



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISC CIVIL APPLICATION NO. 29 OF 2019

LAWRENCE KIRURI MWATHE.....1ST APPLICANT

SCHOLASTICA WANGARI KIRURI.....2ND APPLICANT

VERSUS

DUNCAN KARANJA MUKUNDI.....1ST RESPONDENT

GITHUNGURI CONSTITUENCY RANCHING

COMPANY LIMITED.....2ND RESPONDENT

Being an Application for Extension of Time to file an Appeal out of time against the decision of the Chief Magistrates Court at Thika by Honourable G. Omodho delivered on 28th November 2018 in Civil Suit No.122 of 2011)

RULING

The matter for determination is the **Notice of Motion** Application dated **28th May 2019**, the Applicants herein seeking for orders that:-

a) This Honourable Court be pleased to extend time and grant the Applicant Leave to file an Appeal out of time against the Judgment/Decree dated 28th November 2018, in respect of Civil Suit No.122 Of 2011, Duncan Karanja Mukundi ..versus..Lawrence Kiruri Mwathe, Scholastica Wangari Kiruri & Another.

b) The Leave so granted allowing the Applicants to lodge their intended Appeal to be filed out of time operate as a Stay of the Execution of the Judgment and Decree in Civil Suit No.122 of 2011, Duncan Karanja Mukundi ...verses... Lawrence Kiruri Mwathe, Scholastica Wangari Kiruri & Another.

c) Costs of this Application be in the cause

The Application is based on the grounds that the Applicants were never given notice of the date when the Judgment in **Civil Suit No. 22 of 2011 - Duncan Karanja Mukundi ...Vs... Lawrence Kiruri Mwathe, Scholastica Wangari Kiruri & Another**, was delivered and that they only got to stumble onto that information after nearly two and half months subsequent to the delivery of the said Judgment. That the Appeal raises fundamental grounds of law and the inability of the Applicants to be furnished with copies of the Judgment and proceedings of the Magistrate Court, the delay in filing and serving the Notice of Appeal, Memorandum of Appeal and Record of Appeal is not inordinate or deliberate and that the same is excusable as they applied for the copies of the proceedings on the **26th of February 2019**, and the same were only furnished to them on the **9th May 2019**. However they are yet to be issued with a certificate of delay.

In their **Supporting Affidavit**, the Applicants averred that on the **11th of November 2018**, Judgment was delivered against them in **Civil Suit No.122 of 2011**. However on the close of evidence, the Court had directed that Judgment would be delivered on Notice. However that they were informed by their Advocate who was on record at the time that she was never notified of the date of Judgment, which was delivered on **28th November 2018**, and as a result they did not have any legal representation during the delivery of the said Judgment as no efforts were made to inform their Advocate that Judgment had been delivered. .

It was their contention that they were thus not aware of the delivery of the said Judgment until the **10th of February 2019**, when they contacted their Counsel and she informed them that she could no longer represent them as she had taken up a job with an NGO. That they then instructed their current Advocate on record and on the **12th of February 2019**, their Advocate requested to be furnished with certified copies of the proceedings, but the said application was unsuccessful since the Court file could not be traced. That they then wrote a letter to the Chief Executive Officer, Thika Law Courts to seek for intervention and since the Firm of Advocates on record was still **Chepkemboi**

Milka & Company Advocates, they applied for fresh certified copies on the **27th of February 2019**, and it was not until Friday the **10th of May 2019**, that their advocates were furnished with the certified copies of the proceedings.

They further averred that they have been advised by their Advocates that they require Leave of Court to file and serve the Appeal as the delay in filing was not inordinate but it was due to their inability to get certified copies of the proceedings and the Judgment. Further that their intended Appeal is arguable and has overwhelming chances of success as the Respondents will not be prejudiced as they will have an opportunity to respond to their intended Appeal. Further that there is a threat of execution of the Decree arising from the Judgment and that it is in the interest of justice that Leave granted do operate as Stay.

The Application is opposed and the 1st Respondent filed **Grounds of Opposition** on the **11th of June 2019**, and averred that the Application as drawn is fatally defective, bad in law, misconceived and that it is a plot meant to delay the execution process. Further that the Application is an afterthought and an abuse of the Court process and it lacks merit as the Applicants have not demonstrated sufficient grounds that warrant this Court to grant orders sought. It was his contention that Judgment was delivered on the **28th November 2018**, and the instant Application was filed on **28th May 2019**, and the delay in filing the Application has not been explained.

The 1st Respondent also filed a **Replying Affidavit** sworn on the **12th of September 2019**, and averred that the Applicants were served with a mention notice for the **18th of July 2018**, when the matter was scheduled for confirmation of filing of submissions and taking a Judgment date and that the matter was mentioned severally to allow for typing of proceedings and the last mention was on the **3rd of October 2018**, when the Defendants' advocate was in Court and the Court indicated that a further mention would be on the **24th of October 2018**, when the Judgment date would be granted. That the Judgment was reserved for the **28th of November 2018**, when the Applicants failed to attend. It was his contention that the present Application was filed over six months and there is no explanation made why the Defendants failed to attend court. That the delay to file the Appeal is therefore inordinate and cannot be found basis for the exercise of the discretion of this Court as the delay is prejudicial to him. That it is in the interest of Justice that every dispute be heard and determined expeditiously. Further that the grant of any extension would be prejudicial to him as he would be kept out of the land that he bought in

1994.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered. The issue for determination before this Court is **Whether or not the Applicant is entitled to the orders sought.**

It is not in doubt that this Court has **jurisdiction** to allow an Applicant to file an Appeal out of time but in doing so the Court is to use its discretion and be satisfied that the Applicant has given sufficient reason to warrant the grant of the said Leave. **Section 79G** of the **Civil Procedure Act**, provides that:-

“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 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”

In the case of **Nicholas Kiptoo Arap Korir Salat...Vs....The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR**, the Court held that:-

“..... It is clear that the discretion to extend time is indeed unfettered.

