



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANGA**

**ELC NO 297 OF 2017**

**JULIA NJERI KINUTHIA.....APPLICANT**

**VERSUS**

**ISAAC WACIURI MBUGUA.....1<sup>ST</sup> RESPONDENT /DEFENDANT**

**PAUL MWANGI MBUGUA.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**RULING**

1. The Plaintiff/ Applicant moved this Court vide a Notice of Motion application dated 12/04/2019 filed under certificate of urgency on 15/04/2019 seeking for the following orders;

a. spent

b. That the Honourable Court be pleased to extend the time for filing and service of the Notice of Appeal to the Judgment delivered by the Court on 25/03/2019 and consequently the Notice of Appeal filed on 11/04/2019 be deemed as filed within time.

c. That the Honorable Court be pleased to grant stay of execution of the judgment delivered on the 25/03/2019 by this Court pending hearing and determination of this application.

d. That the Honorable Court be pleased to grant stay of execution of the judgment delivered on the 25/03/2019 by this Court pending hearing and determination of the Appeal.

e. That costs of the Application be provided for and the Court be at liberty to make any orders it deems fit in the interest of justice.

2. The Applicant brought the application on the following grounds; -

a. Judgment was delivered on 25/03/ 2019 in open Court with the Court reading out the summary of the orders.

b. The reasons for the dismissal were not immediately availed by the Court and the Plaintiff only decided to appeal when a copy of the judgment was available and obtained from the registry on the 05/04/2019 and the content explained to her on 11/04/2019.

c. That there was no in-ordinate delay in filing this application and there exists satisfactory reasons for granting the orders prayed.

d. The Plaintiff stands to suffer substantial loss should the judgment of the Court delivered on the 25/03/2019 be executed and further rendering the intended appeal nugatory.

e. That the Plaintiff's Appeal raises substantially weighty issues of public importance and revolving on public policy and has high chances of success.

f. The Defendants whose counter-claim was similarly dismissed do not stand to suffer any prejudice if any of the orders sought are granted.

3. In her supporting affidavit the Plaintiff / Applicant reiterates the grounds on the face of the application and adds that after the copy of the judgment was obtained she was at home unwell until the 11/04/2019 when she managed to go to her lawyer's' office and after being informed the findings of the Court she instructed her lawyers to file a Notice of Appeal which was filed on 11/04/2019. That this application was then filed the next day which she believes was done without undue delay. That she stands to suffer substantial loss if stay orders are not granted as her title to the suit property may be cancelled by the Land Registrar whilst she believes she has an arguable appeal with high

chances of success. That the Defendant shall not suffer any loss because their counterclaim was also dismissed.

4. There is on record a Notice of Appeal dated 11/04/2019 and filed on same day.

5. The application was opposed through a Replying Affidavit of the 1<sup>st</sup> Defendant sworn on his own behalf and that of the 2<sup>nd</sup> Defendant. He deposes that the Applicant has failed to demonstrate that her appeal has chances of success. That the application was actually filed 18 days after the delivery of the judgment and the delay has not been sufficiently justified. That the application is a ploy to deter the Defendants from enjoying the fruits of the judgment of administering their father's estate. That the Applicant be ordered to provide security for the intended appeal in monetary terms for half value of the suit land to be deposited and an interest earning account in the joint names of the Advocates for the parties.

6. In her further affidavit, the Applicant avers that it is her constitutional right to appeal and opposes the assessment of the security for costs in the manner proposed by the Respondent for reasons that no costs have accrued to the Respondents so far and that the proposed amount has no legal backing. That the judgment they intend to appeal from gave orders that were not sought by the Defendants.

7. The Applicant submits that the issue of provision of security for costs would only arise if the Respondent has demonstrated that the Applicant is so poor that she would be unable to pay costs that the order for security is at the discretion of the Court and must be done in moderate terms. And that security in monetary terms are not mandatory where the decree is not for a liquidated sum and basis for the security has to be established. That the Appellants appeal is merited for stay of execution orders as she stands to suffer substantial loss if her title is cancelled and has enjoined the Court to exercise its discretion in her favour.

8. The following are factors to be considered by the Court to applications for extension of time to file an appeal; as was stated in the oft-cited case of **Leo Sila Mutiso vs. Rose Hellen WangareMwangi Civil Application No. NAI 255 of 1997 (ur)** which was a decision of the Court on a reference from a decision of a single judge:

*"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are:*

*First, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted".*

9. Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal. In the case of **Athuman Nusura Juma v. Afwa Mohamed Ramadhan, CA No 227 of 2015**, this Court stated thus, on that issue:

**"This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly".**

10. The Supreme Court set out certain guiding principles, on the question of extension of time in the **Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & Others Supreme Court Application No. 16 of 2014** as below;

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- a) extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- b) a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
- c) whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
- d) whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e) whether there will be any prejudice suffered by the respondents if the extension is granted;
- f) whether the application has been brought without undue delay; and,
- g) whether in certain cases, like election petitions, public interest should be a consideration for extending time."

