



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC MISC. APP.21 OF 2018

JOHN MWANGI KAMAU.....APPLICANT

-VERSUS-

DAVID MWAURA NDURUHL.....RESPONDENT

RULING

There are two applications for determination herein. The first *Notice of Motion* application is dated **21st December 2017**, brought by the Applicant herein **John Mwangi Kamau** under **Sections 79 and 95** of the *Civil Procedure Act* and also **Sections 1A, 1B & 3A** of the same Act together with **Order 51 Rule 1** of the *Civil Procedure Rules*.

The Orders sought are:-

- a. That the Applicant be granted leave to file an Appeal out of time against the whole Ruling of Honourable B. N. Ireri delivered on the 10th day of November 2017, in Thika CMCC 59 of 2017 and the Appeal be deemed to be properly filed.***
- b. That this Honourable court do order a Stay of Execution of the whole Ruling of Honourable B. N. Ireri delivered on the 10th day of November 2017 in Thika CMCC 59 of 2017 and all subsequent orders pending hearing and determination of the intended Appeal.***
- c. That the costs of this application be provided for.***

The application is premised on the grounds stated on the face of the said application and these grounds are:-

- a. That the Hon. B. N. Ireri delivered a Ruling on the 10th day of November 2017 in regard to Thika CMCC 59 of 2017 in which he held that the Respondent had satisfied the conditions requisite for the issuance of an order of injunction against the Applicant.***
- b. That the Applicant is aggrieved by the said ruling and intend to appeal against the same.***
- c. That the Applicant has a valid Appeal raising triable issues that ought to be heard and determined by the Superior court.***
- d. That the Applicant failed to file their appeal within thirty (30) days from the date of the Judgment due to a slight delay in instructing their advocates to appeal***
- e. That the Applicant has not delayed in filing this application.***
- f. That unless this court exercises its discretionary powers to grant the prayers sought herein, the applicant shall suffer great injustice as his Appeal will be foreclosed and the Applicant continues to suffer great loss and damage.***

Further the application is supported by the affidavit of **John Mwangi Kamau** who averred that on **7th June 2013**, he purchased the suit premises for a consideration of **Kshs.55,000,000/=** and a valid certificate of title was issued to him by the Ministry of Lands on **4th July 2016** and he took full possession of the said premises.

It was his contention that on **4th July 2016**, the same day that he received the Certificate of title in his name, he informed the Respondent

who was a tenant together with other nine tenants that he was the new owner. Further that the Respondent was to pay monthly rent of **Kshs.200,000/=**.

He also contended that all the other tenants paid the monthly rent to his agents as instructed save for the Respondent who failed to remit any rent to his appointed agents from the month of **July 2016** to date.

Further that given that the suit premises was an old property, he decided to construct an ultra-modern building with the current trends and on order for the same to be done, he requested for vacant possession and on **12th August 2016**, he gave the Respondent Notice to vacate in compliance with **Section 4(2)** of the **Landlord and Tenant (Shops, Hotels & Catering Establishment) Act, Cap 302 Laws of Kenya**. The said vacation was to be done by **1st January 2017**. He averred that all the other tenants vacated the premises, save for the Respondent who occupies three shops at the front part of the suit premises who is claiming to be the owner of the same. That he obtained an order from the **Business Premises Rent Tribunal**, seeking orders to evict the Respondent on **31st January 2017**. However, the Respondent was granted orders setting aside the Tribunal's earlier orders because he alleged that he was the owner of the premises. Further that the Respondent filed **Civil Case No.59 of 2017**, at the **Thika Law Courts** on **10th February 2017** seeking injunction orders against himself preventing the Applicant or his agents from distressing for rent or interfering with the property in any way.

That the said application was heard and on **10th November 2017**, the Learned Magistrate delivered a Ruling and issued injunctive orders in favour of the Respondent herein. It was his averment that the Learned Magistrate ignored the fact that he was a holder of a valid title which title has never been challenged. That as he sought counsel from his advocates on record, to fully understand the impact of the said Ruling, he was slightly late in filing the intended Appeal wherein he has now filed a Memorandum of Appeal **JMK – 1**. He averred that he is aware that he has delayed in filing the Appeal by a period of 9 days but he further averred that the said delay is not inordinate and there will be no harm that will be suffered by the Respondent if this application is allowed.

It was his contention that the Memorandum of Appeal raises triable issues which ought to be considered and determined by the Superior Court. He also contended that he is suffering huge losses as the better part of his premises remains vacant while the Respondent continues to enjoy occupation of the same. He also contended that he was apprehensive that the Respondent may try to dispose off the property to a third party thereby alienating him further from his rightful possession and that the court ought to safeguard him against such an occurrence. He also contended that unless the orders sought in the application are granted, he will continue to suffer great injustice and prejudice as the Appeal which raises weighty issues which were inadequately dealt with or absolutely ignored by the subordinate court.

