



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 186 OF 2012(OS)

HARDEV KALSI SINGH.....PLAINTIFF/RESPONDENT

- VERSUS-

ILAM DIN S/O UMAR DIN.....1ST DEFENDANT/APPLICANT

MOHAMMED ASLAM S/O ILAM DIN.....2ND DEFENDANT/APPLICANT

ASGIRI D/O ILAM DIN.....3RD DEFENDANT/APPLICANT

MOHAMMED AKHTAR.....4TH DEFENDANT/APPLICANT

MOHAMMED AZHAR S/O MOHAMED AKRAM.....5TH DEFENDANT/APPLICANT

RULING

What is before the court is the Notice of Motion application dated 28th January 2019 brought by the 5th defendant/applicant (hereinafter referred to only as “the applicant”) in which he has sought leave of the court to file an appeal against the judgement delivered herein on 23rd July 2015. The application is premised on the grounds set out on the face thereof and in the supporting affidavit of the applicant sworn on 28th January, 2019. The applicant averred that in the judgment delivered by the court on 23rd July, 2015, the court declared that the plaintiff/respondent (hereinafter referred to only as “the respondent”) had acquired all that parcel of land known as L.R No 209/4931/21 (hereinafter referred to only as “the suit property”) by adverse possession.

The applicant averred that the 1st to 4th defendants and he were registered as proprietors of the suit property as tenants in common. The applicant averred that he was aggrieved by the said judgment and intended to appeal against the same to the Court of Appeal. The applicant averred that he had obtained extension of time from the Court of Appeal to file the intended appeal out of time. The applicant averred that the intended appeal had merit and that the respondent would not suffer any prejudice if the application was allowed. The applicant averred that the application was filed timeously and that it was in the best interest of justice that the application be allowed.

The application was opposed by the respondent through a replying affidavit sworn by his advocate, James Gitau Singh on 16th April, 2018. The respondent averred that after judgment was entered in favour of the respondent on 23rd July, 2015, the applicant filed an application for review of the same which was heard and dismissed by the court on 22nd September, 2017. The respondent averred that the applicant having sought a review of the judgment of the court and lost, the applicant had no right to appeal to the Court of Appeal against the said judgment. The respondent averred further that the applicant’s application was filed out of time and was an abuse of the court process. The respondent averred that litigation must come to an end and that the orders sought if granted would deny the respondent a right to enjoy the fruits of the judgement that was entered in his favour.

The application was heard on 24th April, 2019. In her submission in support of the application, the advocate for the applicant reiterated the grounds on the face of the application and the supporting affidavit of the applicant. On the respondent’s contention that the applicant had no right of appeal having sought a review of the subject judgment and failed, the applicant’s advocate submitted that the issue was raised by the respondent in the Court of Appeal during the hearing of the applicant’s application for extension of time within which to file the appeal. She submitted that the issue was considered and the Court of Appeal proceeded to grant the applicant extension of time. The applicant’s advocate submitted that the Court of Appeal would not have granted the extension of time if the applicant had no right of appeal. The applicant’s advocate submitted that the Court of Appeal also gave the applicant liberty to apply for leave to appeal if necessary. The applicant’s advocate submitted that if the leave sought was not granted, the applicant’s appeal to the Court of Appeal would be rendered nugatory. Counsel urged the court to exercise its inherent powers and grant the leave sought.

In his submission in reply, the advocate for the respondent submitted that the applicant's application was an abuse of the process of the court. He submitted that the applicant's application should have been brought within 14 days from the date of judgment and that the applicant had not sought extension of time within which to file the application. The respondent's advocate submitted further that after a judgment is made, an aggrieved party has to make an election whether to seek review of the judgment or to appeal against the same. He submitted that a party has no right to pursue both remedies. He submitted that the applicant applied for review of the judgment which application was heard and dismissed on 22nd September, 2017. He submitted that the applicant having elected and exercised his right of review, he had no right to appeal against the same judgment. The respondent's advocate submitted that the respondent should not be denied the fruits of the judgment that was entered in his favour. He submitted that the issue as to whether or not the applicant had a right to appeal having applied for review was not determined by the Court of Appeal. The respondent's advocate submitted that the applicant's application that was brought after inordinate delay should be dismissed.

I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the respondent in opposition to the application and the submissions of counsels. On 20th December, 2018, the Court of Appeal granted to the applicant extension of time within which to file an appeal against the judgment of this court delivered on 23rd July, 2015. The Court of Appeal also gave the applicant liberty to apply for leave to appeal within 30 days from 20th December, 2018. The present application was filed on 28th January, 2019. Under Rule 3 (e) of the Court of Appeal Rules, 2010, the period of Christmas vacation shall not be reckoned in the computation of time. The applicant's application was in the circumstances filed within the time that was given by the Court of Appeal. The Court of Appeal had given the applicant liberty to apply for leave to appeal if necessary. In her submissions, the applicant's advocate did not address the court why the applicant thought that leave was required to appeal to the Court of Appeal from the judgment that was delivered herein on 23rd July, 2015. In my view, although the judgment of the court was given in a suit instituted by an Originating Summons, it gave rise to a decree and not an order. Following that judgment, the respondent extracted a decree on 20th February, 2018 for execution. It is against that decree as amended that the applicant has preferred an appeal to the Court of Appeal.

Under section 66 of the Civil Procedure Act, Chapter 21 Laws of Kenya, there is a right of appeal to the Court of Appeal from any decree or part of a decree issued by this court save where the same is expressly limited by the said Act. I am not aware of any provision of the Civil Procedure Act limiting the right of appeal to the Court of Appeal against decrees or part of decrees arising from suits instituted by way of Originating Summons. The applicant's application was brought under Order 43 Rules 2 of the Civil Procedure Rules. In my view, Order 43 does not apply in the circumstances. Order 43 of the Civil Procedure Rules applies to appeals from orders. As I have mentioned, the applicant's appeal is not against an order but a decree of the court that conclusively determined the rights of the parties herein. Order 43 Rule 3 expressly excludes from the purview of the Order adjudications that conclusively determines the rights of the parties with regard to all or any of the matters in controversy in a suit. Even if it was to be argued for argument's sake that the judgment of this court made on 23rd July, 2015 gave rise to an order and not to a decree which is not the case, it would still be excluded from the provisions of Order 43 of the Civil Procedure Rules by Order 43 Rules 3 of the Civil Procedure Rules aforesaid.

The upshot of the foregoing is that the application before the court is superfluous. Assuming that I am wrong on the issue of whether or not the applicant required leave to appeal, I would still on merit grant the leave sought. I am not in agreement with the respondent that the application was brought after inordinate delay. As mentioned earlier, the time within which the applicant was to file the application was extended by the Court of Appeal and the application was filed within the extended period. The respondent had also argued that the applicant having sought review had no right of appeal to the Court of Appeal. This issue as rightly pointed out by the applicant was raised before the Court of Appeal which considered it and proceeded to grant the applicant extension of time within which to file appeal against the judgment of this court. The applicant having filed an appeal to the Court of Appeal with leave of that court, it is not open to this court to question the competency of that appeal.

In conclusion, I hereby grant leave to the applicant to appeal to the Court of Appeal against the judgment delivered by this court on 23rd July, 2015 in the event that such leave is required. Each party shall bear its own costs of the application.

Delivered and Dated at Nairobi this 19th day of December 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Kiragu for the Applicant

N/A for the Respondent

Ms. C. Nyokabi-Court Assistant