



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L NO. 110 OF 2014 (OS)

IN THE MATTER OF AN APPLICATION FOR ORDERS UNDER S.S 37 & 38

OF THE LIMITATION OF ACTION ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF APPLICATION FOR ORDERS BASED ON ADVERSE POSSESSION

AND

IN THE MATTER OF LAND PARCEL NO. UASIN GISHU/KIMUMU/983

AND

IN THE MATTER OF LAND PARCEL NO. UASIN GISHU/KIMUMU/4441

BETWEEN

TAMUREI KOBILO CHEPKAITANY.....APPLICANT/PLAINTIFF

VERSUS

JOANES OCHIEL NYAWARA.....1ST RESPONDENT/DEFENDANT

CHEPKAITANY KAIMUGUL.....2ND RESPONDENT/DEFENDANT

RULING

1. This ruling is in respect of an application dated 28th July, 2018 by the respondent/Applicant seeking for the following orders:

- a) The time for giving notice of intention to appeal this court's judgment dated and delivered on 21st June 2018 by the Respondents/Applicants be extended.
- b) Stay of execution of the decree, order or further proceedings arising from the judgment dated and delivered on 21st June 2018 be granted pending the hearing and determination of this application.
- c) The cost to the Defendants/Applicants.

2. Counsel agreed to canvass the application by way of written submissions which they filed. Counsel for the applicant gave a brief background to the suit and relied on the grounds on the face of the application together with the affidavits sworn by the applicant. Counsel submitted that the judgment was delivered on 21st June 2018 in the absence of Counsel for the defendant and without notice. That the respondent/applicants met with their advocate on 2th July 2018 and 21st July 2018 respectively for purposes of instructions to appeal against the decision of the court, however time for filing a notice of appeal had expired by 18th July 2018.

3. It was Counsel's further submission that the respondent/applicants were therefore unable to exercise their right of appeal in time having

been aggrieved with the judgment of the court. Counsel submitted that the court has jurisdiction to extend time within which to file a notice of appeal and relied on the case of NYERI E&LC CIVIL APPEAL NO. 8 OF 2013 SAMUEL MWANGI NGANGA DAMARIS WANJIKU KAMAU & JOSEPH KAMAU MWANGI where it was held that both the High Court and Court of Appeal have the Jurisdiction to extend time for filing notice of appeal.

4. Counsel further submitted that the power to extend time for the filing of a notice of Appeal is vested in both this court and the Court of Appeal under the provisions of section 7 of the Appellate Jurisdiction Act and Rule 41 of the Court of Appeal Rules, 2010 under which one is free to approach either this Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.

5. On the issue as to whether the respondent/applicants have viable or sufficient grounds before this Court, Counsel submitted that the respondent/applicants have given satisfactory explanation for the delay in filing the notice and hence urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

6. Counsel for the respondent opposed the application and submitted that the applicant's ground for seeking the orders are that they were not notified of the delivery of judgment and that by the time they learnt of the judgment on 18th July 2018 time had lapsed.

7. Counsel submitted that the applicants were in court on 13th June 2018 when the court informed the parties that the judgment was not ready and it would be delivered on 21st June 2018. Further that the respondents were present in court when the judgment was delivered and it was incumbent upon them to inform their lawyer of the outcome of the case. That the applicants were indolent and do not deserve the exercise of discretion in their favour.

8. Counsel listed the following issues for determination by the court:

- a) Whether the Applicants were aware of the date of judgment.
- b) Whether time within which to file appeal had lapsed when they instructed their advocate to file Notice of Appeal.
- c) Whether the Applicants were indolent in seeking to exercise their right to appeal.
- d) Whether the Applicants deserve the grant of the orders prayed for.
- e) Who shall bear the costs of this application?

9. Counsel submitted on the issues and stated that the respondent in the paragraph 4 & 5 of the replying affidavit deponed that 13th June 2018, to the effect that the Applicants were present when the court informed parties that judgment was not ready and had issued a new date for judgment being the 21st June 2018. Further that the court gave a verbal direction of the next date which was 8 days away which did not require a written notice as the parties were present in court.

10. On the second issue as to whether time within which to file appeal had lapsed, Counsel submitted that the applicant had 30 days from 21st June 2018 a window period which lapsed on 22nd July 2018 and that the applicants claim that they knew of the delivery of judgment on 18th July 2018 which means that time had not lapsed. Counsel therefore urged the court to dismiss the application with costs. That a prayer for extension of time within which to file an appeal is not granted as a right or matter of cause.

Analysis and determination

11. This application is twofold seeking for extension for time to file a notice of appeal and stay of execution of the proceedings and judgment delivered on 21st June 2018.

12. It should be noted that from the onset the judgment in this matter was scheduled for delivery on 13th June 2018 but the same was rescheduled to 21st June 2018 in the presence of the parties so there was no need to issue notices.

13. The court only issues notices when the parties are not aware of the dates for delivery of rulings and judgments. This only happens when the rulings and judgements are on notice and a copy sent to the parties and one filed in the court file. This explains why there is no copy on the court file indicating the rescheduled date. How did the applicant know of the judgment date of which they attended for the delivery?

14. The issue for determination is as to whether the judgment was delivered in the absence of the applicant without notice thereof and whether the applicant is entitled to the orders sought for extension of time within which to file a notice of appeal.

15. On the first issue I find that the parties were notified in court of the new date for delivery of judgement and there was no need of issuing a notice. The applicant wants to use this as an excuse to hide his indolence and explain away the reason for not filing the notice of appeal in time.

16. Assuming that the applicant got to know of the judgment of 18th July 2018, he still had time to instruct the lawyer to file a notice of appeal within the stipulated time. The notice of appeal is not a memorandum of appeal or a record of appeal. This is signal to inform the

other party that they are dissatisfied with the judgment and intend to appeal.

17. Extension of time to file a notice of appeal is discretionary and the court can either exercise it in favour of the applicant or decline depending on the circumstances of the case.

18. Section 7 of the Appellate Jurisdiction Act gives the court powers to extend time for giving notice of intention to appeal from a judgment of the High court notwithstanding that time for giving such notice has expired.

19. The applicant in this case has used untruthful reasons why it did not file the notice in good time. The discretion cannot tilt in favour of the applicant. At one point on 23rd October 2018 the applicant had informed the court the parties were negotiating a settlement and that Counsel had drafted a consent for the consideration and that they needed one week to record a consent. This matter was later mentioned on 19th December 2018 and counsel for the applicant informed the court that they were still negotiating and needed more time.

20. I find that this application is an afterthought after the negotiations collapsed and not the reason given that they were not aware of the judgment. The application for stay of proceedings and judgment has not been argued in the submissions and I therefore find that the application has not met the threshold for grant of orders sought for stay of proceedings. The applicant has not established that he will suffer any loss if the order is not granted.

21. I have considered the application, the submission by counsel and the relevant authority and find that the application has not merit. The same is dismissed with costs.

Dated and delivered at Eldoret on this 30th day of July, 2019.

M.A. ODENY

JUDGE

RULING READ in open Court in the presence of Mr.Kipnyekwei for the Plaintiff/Respondent and Mr.Cheptarus for the Defendant/Applicant.

Mr.Mwelem – Court Assistant