



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. APPL. NO. 9 OF 2019

DORIS VOSENGE MOGA.....APPLICANT

VERSUS

ALPHONCE JUMA NYONGESA.....DEFENDANT

RULING

1. The application dated **23/4/2019** and filed in court on the same date and has been brought by the plaintiff in **Kitale CMCC Land Case No. 7 of 2019** (also referred to as the Magistrate's Court Case). It seeks orders that this court be pleased to enlarge time within which to file an appeal against the order of **Hon. C.M. Kesse** issued on **4/2/2019** in that case and that pending hearing and determination of this application this court do issue orders for stay of proceedings in that case.
2. An affidavit sworn by the applicant on **23/4/2019** is annexed to the notice of motion in support of the grounds.
3. The respondent filed a replying affidavit on **14/5/2019** exhibiting numerous documents that had been filed in the magistrate's court case. In response to the respondent's replying affidavit the applicant filed further affidavit on **13/6/2019**.
4. The grounds upon which the application is made and which can be discerned from the face of the application and the supporting affidavit and the further affidavit are that the orders of **4/2/2019** contradicted earlier orders issued by the same court yet they were issued *ex-parte*; that the court ought to have ordered the subsequent application to be served for *inter-partes* hearing; that the applicant is unduly prejudiced by the order of **4/2/2019** and that it is prudent and in the interest of justice that the orders sought herein be granted.
5. The background to the application at least as far as the documents are concerned are that the magistrate's court case was instituted by the applicant herein on **25/1/2019** seeking *inter alia* an order for valuation of the permanent building and land on **LR. No. 17389/31** Kiminini Sub-County, Trans-Nzoia County otherwise known as **Ingavi Farm**, an order that after valuation the suit property be sold and the proceeds be distributed to the parties according to their respective contributions for the purchase and development of the property, an order allowing the plaintiff to collect her belongings and costs of the suit; that alongside the plaint an application, also dated **25/1/2019** was filed seeking *inter alia* that the court do direct the respondent to allow the applicant access to the matrimonial home on Ingavi Farm to collect various items and that the OCS Kiminini police station do provide security; that upon hearing the application on **28/1/2019** Hon. C.M. Kesse granted the orders sought and fixed the application for hearing on **12/2/2019**.
6. The applicant maintains that the execution of the orders of **28/1/2019** was lawfully done under the

supervision of the Kiminini police. She further avers that after the respondent obtained orders on 12/2/2019, she had tried to hand over the respondent's personal items to the Kiminini police station but the OCS declined to receive them; that she could not deliver the items to Kitale police station because the order was initially served at Kiminini police station. It is also averred that the respondent did not possess any court orders to visit the applicant brother's house where some of the items said to have been improperly carried away by the applicant were located.

7. The respondent's version is that subsequently while the respondent was away in Nairobi on 28th to 29th January, 2019 the applicant, the OCS Kiminini and 16 other unidentified people proceeded to Ingavi Farm, cut the metal panel on the back door broke the padlock and took away numerous items as listed in **paragraph 11** of the replying affidavit, and he travelled home on 30/1/2019 only to find an empty house; that he therefore filed an application dated 1/2/2019 seeking review of the orders of 28/1/2019 on 4/2/2019 the orders that the applicant now seeks to appeal against were issued with respect to that review application.

8. It is averred by the respondent that the applicant selectively complied with the orders on 4/2/2019 and still holds considerable documentary evidence which the respondent may need to rely on in litigation, hence she may be deemed as stealing a march from the respondent.

9. The respondent depones that he made a complaint to the police at Kitale police station regarding the goods taken by the applicant which were not included in the court order and that in the company of police, he went to the applicant's brother's house and found some of the things taken from his house and the police intend to arraign the applicant in court.

10. It is also averred that there was a long and unexplained delay in lodging the instant application, that it is without merit and it should be dismissed.

11. The only issue that appears to arise for determination and which the applicant wishes to take up in the intended appeal is whether the magistrate's court having heard and granted final orders on 28/1/2019 had jurisdiction to issue an order that had the effect of countermanding the orders of 28/1/2019 without hearing the respondent. That issue is to be determined by the appellate court. For now what the applicant seeks is an order enlarging time within which to file an appeal against the orders of Hon. C.M. Kesse issued on 4/2/2019.

12. In applications for enlargement of time explanation for the delay is required. Part of the respondent's defence is that the application has been brought after a long and unexplained delay. Was there such long and unexplained delay?

13. The record shows that the impugned orders were issued on 4/2/2019 and the instant application was filed on 23/4/2019, 77 days thereafter, that is to say about 2 ½ months later. Delay there was, therefore. Has that delay been explained?

14. It must be recollected that the impugned order was made *ex-parte*. It is not indicated by respondent in his replying affidavit as to when that order was served on the applicant. This court is therefore unable to determine the date of which service of that order was effected.

15. However it would appear that the respondent was issued with an order on 19/3/2019 in the magistrate's court case, directed at the OCS Kiminini to attend court and explain why he disobeyed the orders issued earlier. Still that does not help this court establish the date on which the applicant was served with the order in question.

16. This court has noticed the replying affidavit of the applicant which was filed on 13/2/2019 which responds to the application dated 1/2/2019 from which the impugned order arose. Nevertheless this court is still unable to make any conclusion as to service of the order save that the applicant was engaged in defending herself in that application as early as 13/2/2019. That knocks off only 9 days from the initial delay of 77 days computed in paragraph 13 above so that the delay now stands slightly above 2 months.

17. It is also noted that this appears to be quite an acrimonious matter and the parties require time to ventilate it sufficiently. Had the respondent given clear indication of the timelines within which the impugned order in question was served, I would have demanded of the applicant herein, and subsequently inquired into the sufficiency or otherwise, of the delay in lodging the application. In the prevailing circumstances the court is not able to declare that the delay was unreasonable and unexplained. In any event I would not under the prevailing circumstances hold two months to be unreasonable delay.

18. Provided that it is allowed by the statute, every party to litigation is entitled to an appeal to a higher court whenever an order of a court of law aggrieves them.

19. I therefore find no good ground for declining the instant application and I therefore allow it in terms of prayer **No. (2)**. The intended memorandum of appeal shall be filed and served within **14 days** hereof. Each party shall bear their own costs of the application.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyama for Respondent

Ms. Arunga for the Applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/9/2019