REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 300 OF 2017

(FORMERLY ELC 186 OF 2011)

PETER CHEGE KIARIE..PLAINTIFF/APPLICANT/RESPONDENT

VERSUS

GEORGE MATU, PROF.MUIGAI WA GACHANJA,

MRS BETTY MENDE MUTUVI &

EPHANTUS WAHOME NGECABI ((Being sued as

the Chairman, secretary, treasurer and Organizing Secretary respectively of

VERSITYVILLE ASSOCIATION...................DEFENDANTS/RESPONDENTS/APPLICANTS

RULING

There are two Applications for determination before this Court. On is the **Notice of Motion** Application dated **14th January 2019,** by the Plaintiff/ Applicant against the Defendants/Respondents seeking for orders that;-

> ***1. That the Applicant be granted leave to Appeal out of time against the whole Judgment of the Hon. Justice G. Ong'ondo delivered on 29th November 2018, at Thika.***
>
> ***2. That the Notice of Appeal and Memorandum of Appeal annexed hereto be deemed as duly filed and served.***
>
> ***3. That there be Stay of Execution of the Judgment of the Hon. Justice G. Ong'ondo delivered on 29th November 2018 pending the hearing and determination of the Intended Appeal.***
>
> ***4. That costs of this Application be provided for.***

The Application is premised on the grounds that **Justice G. Ongondo** delivered **Judgment** in the matter on **29th November 2018** at Thika. The Applicant being dissatisfied with the entire decision intends to appeal against it. However there was delay in filing an Appeal as the client had not given proper instructions. Further that the delay is not inordinate and the Defendants/Respondents will not suffer any prejudice. However if the Application is not allowed the Plaintiff/Applicant stands to suffer irreparable harm as he has been the absolute proprietor of **Ruiru/Ruiru East Block 7/21,** with a valid title deed and it would only be just that he is allowed leave to Appeal out of time.

In his **Supporting Affidavit** the Plaintiff/Applicant reiterated the grounds on the face of the Application and further averred that he has been advised by his advocate that time allowed to appeal under the Act had run out but the Court has the power to enlarge such time and that the delay of about 7 days is not so inordinate as to be inexcusable. He therefore urged the Court to allow his Application for the interest of Justice.

The Application is opposed and the Respondent filed a **Replying Affidavit** through **Major (Retired) John Njoroge Wanjagi**, and averred that the Applicant has not given adequate reasons for failing to file the Appeal in good time as it is not sufficient for the Applicant's Advocate to claim that the delay was occasioned by lack of proper instructions. He averred that the Applicant's affidavit exhibits scant respect for the delay alleging that it is not so inordinate without giving any justification for the delay. He alleged that, the **National Land Commission** declared that the properties were preserved for public utility and through a **Gazette Notice Volume CXIX- No.97** directed the

Registrar of titles to revoke the titles to the properties issued to the Applicant. It was his contention that the Applicant stands to suffer no prejudice as the Honourable Judge rightly found that the suit property belongs to the public and is reserved for public use and that title to the property was acquired through fraudulent means. He further averred that the Defendants/Respondents stand to suffer prejudice if the Application is allowed as since their rights which the Court has recognized and protected are likely to be infringed upon. Further that the Applicant has not demonstrated that he has an arguable appeal.

He averred that he has been advised by his Advocate that extension of time is an equitable remedy that is only available to a deserving party to the discretion of the court and a party seeking extension has the burden of laying a basis that is satisfactory to the court for the whole period of delay. Further that the rule of procedure and the timeline set therein serve to make the process of judicial adjudication and determination fair, just and certain and even handed and the Applicant having not given any reason to justify the delay in filing the appeal out of time would therefore mean that the Application lacks merit and the applicant has not satisfied the requirements for grant of Stay and his Application should be dismissed.

The 2nd Application is the **Notice of Motion** Application dated **4th**

March 2019, by the Defendants/Applicants are seeking for orders that;

> ***1. This Honourable Court be pleased to correct the error arising from an accidental slip or omission in the Judgment given on 29th November 2018 at paragraph 27 (b) as follows:***
>
> ***(i) Deleting the words orders (a) and (d) of the said***
>
> ***paragraph.***
>
> ***(ii) Replacing the said words with prayers (a) to (d) to reflect***
>
> ***the true intention of the Judgment.***
>
> ***2. The Costs of this Application be provided for.***

The Application is premised on the ground that the Court delivered Judgment in open Court on **29th November 2018,** and held at paragraphs 23, 24 and 26 that the Defendants had proved their case against the Plaintiff to the required standard and that they were entitled to the reliefs sought in the Counterclaim. Further that when the Court read the Judgment in open Court, it stated that the Defendants had been allowed in terms of prayers **(a) to (d).** However there is an accidental slip or omission in the typed judgment as it indicates that the Defendant's Counter-claim was allowed in terms of prayer **(a) and (d).** As such the final orders in the Judgment ought to be corrected in terms of prayer **(a) and (d)** only in view of the fact that the Court had already found in paragraphs 23,34 and 26 that the property belongs to the public i.e the residents of the **Versityville Resident Association** and it is reserved for public use by the said residents.