The application is contested and **David Mwaura Nduruhi**, the Respondent filed a **Replying Affidavit** on **16th January 2018**, and averred that the Applicant does not have a meritorious Appeal as alleged and that the delay in filing the intended Appeal is inordinate and inexcusable. That the Applicant instead of seeking for leave to file Appeal out of time had delved on issues raised and pending at **Thika CMCC No.59 of 2017** which are yet to be determined in a full trial. He further averred that the application is bad in law and ought to be struck out in limine as he purchased property known as plot **No.4953/34/IV** (suit property) within **Thika Municipality** in **February 2009** and has been in quiet possession to date. He further averred that on **7th February 2017**, he was served with court papers in **Thika Misc.No.14 of 2017**, wherein the Applicant had sought to his landlord and the said proceedings he had filed at **Business Premises Rent Tribunal** by the Applicant herein who claimed to be his landlord. That he has never been a tenant of the Applicant and the **Business Premises Rent Tribunal** later set aside the orders issued against the Respondent herein.

He contended that he has always been in quiet possession of the suit property known as **LR.No.4953/34/IV** within **Thika Municipality**, where he runs a business having bought the same way back in **February 2009**. He claimed that he was a stranger to the Respondent and his actions are not sanctioned by any law since he has been in quiet occupation of the premises for over 8 years. Further that the Applicant has never filed any suit seeking vacant possession of the premises if at all he bought the same as alleged by him. He contended that he challenged the Applicant's action of levying distress against him vide **Thika CMCC No.59 of 2017**, wherein the court issued an injunction against the Applicant pending the hearing of the main suit. Further that there are myriad of suits filed in respect to the suit property plot **No.4953/34/IV**, against the administrators of the estate and in particular the Respondent has filed **Milimani ELC No.17 of 2014**, where he is seeking an order to compel the administrators to transfer the suit property to him. The deponent also denied that he has intention of disposing the suit property as alleged by the Applicant and he urged the court to dismiss the instant application.

The Applicant filed a further affidavit and averred that he has an arguable Appeal and urged the court to allow his application. He also stated that he delay of **nine (9) days** is not inordinate and indeed the Respondent has not shown what harm he will suffer if the application is allowed. He reiterated that he was apprehensive that the Respondent may try and dispose off the suit property to a third party and thus the court ought to safeguard him against such occurrence. Further that unless the orders sought are granted, he will continue to suffer great injustice and prejudice.

The second application is dated **10th November 2018**, brought under **Section 3A, Section 6** of the **Civil Procedure Act Cap 21, Order 51 Rule 1** of the **Civil Procedure Rules** and all other enabling provisions of law.

The Applicant has sought for the following orders:-

- 2) **That there be a Stay of proceedings in this case pending hearing and determination of this application.**
- 3) **That there be a Stay of proceedings in this case pending Hearing and determination of Nairobi ELC No.17 of 2014, David Mwaura Nduruhi -Vs- Jane Wambui Kabaru & 2 Others.**
- 4) **That the costs of this application be in the cause.**

The application is premised on the following grounds:-

b) The subject matter in issue in this suit LR.No.4953/34/IV is the same as the suit premises in issue in Nairobi ELC No.17 of 2014, David Mwaura Nduruhi-Vs-Jane Wambui Kabaru & 2 Others, which has partly proceeded for hearing before Justice Okong'o.

c) The Applicant will not be prejudiced in any way if this application is allowed but will actually assist this Honourable court arrive at a just and well informed decision.

The application is also supported by the affidavit of **David Mwaura Nduruhi**, wherein he averred that he purchased the property known as plot **No.4952/34/IV** within **Thika Municipality** in **February 2009** from **Peter Kabaru Muiruri** and **Jane Wambui Kabaru** on **20th February 2009**, and has been in quiet possession to date. He attached a copy of the Sale Agreement. Further that the Applicant has filed the instant application emanating from the orders given in **Thika CMCC No.59 of 2017**, between the Applicant and the Respondent herein.

Further that the Applicant is fully aware that there is a matter pending in **Milimani ELC No.17 of 2014** between **David Mwaura Nduruhi (Applicant) -Vs- Jane Wambui Kabaru & Teresia Nyambura Kariuki**, which is parheard and the Applicant is seeking specific performance over the suit property **4953/34/IV** regarding the **Sale Agreement** entered on **20th February 2009**. He averred that he has been advised by his advocate on record that the issue in this matter being plot **No.4953/34/IV**, is directly in issue in the above named matter at **Milimani ELC** and it is only prudent that this court stays proceedings in this matter until **ELC No.17 of 2014** is heard and determined as it will determine the issue of ownership.

