



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

MISC. APPLICATION NO. 11 OF 2019

JANEFFER IRUMBI NYAGAH.....APPLICANT

VERSUS

JOHN NJOKA NGIRI.....1ST RESPONDENT

PATTERSON KARIUKI MUTURI.....2ND RESPONDENT

R U L I N G

1. By a notice of motion dated 17 July 2019 brought under the provisions of **Order 42 Rule 6 (1), Order 50 rule 6** of the **Civil Procedure Rules** the Applicant sought the following orders:-

a) That this Honourable Court be pleased to grant leave to the Applicant to file appeal out of time.

b) That this Honourable Court be pleased to grant an order of stay of execution of the judgment of Honourable M.N. Gicheru, Chief Magistrate in Embu Civil Case No. 314 of 2014 delivered on 1st April 2019 pending the hearing and determination of this Application and the intended Appeal.

c) That costs be in the cause.

2. It was based on the grounds set out on the face of the motion and supported by the affidavit sworn by the Applicant on 17.07.2019. It was contended that the Applicant had applied for certified copies of proceedings on 2.04.2019 and that the same were not supplied until after the period for appeal had expired.

3. The Respondents filed a replying affidavit sworn by their advocate on record, Mr. Njeru Ithiga, on 28.08.2019 in opposition to the said application. It was contended that the Applicant had not demonstrated sufficient reasons to warrant an extension of time within which to file an appeal. It was contended that the Applicant had misled the court that she had applied for copies of proceedings on 2.04.2019 whereas the application was, in fact, made on 18.06.2019 way after the appeal window had lapsed. It was further contended that even though the proceedings were supplied to the Applicant on 4.07.2019 she did not file the instant application until 7.08.2019.

4. It was further contended that the Applicant had not tendered any explanation for the delay of 81 days in both seeking copies of the proceedings and judgement and in filing the instant application. The Respondents therefore considered the Applicant to be an indolent litigant hence they urged the court to dismiss the said application.

5. The Applicant filed a further affidavit sworn on 1st October 2019 in response to the Respondents' replying affidavit. The Applicant contended that the court file was unavailable on 2.04.2019 when she applied for proceedings hence the reason why the letter of request was date stamped 18.06.2019. The Applicant blamed the delay upon the court registry and the Respondents' advocates.

6. When the said application was listed for hearing on 25 September 2019 the parties were granted timelines within which to file their respective written submissions. The record shows that the Applicant filed her written submissions on 7.10.2019 but the Respondents' submissions were not on record by the time of preparation of the ruling.

7. In the case of **Mwangi v Kenya Airways Ltd (2003) KLR 486** it was held that the factors to be considered in an application for leave to appeal out of time are the following:-

a) The length of the delay

b) Reasons, if any, for the delay

c) Possibly, the chances of the appeal succeeding

d) The degree of prejudice to the Respondent if the application is granted.

8. The court has considered the period of delay on the part of the Applicant. There is no doubt that the judgment of the trial court was delivered on 1st April 2019. There is also no doubt that the Applicant's letter of request was assessed and stamped on 18.06.2019, that is, about 48 days after delivery of judgement. The material on record indicates that the Applicant did not offer any explanation for the delay between 2.04.2019 and 18.06.2019. In fact, the Applicant tried to mislead the court into believing that she had lodged her application for copies of the proceedings and judgment on 2.04.2019.

9. The Applicant only changed tact in her further affidavit of 1st October 2019 after the Respondents pointed out her mischief in the replying affidavit. The Applicant then claimed that the court file had gone missing between 2.04.2019 and 18.06.2019. She then blamed the Respondents' advocate and the court registry for the alleged unavailability of the court file for 48 days. The court is unable to accept that explanation as genuine for two reasons. First, if it were genuine it would have been voluntarily offered by the Applicant in the application and supporting affidavit of 17.07.2019. It would not have come out as an afterthought. Second, there is no evidence on record to demonstrate that the Applicant ever wrote a letter to the court complaining about the alleged unavailability of the court file. It is not usual for a party whose right of appeal is at stake to fail to raise such a critical issue with the court. There is simply no evidence on record to demonstrate that the court file was missing at any given time.

10. The material on record further demonstrates that even though the Applicant was supplied with copies of proceedings and judgment on 4.07.2019, the instant application was not filed until 7.08.2019. The delay in the filing of the application was not explained by the Applicant at all. The court is of the opinion that the Applicant is not a diligent litigant at all.

11. The court is entitled to consider if the intended appeal has any chances of success. That is not to say that the Applicant must demonstrate that the intended appeal has good chances of success. The idea is to consider whether the Applicants' intended appeal is an arguable one. The court has to avoid the risk of entertaining merely frivolous and fanciful appeals which would be a waste of judicial time.

12. The court has perused the judgement of the Hon. Chief Magistrate dated 1.04.2019 annexed to the Respondents' replying affidavit. It is noteworthy that the Applicant completely avoided exhibiting a copy of the judgement in her application. The judgement indicates that the court had referred the land dispute to the Land Registrar Embu to demarcate the boundaries between the Applicant's and the Respondents' parcels of land. The Registrar filed a report dated 10 November 2016 which indicated that the owner of parcel No. MBEERE/KIRIMA/2602 (the applicant) had encroached into parcel no. MBEERE/KIRIMA/3630.

13. The material on record further indicates that the Applicant disputed the findings of the Registrar and sought to have a second survey conducted by the Director of Surveys. The trial court apparently granted the Applicant her wish. A second survey was duly carried out and vide a report dated 3.08.2018, the Director of Surveys came to the same conclusion as the Registrar. Consequently, the trial court entered judgement against the Applicant on the basis of the two reports before the court.

14. The court is thus of the opinion that the intended appeal is merely fanciful and frivolous. If both the Land Registrar and the Director of Surveys found the Applicant to have encroached into the Respondents' parcel of land, there is no possibility that an appellate court would come to a different conclusion. The Applicant appears to be a vexatious litigant who is bent on keeping the litigation amongst the parties pending for as long as possible without a legitimate reason.

15. The court has also considered the issue of prejudice to the Respondents. The court has found that the Applicant is guilty of delay both before requesting for proceedings and after obtaining them. The court has found no good or genuine explanation for the delay. In fact, the Applicant even tried to mislead the court into believing that her application for proceedings was made on 2.04.2019. The court has also found that the intended appeal is merely fanciful and frivolous. It would, therefore, be highly prejudicial to subject the Respondents to frivolous litigation by an indolent litigant. The material on record has also shown that the Applicant is yet to pay the Respondents' costs in the proceedings before the trial court.

16. The upshot of the foregoing is that the court finds no merit whatsoever in the Applicant's notice of motion dated 17.07.2019. Accordingly, the same is hereby dismissed in its entirety with costs to the Respondents.

17. It is so ordered.

Ruling dated, signed and delivered in open court at Embu this 19th day of December 2019.

In the presence of:

Mr. Ngari for the Applicant and Ms. Njuguna holding brief for Mr. Ithiga for the Respondents.

Court Assistant Mr. Muinde.

Y.M. ANGIMA

JUDGE. – 19.12.19.