmes", to apply technological language to this litigation, are always running as litigation rages or waltzes and it is important that this court pays heed to the deeper implications of some of those programmes, when they are brought up in the form of issues such as illness.
35. Besides only caution is urged in the **Harun Rashid Khator case (supra)** which is only persuasive and which implies that even in such instances of mistake of counsel the applicant may be excused for sufficient reason. I do not tire of referring to the case of **Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [Eklr]** where Shah, JA, as he then was held that the applicant was entitled to relief despite the "*litany of blunders*" committed by his counsel.
36. In my view the applicant has attempted to explain and has done so successfully. I finds that if he was not aware of the orders of **25/7/2018**, there was nothing that he could do about those orders in compliance thereof.
37. On the issue of stay I find that the applicant has demonstrated by way of an affidavit that he has been in occupation of the suit land for a lengthy period and he relies on the suit land for subsistence farming for the upkeep his family and the eviction would definitely affect persons other than the applicant. He is ready to abide by any reasonable terms that this court may impose.

**38.** I must remind myself that the suit herein was not heard on its merits and that some of the hurdles to the hearing of the suit including demise of one **Ndiwa Naibei** and the respondents desire to substitute him which had not been done as at the time of the dismissal were not of the applicant's making. In my view it is therefore necessary to preserve the suit property herein subject to what I will find hereinbelow regarding extension of time to file a notice of appeal.

**39.** Regarding extension of time, I note that the same grounds I have discussed herein above apply. The respondent's submission that no arguability of the appeal has been demonstrated is correct. But this is an application in which the notice of appeal has not been filed and in which the extension of time is being sought vide this application. In my view the right to appeal against an order of dismissal is protected by law. Barring limitation the applicant had automatic right to file a notice of appeal. Now the default in complying with the requirement in the Appellate Jurisdiction Act and the Court of Appeal rules has been explained sufficiently and I find that the applicant deserves an order granting him extension of time to file the notice of appeal as desired.

**40.** For the above reasons the applicant's application dated **12/3/2019** has merit. I hereby grant it in terms of prayers **Nos. 3** and **4** thereof. The costs of the application shall abide the appeal decision. The period within which the applicant will file and serve the notice of appeal is hereby extended by **14 days** from the date of this order.

**Dated, signed and delivered at Kitale on this 8<sup>th</sup> day of May, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**8/5/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Mufutu holding brief for Kiarie for defendant

N/A for the plaintiff

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**8/5/2019**