



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO. 23 OF 2018

MAKAU NZUKI.....APPLICANT

VERSUS

BENSON NZIOKA MAKENZI.....RESPONDENT

JUDGMENT

1. In the Notice of Motion dated 3rd July, 2018, the Applicant is seeking for the following orders:

a. That pending the hearing and determination of prayer 3 herein below, this Honourable Court be pleased to stay execution of the Ruling herein dated the 4th day of October, 2017 and originating from the Chief Magistrate's Court- Machakos in Civil Suit No. 326 of 2006 and in particular execution of the warrant of arrest issued on the 18th day of April, 2018 and the intended eviction of the Applicant from Land Parcel No. Muputi/Kaani/780.

b. That without prejudice to the foregoing this Honourable Court be pleased to grant leave to the Applicant to file an Appeal out of time of the Ruling of Hon. A. G. Kibiru (Chief Magistrate)- Machakos) dated the 4th day of October, 2017 in his Civil Suit No. 326 of 2006 and if this order be granted, the annexed draft copy of the Petition of Appeal be deemed as filed.

2. The Application is supported by the Affidavit of the Applicant who has deponed that he is a Defendant in Machakos CMCC No. 326 of 2016; that the matter before the Magistrate's Court involves parcel of land known as Muputi/Kaani/780 (*the suit land*) and that on 9th April, 2014, the trial court delivered Judgment in favour of the Respondent.

3. According to the Applicant, the hearing of the suit proceeded in his absence and in the absence of his lawyer; that he applied for the setting aside of the Judgment and stay of execution of the Judgment and that his Application was dismissed on 16th December, 2015.

4. The Applicant finally deponed that he filed an Application for Review of the dismissal order, which Application was allowed on 12th September, 2017 and that although the court had observed that it did not have jurisdiction, the trial court went ahead to dismiss the Application dated 4th August, 2015.

5. According to the Applicant, the suit land is the only place he calls his home; that he lives on the land with his family and that he has invested all his savings in the said land.

6. In reply, the Respondent deponed that he was the Plaintiff in Machakos CMCC No. 326 of 2006; that the Applicant has all along been represented by a lawyer; that the suit proceeded for hearing in the Magistrate's Court on 11th December, 2013 in the absence of the Applicant and his advocate despite having been served with the hearing notice and that the Applicant's attempt to set aside the ex-parte Judgment was dismissed by the court.

7. The Respondent finally deponed that by the time the Ruling of 4th October, 2017 was delivered, the court had jurisdiction to deal with the matter and that it is now over four (4) years since the suit was heard and determined. Both the Applicant's and the Respondent's advocate filed short submissions which I have considered.

8. The Applicant is seeking for leave to file an Appeal out of time in respect of the Ruling of the trial court dated 4th October, 2017. In addition, the Applicant is seeking for a stay of execution of the Ruling of 4th October, 2017. The prayer for stay of execution of the Ruling of 4th October, 2017 can only be considered by this court if the Applicant is granted leave by this court to file the Appeal out of time.

9. The Ruling of the trial court that the Applicant is seeking to Appeal against was delivered by the learned Magistrate on 4th October, 2017. The said Ruling was in respect of the Applicant's Application dated 4th August, 2015 in which he sought to set aside the ex-parte proceedings of 11th December, 2013 and the Judgment of 9th April, 2014.

10. After the Ruling of 4th October, 2017, the Applicant was required to file his Memorandum of Appeal within thirty (30) days (*See Section 79G of the Civil Procedure Act*). However, it was not until 4th July, 2018 that the Applicant filed the current Application.

11. The Applicant has not given any explanation why he failed to file the Memorandum of Appeal within the requisite period. Indeed, considering that the Ruling of 4th October, 2017 was delivered in open court, the Applicant should have been vigilant to know the outcome of the matter.

12. The Applicant has admitted that he "lost contact" with his then advocates because he was transferred from Machakos to Nairobi, then to Kisumu and finally to Malindi. That explanation is not plausible, especially for a litigant who was represented all along. The delay in filing the Appeal or the current Application is inexcusable.

13. Having not given a plausible and reasonable explanation for his failure to file the Memorandum of Appeal within thirty (30) days, this court declines the invitation to grant leave to the Applicant to file the Appeal out of time.

14. Having declined the prayer for leave to file the Appeal out of time, the prayer for a stay of execution of the Ruling of the lower court cannot be granted. For those reasons, the Application dated 3rd July, 2018 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2019.

O.A. ANGOTE

JUDGE