11. The intended appeal relates to the judgment of this Court delivered on 25/03/2019 and to which the Appellant herein avers to have been

aggrieved and is desirous of appealing on the same, and therefore lodged a Notice of Appeal on the 11/04/2019 out of time. It is that belated Notice of Appeal that the Appellant has indulged the Court to expand the time and consider it duly filed. The Appellant also seeks for stay of execution of the said judgment pending determination of this application and the subsequent appeal.

12. The record of the Court shows that the judgement was read in open Court in the presence of Mr Makori Advocate holding brief for Mr Nderitu for the Plaintiff and Mr Opiyo Advocate holding brief for Mr Mbiyu Kamau for the Defendants.

13. The grant or otherwise of expansion of time is purely discretionary. This Court is guided by the foregoing principles as set out in case law here above.

14. Order 50 Rule 6 of Civil Procedure Rules provides that;

‘Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.

15. It is trite that an aggrieved party must lodge its notice of appeal within fourteen days of the date of the decision against which it is desired to appeal. This appeal was lodged after 19 days therefore out of time. The delay in lodging the appeal has been explained as two fold; that the Applicant was unwell and therefore impeded from instructing the Advocate to file the Notice of Appeal and secondly that there was delay in obtaining the typed copies of the judgement. In respect to the first reason, the Applicant has not provided any evidence to support her being indisposed other than to state under para 6 of her supporting affidavit that “ prior to that I had been home unwell and unable to move and on medication having swollen feet and right ankle, issues associated with my advanced age.” The view of the Court is that in the absence of a medical report this averment remains unsubstantiated.

16. In respect to the second reason, it is on record that the firm of Nderitu & Waturu Associates Advocates vide a letter dated the 26/3/19 addressed to the Executive Officer sought certified copies of proceedings and judgement in this case. The letter was received in the Registry on the 29/3/19. On the reverse side of the said letter a Mr. Frank Kilatya for Nderitu & Waturu Associates duly acknowledged receipt of the uncertified judgement in this case on 8/4/19. It is clear that the judgement collected by the Applicants Advocates representative on the 8/4/19 and not the 5/4/19 as pleaded. The delay in obtaining the copy of the judgement has not been explained at all. In the overall, it is the view of the Court that the Appellant has not explained the delay.

17. That notwithstanding I am satisfied that the delay is not inordinate in that the Notice of Appeal was only filed 2 days out of time. I find that it is a case that I can exercise my discretion and allow the extension notwithstanding the unexplained and unsupported reason for the delay.

18. Lastly on the degree of prejudice to be occasioned to the Respondents other than their contention that the appeal would occasion a delay in enjoyment of the fruits of the judgment, the Respondents have not explained any other prejudice that they stand to suffer if the application is allowed.

19. Is the Applicant entitled to orders of stay of execution? Grant of stay of execution is also discretionary and determined on a case-to-case basis. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

- (a) The application was brought without delay;
- (b) Substantial loss may result to the Applicant unless the stay is granted; and
- (c) Security for the due performance of the order or decree has been provided.

20. Going by the record the judgment complained of was delivered on the 28/6/18. The application for stay was filed on 28/8/18. The application was filed within 60 days after the judgment. The Court finds and holds that in the circumstances of this case there is no delay in bringing this application. It was filed timeously. Ground No a) succeeds.

21. Regarding the issue of substantial loss that is likely to be suffered by the Applicant, the Court pronounced itself in the case of **James Wangalwa & Anor. Vs Agnes Naliaka Cheseto 2012 (eKLR)**, thus:-

“No doubt , in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process...The Applicant must establish other factors which show that the essential core of the Application as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni [2002] KLR 867** the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

22. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated:-

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

23. The case of **Absalom Dora vs. Turbo Transporters 2013 eKLR** the Court hold as follows:-

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing right focuses on their reconciliation which is not a question of discrimination.”

24. The Applicant has implored the Court to grant stay of execution to prevent her appeal from being rendered nugatory on the ground that if the land is reverted to the original owner, it may be succeeded by the respondents further depriving her of her right to the suit land. I am satisfied that the Applicant has established substantial loss.

25. As regards security for costs, I order Kshs 80,000/- being security for costs payable by the Applicant to be deposited in an interest earning account of the two counsels within 15 days from the date of this ruling. Further the second condition is that the Applicant to file his appeal within 60 days from the date of this ruling. In default, the orders herein shall lapse.

26. The application is allowed subject to the conditions set out in Para 25 above. Costs shall be payable by the Applicant.

27. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANGA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2019**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Ms Kariri for the Plaintiff/Applicant

Ngari HB for Mbiyu Kamau for the Respondents/Defendants

Irene and Njeri, Court Assistants