It was contented that it is quite clear that there is an error arising from an accidental slip or omission in the typed Judgment which ought to be corrected under **Section 99** of the **Civil Procedure Act**. That it is in the interest of Justice that the Judgment be corrected so as to reflect the true Judgment delivered on **29th November 2018.**

In her **Supporting Affidavit, Leah Wanjiru Muhia,** the Advocate for the Respondents reiterated the content on the grounds on the face of the Application and averred that unless the prayers sought are granted, the Defendants shall be prejudiced as they will be denied the fruits of their judgment.

The Application is opposed and the Plaintiff/Applicant/Respondent filed grounds of opposition and averred that the Application is misconceived, mischievous and an abuse of the Court process as it is the Applicant's intention to defeat the ends of justice having full knowledge that the matter is subject of an ongoing Appeal against the Judgment and decree of the Court. That further the Applicant's contention of an accidental slip or omission by **Justice Ong'ondo** can be determined in the appeal. It was his contention that no prejudice shall be suffered by the Applicants as his appeal contains arguable point vide the **Grounds of Opposition** filed in reply and opposition to this application.

The two Applications were canvassed together by way of written submissions to which the Court has now carefully read and considered.

The Court has further read and considered the two Applications and the annextures thereto and the submissions by the parties, and will first determine the Application dated **4th March 2019** by the Defendants herein.

The Defendants/Respondents in their Application have urged the Court to correct an accidental slip or omission in the Judgment given on **29th November 2018** by the **Justice Ong'ondo** by deleting the words orders **(a) and (d)** and replacing the same with the words prayer **(a) to (d).** In opposing the said Application the Plaintiffs/Applicants have filed **Grounds of Opposition** and stated that the Application by the Defendants is an abuse of the Court process as the same can be canvassed on appeal.

Section 99 of the **Civil Procedure Act** vests in the High Court the power to correct clerical or arithmetical mistakes in Judgments, Decrees or Orders or errors arising from any accidental slip or omission either on its own motion or on application by a party to a suit. It is therefore this Court's opinion that it has the Jurisdiction to correct the error or omission if it satisfied that the same has arisen from an accidental slip or omission.

The issue then that this court must determine is whether or not the matter that the Defendants have complained about constitute clerical or arithmetical errors or errors arising from accidental slip or omission. The Defendants have alleged that the **Justice Ong'ondo** made an error in his Judgment and used the word **"and"** instead of **"to".** It was their contention that in his Judgment the **Hon. Judge** had acknowledged that they had proven their case and when the Judgment was read in open Court, he declared that orders **'a to e'** have been granted. However he has made a mistake and granted orders/prayers **a & d**. For this Court to be able to determine whether there is an error that was made and that the same was arithmetical, it has to be satisfied that to correct the error will be giving full effect to the intention of the Court. See the case of **Dominic Alois George Omenye t/a Omenye & Associates …Vs…Prime Bank Limited [2017] eKLR** where the Court held that**;**

> ***"Regarding that jurisdiction, the Court was emphatic that the power to correct errors will only be made where the court is fully satisfied that it is giving effect to intention of the court at the time when judgment was given, or in the case where a matter was overlooked, where it is satisfied beyond doubt that as to the order which it would have made had the matter been brought to its attention."***

While on their grounds in support of the Application, the Defendants have averred that in open Court the Court declared that it had granted prayer **a to e,** they have urged the Court to correct the said wordings to read **a to d** only. This Court has carefully perused the Judgment of the Honourable Judge. It is not in doubt that the Court had found that the Defendants had proved their case. However it is also important to note that in their Counter-claim the Defendants had sought for **five** prayers but the Court seems to have granted only two prayers .The Defendant contended that as the Court had found that they had proved their case, it must have then granted them all their prayers as sought. This is not the correct position. From the Judgment and pleadings of the parties prayer **c** of the Defendant's Counter-claim is a claim for General Damages. If the Court is to correct the alleged error to read prayer **a to d,** it should then mean that the prayer for General Damages will have been awarded.

It is this Court's opinion that if the trial Court intended to grant the prayer for General Damages, then it would have gone ahead and calculated the General Damages to be granted to the Defendant. The Court would not have awarded a claim of General Damages in a vacuum and leave it to the parties to figure out how much should be the General Damages. This is because when **General Damages** are awarded, they become a liquidated amount.

This Court therefore is not satisfied that replacing and correcting the wordings of the Judgment would be giving effect to the Judgment and thus finds that the Application is not merited and the same is dismissed with costs to the Plaintiff.

The second Application for determination is that by the Plaintiff/ Applicant seeking for leave to appeal out of time and that the **Notice of Appeal** and **Memorandum of Appeal** to be deemed as duly filed. The Plaintiff/Applicant has also sought for stay of execution of the Judgment pending the hearing and determination of the Appeal.