He also averred that the Applicant/Respondent herein has filed **Thika ELC No.551 of 2017** between himself and **David Mwaura Nduruhi** with the full knowledge of the existence of **ELC No.17 of 2017 at Milimani**. The Applicant contended that it is only just that this matter be stayed until the **Milimani ELC No.17 of 2014** is heard and determined as it would be in the interest of justice to stay the proceedings herein. Further that the Applicant/Respondent would not be prejudiced in any way if the application herein is allowed but the court will be able to arrive at a just and well informed decision after hearing both parties.

This application is contested and **John Mwangi Kamau** filed a **Replying Affidavit** on **11th December 2018**, and averred that the Applicant/Respondent never purchased the suit property at all and he is for all intents and purposes a tenant at **LR.No.4953/34/IV Thika Municipality**. He further averred that the Respondent filed **Thika CMCC No.59 of 2017**, wherein he obtained restraining orders against the deponent and then the deponent filed the instant **Misc. No.21 of 2014**. He contended that **ELC No.17 of 2014** at **Milimani ELC** is between the Respondent/Applicant and the beneficiaries of the estate of **John Muiruri Kabaru** (deceased) and Applicant/Respondent is not a party to the said suit though he is a holder of a valid title in respect of the suit property.

Further that he has been advised by his advocate on record that the prayers sought in **Milimani ELC No.17 of 2014** are specific performance of a contract and/or refund of monies allegedly paid to the said beneficiaries of the estate of **John Muiruri Kabaru**. However, since the Applicant/Respondent is not a party to the said suit, there is no duplication of prayers in the two suits. He also contended that the Applicant has not shown any reason why the suit should be stayed and that if the suit is stayed, the Applicant/Respondent will suffer irreparable loss and damage as he is unable to continue using the said business premises and the said business premises continues to waste away from the **year 2016** and the Respondent/Applicant continues to do business without paying rent. He urged the court to dismiss the instant application with costs.

The Respondent/Applicant filed a further affidavit on **28th March 2019** and averred that in **ELC No.17 of 2014**, the Applicant/Respondent filed an application on **27th November 2017**, as an Interested Party seeking joinder to the said suit and therefore he cannot allege that he is not a party and does not know the existence of that suit. He also reiterated that the suit property **No.4953/34/IV** is the same property in **ELC No.17 of 2014**, at Milimani and the outcome will affect all the parties herein including the Applicant/Respondent. Therefore it is crucial and in the interest of justice that the suit herein be stayed pending this hearing and determination of **Nairobi ELC No.17 of 2014** which is partly heard.

The two applications were canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto and makes the following findings:-

The Court will first determine the application dated **14th November 2018** for stay of proceedings in this case pending the hearing and determination of **Nairobi ELC No.17 of 2014**. If an order of stay is granted, then there would be no need of determining the earlier application on merit.

The instant application for stay of proceedings is brought under **Section 3A** of the **Civil Procedure Act**, which grants the court the power to issue such orders that are necessary for the end of justice to be met. Further, the application is brought under **Section 6** of the **Civil Procedure Act** which provides:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The above Section comes into play in an attempt to prevent multiplicity of suits over the same matter in issue. The Applicant has alleged that the matter in issue herein is **LR.No.4953/34/IV** which is also in issue in **Nairobi ELC No.17 of 2014**. It is indeed correct that there is an **ELC No.17 of 2014** pending at **Milimani ELC Court**. The said suit was filed by the Applicant herein **David Mwaura Nduruhi** against beneficiaries of the estate of **John Muiruri Kabaru** who are **Jane Wambui Kabaru & Teresia Nyambura Kariuki**. However, this matter herein is a Misc. Application by the Respondent/Applicant **John Mwangi Kamau** who is seeking to be allowed to file an Appeal out of time. The Appeal is against a Ruling that was delivered in **Thika CMCC No.59 of 2017**, which suit had been filed by the Applicant/Respondent **David Mwaura Nduruhi** who is enjoying injunctive orders that the Respondent/Applicant **John Mwangi Kamau** would wish to Appeal

against. The issue herein is whether the said **John Mwangi Kamau** should be allowed to file his Appeal out of time. The issue in **Nairobi ELC No.17 of 2014** is whether the Applicant herein **David Mwaura Nduruhi** is entitled to his prayers of specific performance and the other prayers thereon. Therefore the matter in issue in **Nairobi ELC No.17 of 2014** is very different from the issue herein since the application herein is seeking for leave to file Appeal out of time.

