



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 7 OF 2019

FRANCIS LUCAS NAMWIBA..... APPELLANT

VERSUS

KEVIN MARTIN WAFULA

VICTOR KANENJE WAFULA.....RESPONDENTS

RULING

The application is dated 19th June 2019 and is brought under Order 42 of the Civil Procedure Rules and Sections 1A, 1B, 3a and 3A of the Civil Procedure Act seeking the following orders;

1. That this application be certified urgent and heard ex parte in the first instance.
2. That there be temporary stay of execution in Mumias SPMC ELC No. 8 of 2018 pending the hearing and determination of this application.
3. That there be stay of execution in Mumias SPMC ELC NO. 8 of 2018 pending the hearing and determination of Kakamega High Court Civil appeal No. 7 of 2019.
4. That any other order this honourable court may deem just and expedient to grant.
5. That the costs of this application be provided for.

It is grounded upon the annexed affidavit of Francis Lucas Namwiba, the grounds that the applicant has lodged an appeal. The appeal will be rendered nugatory if execution is carried out. The respondents can execute the decree anytime to the detriment of the applicant. The applicant stand to suffer irreparable loss and damage. No prejudice shall be occasioned to the respondents. In the interest of justice. The appeal raises triable issues and is not a sham. That a similar application was before the trial court which was on 14/6/2019.

The respondent submits that this appeal has been filed out of time and should be struck out. The said judgement was delivered on the 4th January 2019 and the appeal filed on the 27th March 2019. That the applicant has filed another suit Kakamega CM No 69 of 2016 seeking a refund of the purchase price from a third party who sold him the land.

This court has considered the application and the submissions therein. In our view the preliminary issue to be determined is whether this appeal was filed out of time without the leave of the court and if so whether the same is fatal. In this case, an appeal from the subordinate court to the High Court is governed by *Section 79G* of the *Civil Procedure Act* which provides-

“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 a good and sufficient cause for not filing the appeal in time”.

Whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek, J.J.A in *Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR*, thus

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

Be that as it may in the **Nicholas Kiptoo Arap Korir Salat-vs- Independent Electoral and Boundaries Commission &7 others** 2014 eKLR the court stated that;

“... counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do

To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.”

In the instant case the said judgement in Mumias Senior Principal Magistrate’s Court ELC No 8 of 2018 to be appealed against was delivered on the 4th January 2019 and the appeal filed on the 27th March 2019. No leave of the court was sought. I find the appeal was filed outside the thirty days provided for without leave of court and is therefore *a nullity and of no legal consequence. Having found so they will be no need to go into the merits and demerits of granting a stay. I find that this application and the entire appeal is not merited and I strike it out with costs.*

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD JULY 2019.

N.A. MATHEKA

JUDGE