



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 28 OF 2017

DR. JOSEPH GIKUNDA KIARA.....PLAINTIFF/APPLICANT

VERSUS

RAFIKI MICRO FINANCE BANK LTD.....1ST DEFENDANT/RESPONDENT

ANTIQUA AUCTIONS.....2ND DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 1st March, 2018, the Plaintiff is seeking for the following orders:

- a. This Honourable Court do enlarge the time within which the Plaintiff/Applicant ought to file the Notice of Appeal intimating his intention to Appeal against the Ruling and Orders of Honourable Justice O. Angote, dated and delivered on the 2nd day of November, 2017.*
- b. The Notice of Appeal filed herewith be deemed to have been properly filed upon payment of the requisite court filing fees.*
- c. This Honourable Court do grant leave to the Plaintiff/Applicant to file his Appeal, against the Ruling, decision and orders of Hon. Justice O. Angote dated 2nd November, 2007 [2017] out of time.*
- d. The costs of this Application to be provided for.*

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that this court delivered its Ruling in respect of the Application dated 2nd November, 2017; that after the delivery of the said Ruling, he expected his advocate to keep him abreast of the proceedings in court and that he was surprised when on 20th February, 2018, the Valuers visited the suit land with a view of valuing it for the purpose of selling the land.

3. According to the Plaintiff, the Ruling of this court was delivered on 2nd November, 2017 in the absence of his advocate; that no notice was served on his former advocate and that on 9th May, 2017, the matter proceeded for mention in the absence of his advocates.

4. The Plaintiff finally deponed that the time within which to file an Appeal against the Ruling of this court has lapsed; that leave should be granted to him to file the Notice of Appeal out of time and that he has an arguable Appeal with high chances of success.

5. The 1st Defendant filed Grounds of Opposition in response to the Application. According to the 1st Defendant, the Application does not meet the standards required in law to warrant the orders sought; that the Applicant has not come to court with clean hands and that the Plaintiff's suit is not only made in bad faith but the same is also intended to defeat the 1st Defendant's right of statutory power of sale.

6. In his Replying Affidavit, the 1st Defendant's Debt Recovery Manager deponed that the Plaintiff charged his land being L.R. No. 12715/12184 for a facility of Kshs. 8,000,000; that the Plaintiff has defaulted in payment of the instalments and that on 2nd November, 2017, this court dismissed the Plaintiff's Application seeking to restrain the 1st Defendant from selling the suit property.

7. In his Further Affidavit, the Plaintiff deponed that the 1st Defendant has not advised him of what is claimed in arrears; that he did commission an accountant to look at the credit facility that was advanced to him by the 1st Defendant and that after the amortization schedule and analysis, he found that the arrears that he owned the 1st Defendant was Kshs. 598,344.47.

8. According to the Plaintiff, the 1st Defendant loaded his loan account with irregular, unjustified and illegal charges which included: Kshs.

14,992 in debt collection charges; Kshs. 105,680 in valuation fees; Kshs. 153,332 in auctioneering fees; Kshs. 258,642.76 in legal fees; and Kshs. 930,934.92 in illegal interest. Both the Plaintiff's and the Defendants' counsels filed their written submissions which I have considered.

9. The Plaintiff is seeking for an order of the court to enlarge the time within which he ought to file the Notice of Appeal in respect of the Ruling delivered on 2nd November, 2017. The Application is brought under Section 7 of the Appellate Jurisdiction Act which stipulates as follows:

“The High Court may extend the time for giving notice of intention to Appeal from a Judgment of the High Court or for making an Application for leave to Appeal or for a certificate that the case is fit for Appeal, notwithstanding that the time for giving such notice or making such Appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

10. The record shows that after the parties herein argued the Application dated 7th February, 2017 for injunctive orders restraining the 1st Defendant from selling the suit property, the court reserved its Ruling until 6th October, 2017. However, the said Ruling was not delivered on the said date.

11. Although a notice was sent to advocates by email by the Deputy Registrar of this court intimating that the Ruling had been rescheduled to 2nd November, 2017, it would appear that neither the Plaintiff's nor the Defendants' advocate received the said notification. I say so because when the Ruling was delivered by the court on 2nd November, 2017, none of the parties, or their advocates, was in court.

12. Considering that the notice for the delivery of the Ruling was not personally served on the Plaintiff's advocate by the court, and in view of the fact that the Ruling of the court was read in the absence of the parties, the Plaintiff has laid a basis as to why he could not have filed a Notice of Appeal within the requisite period of fourteen (14) days.

13. Indeed, the Plaintiff has explained the delay to the satisfaction of the court. Considering that the Plaintiff has constitutional right to be heard by the Court for Appeal in respect of the Ruling of this court of 2nd November, 2017, he will be prejudiced if the extension is not granted. The Application was filed within four (4) months of the delivery of the Ruling, and in view of the fact that the Plaintiff was not aware of the date of the delivery of the Ruling, I find and hold that the Application was filed without unreasonable delay.

14. For those reasons, I allow the Application dated 1st March, 2018 as follows:

a. The time within which the Plaintiff ought to file the Notice of Appeal against the Ruling delivered by this court on 2nd November, 2017 be and is hereby enlarged.

b. Leave is hereby granted to the Plaintiff to file his Notice of Appeal out of time.

c. The Plaintiff to file his Notice of Appeal within fourteen (14) days of the date of this Ruling.

d. Each party to bear his/its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE