



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC MISC APPLICATION NO. 10 OF 2018

JAMES NGARI MAKAMBI.....APPLICANT

VERSUS

PAULINE MUTHONI NGARI.....RESPONDENT

RULING

1. By a notice of motion dated 16th August 2018 brought under **Sections 3A, 79G and 95 of the Civil Procedure Act (Cap. 21) and Order 50 Rule 6 of the Civil Procedure Rules**, the Applicant sought leave to file an appeal out of time against the Ruling of the Hon. M.N. Gicheru (CM) in *Embu CMCC No. 81 of 1989*.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the ruling of 30th April 2018 was delivered in the absence of the Applicant and that his previous advocate had failed to lodge an appeal in time and to seek a stay of execution pending appeal.

3. The said application was supported by an affidavit sworn by the Applicant on 16th August 2018 which expounded upon the grounds set out in the notice of motion. It was contended that the order of 30th April 2018 allowed the Respondent to execute a decree which was 28 years old and that the decree holder was no longer the proprietor of the property in dispute since he had sold it a long time ago. The Applicant contended that his intended appeal had high chances of appeal hence he should be allowed to ventilate the matter on appeal.

4. The Respondent filed a replying affidavit sworn on 15th July 2019 in opposition to the said application. It was contended that the Applicant was an illegal occupant of the property in issue and that he had disobeyed court orders to vacate. It was further contended that the Applicant had not exhibited a draft memorandum of appeal to demonstrate that he had an arguable appeal and that the application had been brought under the wrong provisions of the law.

5. When the said application was listed for hearing on 9th October 2019 the advocates for the parties agreed to canvass it through written submissions. The parties were granted 28 days to file and exchange their respective submissions.

6. The court has considered the Applicant's notice of motion dated 16th August 2018, the Respondent's replying affidavit as well as the entire material on record. The ruling which the Applicant intends to challenge on appeal was made on 30th April 2018, whereas the application for extension of time was filed on 16th August 2018. There was a delay of about 3½ months in filing the application. The Applicants' explanation for the delay was that the said ruling was delivered in his absence and that his previous advocate had failed to take necessary steps to appeal and seek a stay of execution thereof.

7. The factors to be considered in granting or refusing an application for extension of time to appeal out of time were summarized in the case of **Mwangi Vs Kenya Airways Ltd [2003] KLR 486** as follows;

“Over the years, the court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance in Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi (Civil Application No. Nairobi 255 of 1997 unreported), the court expressed itself thus;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also settled that in general the matters which this court takes into account in deciding whether to grant an extension are; first, the length of the delay. Secondly, the reason for the delay; third (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.”

8. The court has considered the length of the delay and the explanation for the delay in filing the instant application. The court has noted that the Respondent has not specifically refuted the explanation rendered by the Applicant. The court is of the view that the explanation is not

unreasonable. The period of delay also appears to be moderate.

9. The court has also considered the grounds of appeal which the Applicant intends to raise on appeal. The Applicant contends that the decree whose execution was allowed by the Magistrate's court was already statute barred. The Applicant also contends that the decree holder had no *locus standi* to proceed with execution since has had disposed of the suit property hence did not have any legal interest in it. The court is of the opinion that those grievances are not merely fanciful or frivolous. They may well be arguable points before this court.

10. The Respondent has not demonstrated what prejudice, if any, she may suffer if the extension of time is granted. The Respondent will be accorded every opportunity to oppose the intended appeal should the Applicant chose to pursue it to its logical conclusion. The Respondent shall still have a chance to argue that the Appellant is an illegal occupant on the suit property and that he had failed to challenge the original decree for 28 years.

11. The upshot of the foregoing is that the court finds merit in the Applicant's notice of motion dated 16th August 2019. The same is consequently allowed in the following terms:

a. Leave be and is hereby granted to the Applicant to file the intended appeal out of time against the ruling/order of the Hon. M.N. Gicheru (CM) dated 30th April 2018 in Embu CMCC No. 81 of 1989.

b. The Applicant shall file and serve his memorandum of appeal upon the Respondent within 14 days from the date hereof in default of which the leave granted shall lapse.

c. The Applicant shall pay the Respondent's costs of the Application in the sum of Ksh.15,000/- within 30 days from the date hereof.

12. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 14TH day of NOVEMBER, 2019.

In the presence of Mr. Manyara holding brief for Ms. Muthoni for the Respondent and the Applicant present in person.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

14.11.19