



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC APPLICATION NO. 14 OF 2018

FRANCIS KAMAU MURIITHI.....APPLICANT

VERSUS

PATRICIA KABARE NDEGE.....RESPONDENT

RULING

INTRODUCTION

The application before me is the Notice of Motion dated 13th November 2013 brought under **Section 27 of the Limitation of Actions Act, Order 37 Rule 6 of the Civil Procedure Rules 2010** and all other enabling laws. The applicant sought the following orders:

- 1. That there be temporary of execution of Kerugoya ELC No. 3 of 2016 pending the hearing of this application inter-partes.***
- 2. That this Honourable Court to grant stay of execution of its orders granted on 21st day of April 2017 until the Court of Appeal intended Appeal is filed, heard and determined.***
- 3. That the Honourable Court be pleased to extend time for the intended Appellant/Applicant to file Notice of Appeal against the whole ruling.***
- 4. That the costs of this application be provided for.***

The application is supported by the affidavit of Francis Kamau Muriithi and grounds apparent on the face of the said application.

The respondent filed a replying affidavit and grounds of opposition.

When the matter came up for directions on 11th June 2019, the parties through their legal counsels agreed to dispose of the said application by written submissions.

APPLICANT'S SUBMISSIONS

The firm of Wanjiru Waweru & Co. Advocates appearing for the applicant submitted that after the ruling was delivered by this Honourable Court on 21st April 2017, the applicant instructed his hitherto counsel M/S Makworo to lodge an appeal but instead of filing an appeal, the said firm of Advocates filed an application to cease acting. He further submitted that an advocate's mistake should not be visited upon his client. The counsel also submitted that the applicant has a Constitutional right to be heard and also to be granted leave to file appeal out of time. In conclusion, the applicant submitted that unless the orders sought are granted, she will suffer substantial loss and that the Respondent will not suffer any prejudice.

RESPONDENT'S SUBMISSIONS

The respondent through the firm of P.M. Muchira & Co. Advocates submitted that the application before Court is incompetent and improperly before Court as the same is expressed to have been brought under the provisions of **Section 27 of the Limitation of Action Act Cap 22 Laws of Kenya** and **Order 37 Rule 6 of the CPR**. Under that ground, the learned counsel argued that **Section 27 of the Limitation of Actions Act** deals with extension of limitation period in case of ignorance of material facts in actions for negligence which is irrelevant in the instances of this case where one is seeking stay of execution of Court orders and extension of time to appeal. Counsel further submitted that **Order 37 Rule 6 CPR** deals with Originating Summons while the application before Court is a Notice of Motion. The counsel for the respondent further observed that the Notice of Motion dated 13th November 2018 was initiated as a separate action Miscellaneous Civil Application No. 14 of 2018 while the orders sought to be stayed were made in ELC No. 3 of 2016. No explanation has been offered by the

applicant why he opted to seek for stay of orders and/or extension for leave to appeal against orders made in ELC No. 3 of 2016 in a different file christened Miscellaneous Application No.14 of 2018. It is submitted that this amounts to an abuse of the process of the Court.

The second limb of the respondent's submission is based on paragraph 4 of the applicant's affidavit in support of this application which reads as follows:

“That the applicant has an arguable case with much anticipated success as the respondent lied before the Court about another non- existence case that has never been filed in any Court of law”.

On that disposition, counsel for the respondent submitted that there is a valid decree of a Court of competent jurisdiction in Nyeri being HCCC No. 19 of 1985 (O.S) in respect of land parcel No. INOI/THAITA/193 initiated by way of adverse possession. The said decree has been annexed to the respondent's replying affidavit and marked **PKN 2**. It is submitted that it was for that reason that this Court struck out the applicant's case in ELC No. 3 of 2016 on 21st April 2017 on the ground that it was Res-judicata. A copy of that order is annexed to the respondent's replying affidavit sworn on 18th December 2018 and marked **PKN 1**.

The third ground raised by the respondent is that there is inordinate and un-explained delay of more than 19 months between 21 April 2017 and filing of this application on 13th November 2018. Counsel for the respondent submitted that no explanation for the delay has been offered save for the blame laid at the door of his advocate in the supporting affidavit at paragraph 3.

In conclusion, the counsel for the respondent argued that the applicant has no arguable appeal as no draft Memorandum of Appeal has been attached to his application.

ANALYSIS AND DECISION

I have considered the application and the affidavit evidence both in support and in opposition thereto. I have equally considered the submissions by the counsels appearing for both parties. This application is expressed to be brought under **Section 27 of the Limitation of Actions Act** as well as **Order 37 Rule 6 CPR**. The applicant is seeking an order for stay of execution of a decree in ELC No. 3 of 2016 as well as leave to extend time to file appeal out of time. The order which the applicant is seeking to stay was issued in ELC No. 3 of 2016. That decree and/or order has not been annexed by the applicant but the respondent has annexed the same to the replying affidavit. There is no explanation given by the applicant why this application has been commenced by a separate suit and not ELC No. 3 of 2016 where the decree sought to be stayed was issued. I also note that the decree/order sought to be stayed was issued on 21st April 2017. If indeed the applicant instructed his hitherto firm of Advocates to file appeal against the decree/order in ELC No. 3 of 2016, she did not follow up to ensure that her lawyer obliged. If she had done so, she could have known that her lawyer had not lodged the appeal. I also find it inconceivable that her hitherto lawyer could have been allowed to cease acting without the Court being satisfied that he was duly served. I agree with counsel for the respondent that the applicant has not properly invoked this Court for the orders being sought. The applicant is seeking stay of execution of a decree/order pending an intended appeal. He is also seeking leave for extension of time to appeal. The provisions of **Section 27 of the Limitation of Actions Act and Order 37 Rule 6 CPR** do not allow him the orders sought. To my mind, the application is an abuse of the process of this Honourable Court. It is also my finding that no proper explanation has been offered for the inordinate delay to bring this application. I also note that the applicant has opted to institute a separate cause of action christened as Miscellaneous Application No. 14 of 2018 and not ELC No. 3 of 2016 in which the decree/order sought to be stayed was issued. No explanation has been offered why the applicant had to commence the stay orders in a separate cause of action. The applicant did not even attach a copy of the decree/order sought to be stayed.

For all the reasons I have given, I find the application dated 13th November 2018 lacking merit and being an abuse of the Court process. The same is hereby dismissed with costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 20th day of September, 2019.

E.C. CHERONO

JUDGE

20TH SEPTEMBER, 2019

In the presence of:

- 1. Mr. Muchira for Respondent*
- 2. Mr. Maina Kagio holding brief for Ms Waweru*
- 3. Mbogo Court clerk – present*