Section 7 of the Appellate Jurisdiction Act, CAP 9, provides as follows;

> ***"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:***

This Court being an Environmental & Land Court(ELC) and having an equal status as the High Court has jurisdiction to extend time for giving of Notice of Appeal. See the case of **Edward Njane Nganga & Another..Vs... Damaris Wanjiku Kamau & Another [2016] eKLR;**

> ***"In light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.***

This Court will therefore make a finding on whether the Application for leave is merited. The principles that guide a court in considering an application for leave to file an appeal out of time were laid down by the Court of Appeal in the Case of **Stanley Kahoro Mwangi & 2 Others…Vs... Kanyamwi Trading Company Limited (2015)eKLR,** where the Court held that:-

> ***"The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.***

The Applicant seeking enlargement of time to file an Appeal or admission of an Appeal of an already filed Appeal must show good cause. The Plaintiff/Applicant has averred that the reason that the appeal was filed late was because the Counsel did not have proper instructions on whether or not to file the Appeal. It as their contention that the 7 days delay in filing the Appeal is well explained and that the same is not inordinate.

Though the Court is required to look at a number of factors before exercising its discretion on whether to grant the leave, it is also clear that the list is not exhaustive. The Counsel has informed the Court that he was away on compassionate leave and only got to know of the Judgment on the **7th December 2018,** and after communicating this, it took time for their client to get back to them. It is clear from the proceedings and Judgment of the Honourable Court that the Defendants were not present when the Judgment was delivered. This Court without any evidence to the contrary will choose to believe the accounts of the Plaintiff. Further it is clear that the delay that was occasioned

is only for around 7 days. This would not seem to be an inordinately long time so as to occasion any injustice to the Defendants. In the case of **Mwangi. S.Kimenyi…Vs… Attorney General & Another (2014)eKLR,** the Court held that;

"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter for the case, the nature of the case, the explanation given for the delay and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain it occurs. The litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore inexcusable.'

From the above it is clear that the delay was not inordinate. This Court therefore finds that the prayer for leave to file the Notice of Appeal out of time is merited and the same is allowed.

Further the Plaintiff/Applicant has also urged this Court to find that the **Notice of Appeal** and **Memorandum of Appeal** are duly filed. First of all this Court is not the proper Court to which a **Memorandum of Appeal** ought to be filed and therefore in making such an order this Court will be acting *ultra vires*. Furthermore for a pleading to be considered to have been filed in a Court, the same must be presented before the proper registry, the requisite fee required paid for and the same stamped. The document by the Plaintiffs have not met these prerequisite conditions and therefore this Court finds that the same is not merited and it is therefore disallowed.

The Plaintiffs have also sought for a prayer for **Stay of Execution** pending the hearing and determination of the **Intended Appeal**. This Court has already held and found that it cannot deem the **Notice of Appeal** and **Memorandum of Appeal** as duly filed given that the proper registry and Court to file the **Memorandum of Appeal** is not this Court and that further for the Appeal to be admitted and regarded as duly filed, the prerequisite conditions of payment of fees must be adhered to. As long as there is no Appeal on record, then there would be no reason to grant the Stay of Execution pending the Appeal. See the case of **Abubaker Mohamed Al-Amin Vs…Firdaus Siwa Somo [2018] eKLR,** where the Court of Appeal held that;

> ***"However, the learned Judge was correct in holding that in the absence of the appeal there was nothing upon which the stay orders sought under Order 42 of the Civil Procedure Rules could be anchored. Towards that end, we concur and adopt the observations made by Meoli, J. in Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR where she stated;***
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> ***"In my view, even if the prayer to appeal out of time had been granted, and the said prayer for stay pleaded in the Motion, it would still have failed for the reason that the existence of an appeal is a condition precedent to the exercise of this court's discretion under Order 42 Rule 6 (1) of the Civil Procedure Rules.***
>
> **…**
>
> ***It would seem that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the memorandum of appeal is filed, the court would be acting in vacuo by granting a stay of execution pending appeal."***
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> ***The prayer for stay of execution could only be canvassed after the appeal had been filed pursuant to the leave granted by the court. The two prayers should not have been lumped together in one application. We are satisfied from the grounds on the face of the application and the appellant's depositions in the supporting affidavit dated 2nd March, 2018 that leave ought to have been granted."***

Consequently, the Court finds and holds that the prayer for **Stay of Execution** pending the hearing and determination of the Intended Appeal is not merited and therefore the same is disallowed.

The Upshot of the foregoing is that the Plaintiff's/Applicant's **Notice of Motion** Application dated **14th January 2019** is partially merited and the same is allowed in terms of **prayer (a) only** of the said **Notice of Motion** Application with each party bearing its own costs.

On the other hand this Court finds that the Defendants/Respondents Application dated **4th March 2019,** is not merited and the same is dismissed with costs to the Plaintiff/Applicant.

It is so ordered.

***Dated, Signed* and *Delivered* at *Thika* this *11th day of October, 2019*.**

L. GACHERU

JUDGE

11/10/2019

In the presence of

No appearance for Plaintiff/Applicant/Respondent

M/S Kiarie holding brief for M/S Wawire for Defendants/Respondents/

Applicants

Lucy - Court Assistant

Court – Ruling read in open court in the presence of the above advocate.

L. GACHERU

JUDGE

11/10/2019