The suit that is being appealed against was filed by the Applicant/ Respondent herein while knowing very well that he has a suit pending at **Milimani ELC being No.17 of 2017**. The Applicant was granted orders favourable to him and he cannot now say the Respondent herein was fully aware of **ELC No.17 of 2014** and he proceeded to file this Misc. Application. This Misc. Application is prompted by the Applicant/Respondent suit **No.Thika CMCC No.59 of 2017**, and the Court finds that the instant application is not brought in good faith.

For the above reasons, the Court finds the **Notice of Motion** application dated **14th November 2018** is not merited the said application is dismissed entirely with costs to the Respondent/Applicant.

The Court now turns to the **Notice of Motion** dated **21st December 2017**, wherein the Applicant has sought for stay of execution of the Ruling issued in **Thika CMCC No.59 of 2017** and Leave to Appeal out of time.

On the prayer for Stay of Execution of the Ruling delivered on **10th November 2017**, **Thika CMCC No.59 of 2017**, the Court finds that the said Ruling was delivered in favour of the Respondent herein and the orders issued was to restrain the Applicant from levying distress for rent against the Respondent herein.

The Applicant has alleged that he purchased the suit property in the **year 2016** and he has a valid title. He further admitted in his affidavit that the Respondent was occupying some shops on the suit property and the Applicant then required him to pay monthly rent which he failed to do and later filed **Thika CMCC No.59 of 2017** seeking injunctive orders and which orders were subsequently granted in favour of the Respondent.

The Applicant is seeking for leave to appeal against the Ruling of the subordinate court that granted injunctive order. Stay of the said injunctive orders would mean staying the implementation of the orders given even before the appeal is heard. It would mean undoing the injunctive orders and therefore there would be no need of appealing against the said Ruling. It is trite that grant of stay of execution of orders appealed against is discretionary but that discretion must be exercised judicially and on sound legal principles. The Court finds that in the instant application, it would not be prudent to issue stay of execution of Ruling delivered on **10th November 2017**, given that the Respondent was allegedly in occupation before the suit **Thika CMCC No.59 of 2017** was filed.

On the second prayer of **Leave** to file Appeal out of time, the Court must consider whether the delay is inordinate, whether the intended Appeal has merit or high chance of success and whether any prejudice will be occasioned to the Respondent should the order be granted.

It is trite that Appeal from the subordinate court should be filed within a period of 30 days from the date of the decree or order appealed against. However, there is a proviso to **Section 79(G)** which provides that **“an Appeal may be admitted out of time if the Appellant satisfy the court that he had good and sufficient cause for not filing the Appeal on time”**.

The Ruling appealed against was delivered on **10th November 2017**. The application herein was filed on **21st December 2017** and the Applicant has admitted that there was a delay of **9 days** and he explained that the delay was caused by the time he took to get counsel from his advocate and understand the impact of the said Ruling. The Court finds that a delay of 8 days was not inordinate and the court will exercise its discretion and excuse the Applicant's delay.

On whether the Appeal has high chances of success or has merit, the Court finds that the Applicant alleged that he has a valid title deed issued in

his favour in the **year 2016**. It would be prudent to allow the Applicant an opportunity to ventilate his Appeal and challenge the Ruling issued in favor of the Respondent herein. The Court has considered the Memorandum of Appeal and finds that the intended Appeal is arguable and Applicant should be allowed to prosecute the same. See the case of **Edward Kamau & Another...Vs...Hannah Mukui & Another (2015) eKLR**, where the Court held that:-

“The right of Appeal, it has been held time and again, is a Constitutional right which is the cornerstone of the rule of Law. to deny a party that right would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under Article 50(1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution.”

On whether any prejudice will be occasioned to the Respondent, the Court finds that the Respondent is in occupation of the suit property and is enjoying injunctive orders. Grant of Leave to Appeal out of time will not occasion any prejudice on his part. Infact, it is in the interest of justice that the application herein should be allowed.

Consequently, after thorough consideration of the instant **Notice of Motion** application date **21st December 2017**, the Court finds that the Applicant has satisfied the court as to why it should exercise its discretion and grant the Applicant leave to file his Appeal out of time.

For the above reasons, the Court allows the Applicant's **Notice of Motion** dated **21st December 2017** in terms of **prayer no.(a)** but disallows **prayer no.(b)**. **Costs shall be in the cause.**

It is so ordered.

Dated, Signed and Delivered at Thika this 12th day of September 2019.

L. GACHERU

JUDGE

12/9/019

In the presence of

Mr. Mugendi for the Respondent/Applicant

Mr. Waigwa for Applicant/Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE