



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

MISCELLANEOUS APPLICATION No. 8 OF 2018

EVELYNE CHEPKURUI MILGO.....APPLICANT

VERSUS

FAMILY BANK KENYA LIMITED.....1ST RESPONDENT

ANTIQUA AUCTIONS AGENCIES.....2ND RESPONDENT

RULING

1. This matter arises from a ruling delivered on 11th September 2018 by Hon. J.B. Kalo (Chief Magistrate) in **CMCC No. 815 of 2015 (Nakuru) Evelyne Chepkurui Milgo v Family Bank Kenya Limited & Antique Auctions Agencies**. The said ruling was on an application that the applicant herein had filed in the matter seeking an injunction to restrain the defendants from inter alia selling, disposing of or transferring a parcel of land known as Nakuru/Langwenda/Settlement Scheme/30 pending hearing and determination of the suit. The learned magistrate found no merit in the application and dismissed it with costs.

2. Aggrieved by the aforesaid ruling, the applicant moved to this court and filed Notice of Motion dated 26th November 2018. The applicant seeks orders that there be a stay of the said ruling pending hearing and determination of an intended appeal to this court and further that she be granted leave to file the appeal out of time. No memorandum of appeal has so far been filed.

3. The application is supported by an affidavit sworn by the applicant wherein she deposed that her advocates did not inform her of delivery of the ruling and that she only learnt of its delivery when a notice of sale by auction was issued against her. She added that she is keen on appealing against the ruling.

4. The respondents opposed the application through a replying affidavit sworn by Lawrence Anthony Ouma, a Senior Legal Officer in the 1st respondent bank. He deposed among others that the application is not meritorious and that the applicant has approached the court with unclean hands.

5. Parties also filed and exchanged submissions. I have carefully considered the application, the affidavits filed and the submissions. The applicant essentially seeks two orders: stay of execution pending hearing and determination of an intended appeal and leave to file the appeal out of time.

6. I will deal with the aspect of leave to file the appeal out of time first. **Section 79G** of the **Civil Procedure Act** provides as follows:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

7. The principles applicable when considering an application for leave to appeal out of time are settled. In **Annah Mwihaki Wairuru v Hannah Wanja Wairuru [2017] eKLR**, the Court of Appeal referred to two of its earlier decisions and stated thus:

In Leo Sila Mutiso v Rose Hellen Wangari Mwangi. (Civil Application No. Nai. 255 of 1997) (unreported); this Court stated thus regarding how such discretion is to be exercised.

“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”.

[10] As was stated by Waki, JA in *Njuguna v Magichu & 73 others* 2003 KLR 507:

“The discretion exercisable under Rule 4 of this Court’s Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless the discretion has to be exercised judicially, that is on sound factual and legal basis.”

8. I will thus consider the plea for extension of time within which to appeal against the 4 tests of the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondents if the application is allowed.

9. Regarding the length of the delay, I note that the ruling sought to be appealed against was delivered on 11th September 2018 and that the present application was filed on 26th November 2018, some two and a half months later. The appeal itself ought to have been filed by 11th October 2018. As such, the application was filed some one and a half months after the time for filing the appeal had lapsed. I do not consider a delay of one and a half months to be unreasonable in the circumstances.

10. Regarding the test of reason for the delay, the applicant has argued that her advocates did not inform her of delivery of the ruling and that she only learnt of its delivery when a notice of sale by auction was issued against her. She has not stated the date when she learnt of the delivery or when the notice of sale by auction was served upon her. I note that the notice which she annexed stated that the property would be sold by public auction on 29th November 2018. Considering that her application was filed on 26th November 2018 which was before the date of the proposed sale, it was incumbent upon the applicant to make a full and frank disclosure on the date when she received the notice. In the absence of those details, it becomes irrelevant whether it is indeed true that her advocates did not inform her of delivery of the ruling since it may well turn out that by the time she became aware of the ruling she was still within time for filing the appeal. I therefore find that no valid reason has been advanced for the delay.

11. As to the chances of the appeal succeeding if the application is granted, I note that the applicant has only annexed an unsigned, undated and unfiled draft memorandum of appeal and a copy of the ruling of the subordinate court. The material that was before the subordinate court has not been supplied, thereby depriving this court of the full picture. Nevertheless, I note from the ruling that the suit property is charged in favour of the 1st respondent to secure a loan facility advanced to Tiloa Limited, a company in which the applicant is a director. The applicant admits having defaulted as regards the repayment obligations and further that she received a redemption notice. In such circumstances, I am not optimistic about the chances of the appeal succeeding.

12. Finally, as regards degree of prejudice to the respondents if the application is allowed, I have carefully perused the replying affidavit and the respondents’ submissions and I have not seen evidence of any prejudice that would be caused by the applicant being allowed to appeal out of time beyond that which can be compensated by an award of costs.

13. Citing the case of *Gerald M’limbine v Joseph Kangangi* [2009] eKLR, the respondents have argued that in view of the provisions of Section 79G of the Civil Procedure Act, the order of extension of time cannot be made since the applicant has not yet filed a memorandum of appeal. Like Ngugi J. in *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR, I take a different view of the matter. To construe the phrase “*Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time*” would mean that a memorandum of appeal must first be filed would run contrary to the court’s overall mission to rise above procedural technicalities in its mission to do justice. See *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR.

14. Although the applicant has only satisfied 2 out of the 4 tests applicable when considering a plea for extension of time within which to appeal, I am persuaded that justice will be better served if the applicant is given a chance to pursue her appeal.

15. Regarding the prayer for stay pending hearing and determination of the intended appeal, Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010 provides:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. [Emphasis supplied]

16. The above provisions envision that an order of stay of execution can only be made where an appeal has been filed. The applicant herein has not filed any memorandum of appeal and it is still a matter of conjecture whether an appeal will ultimately be filed. In such

circumstances, there would be no basis upon which to grant stay. Further as worded, the applicant seeks stay of the ruling delivered on 11th September 2018. The effect of that ruling was dismissal of the applicant's application for an interlocutory injunction. There is thus no positive order capable of being stayed. I therefore do not find any merit in the prayer for stay.

17. I therefore make the following orders:

- a) The prayer for stay pending hearing and determination of an intended appeal is dismissed.
- b) Leave is hereby granted to the applicant to file an appeal against the ruling delivered on 11th September 2018 by Hon. J.B. Kalo (Chief Magistrate) in **CMCC No. 815 of 2015 (Nakuru) Evelyne Chepkurui Milgo v Family Bank Kenya Limited & Antique Auctions Agencies** out of time.
- c) The Memorandum of Appeal to be filed and served within 14 (fourteen) days from the date of delivery of this ruling. In default, Notice of Motion dated 26th November 2018 shall stand dismissed with costs to the respondents.
- d) Costs of Notice of Motion dated 26th November 2018 are awarded to the respondents in any event.

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 6th day of November 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the applicant

No appearance for the respondents

Court Assistants: Beatrice & Lotkomoi