“It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the

following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

In line with the foregoing cases, it is this Court's opinion that the question that must then be answered is whether the Applicants have explained the reason for the delay to the satisfaction of this Court.

It is the Applicants contention that the trial Court informed their counsel that Judgment would be delivered on Notice when the Counsel appeared before the trial Court to confirm filing of submissions. Further the Applicants contended that they were not aware when the Judgment was delivered and that they only got to learn of the delivery of the Judgment in February 2019, wherein they sought to have the Court proceedings and Judgment. That they failed to file the Appeal on time as they were unaware of the entry of Judgment.

The Court has gone through the annexures annexed by the Applicants herein. From the proceedings annexed, it is not in doubt that the Court on several occasions mentioned the matter to confirm the filing of the submissions by the parties. It is also clear as stated by the Respondent that on the 3rd of October 2018, the Court further gave a mention date to the parties in order to reserve a Judgment date. However that is as far as the proceedings annexed to this Application goes. However the

Court is unable to confirm whatever happened on the subsequent dates. Further the Court has seen a copy of the Judgement that was presented before it and indeed confirms that the Applicants were not in Court when the Judgment was delivered.

Further this Court has seen various letters from the Applicants to the Executive Officer, Thika Law Courts, confirming that the Applicants had sought to have the typed proceedings and Judgment in February 2019. Further the Court has also seen a letter requesting for the Certificate of delay from the lower Court. Without any evidence to contradict the assertions by the Applicants, this Court finds that the Applicants have been able to give a satisfactory explanation as to why there was a delay in filing of the Appeal. See the case of Stanley Kahoro Mwangi & 2 others v. 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.”

Further in the case of Kenya Red Cross Society v Mbondo Katheke Mwanja [2019] Eklr, the Court stated that:-

“Ordinarily, where a judgement is delivered in the absence of a party without notification and the party becomes aware of the same after the lapse of the time prescribed for taking action, that constitutes sufficient ground for extension or enlargement of time to take the necessary step. This is my understanding of the decision in Edward Njane Nganga & Another vs. Damaris Wanjiku Kamau & Another [2016] eKLR, where in allowing an application for Leave to Appeal out of time, the Court expressed itself as follows:

“The applicant has annexed to his supporting affidavit a letter dated 20th July, 2015 addressed to the Deputy Registrar of this Court requesting for a certified copy of the proceedings. Through a letter dated 22nd September, 2015 the applicant also applied for a certified copy of the order in the decision/Judgment hereto. There is evidence of payment in respect of the documents requested. Counsel for the applicant informed the court that there was delay in obtaining the documents required to prepare the record of Appeal and explained that the delay in obtaining those documents is not attributable to the applicant... I have considered the peculiar circumstances of this case. The Judgment Appealed from was delivered in the absence of the applicant/his counsel; there was no inordinate delay in bringing the application...”

This Court finds that the Applicants have satisfied this Court with satisfactory explanation of the said delay and consequently has persuaded the Court to exercise its discretion and therefore the prayer is merited.

The provisions of Order 42 Rule 6(2), sets out the principles that the court should consider while deciding whether to grant Stay of Execution Pending Appeal. These are:-

“No order for Stay of execution shall be made under subrule (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.”

There are also plethora of decided cases on the issue of grant of Stay of Execution pending Appeal. See Civil Appeal No.107 of 2015, Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR, where the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order Stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant Stay, the Applicant must furnish security, the application must be made without unreasonable delay.”

In addition, the Applicant must demonstrate that the intended

Appeal will be rendered nugatory if Stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”

The Court will then proceed to determine whether the Appellants/

Applicants herein have satisfied the required standard for grant of Stay orders pending Appeal.

Firstly, the Applicant must show that he will suffer substantial loss. It is evident from the above provisions of law that the Court has discretion to issue an Order of Stay of execution. However, the said discretion must be exercised judicially. See the case of Canvass Manufacturers Ltd...Vs...

Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853, where the Court held that:-

“Conditions for grant of Stay of execution pending Appeal, arguable Appeal and whether the Appeal would be rendered nugatory. The discretion must be judicially exercised”.

Further in the case of Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991, the Court held that:-

“For the court to order a Stay of execution there must be:-

- i. Sufficient cause?*
- ii. Substantial loss*
- iii. No unreasonable delay*
- iv. Security and the grant of Stay is discretionary”.*

As the Court also embarks in determination of this application, it will take into account that it is not the practice of the Courts to deprive a successful litigant of the fruits of his/her litigation. Further the Court will take into account that the purpose of Stay of execution pending Appeal is to preserve the subject matter. See the case of Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), where the Court held that:-

“The purpose of the application for Stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.

The conditions that the Applicants herein should satisfy is as stated in **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. The Court will now consider each of the condition and juxtapose them with the available evidence herein to determine whether the Applicants are deserving of the orders sought.

Firstly, the Applicant must satisfy that they will **suffer substantial loss**, unless the orders sought are issued. From the Judgment of the subordinate Court, it is clear that the Respondent had sought for orders of vacant possession as against the Applicants and damages which orders were granted by the Court. To this effect, the Court found in favour of the Respondents and ordered for cancellation of the Applicants title and also issued an order for vacant possession.

It is not in doubt then that the Applicants have been in possession of the suit property. Since the Appellants were in possession of the suit land and the fact that the orders that have been granted will serve the purpose of evicting them from the said land, this Court finds that the Appellants will certainly suffer loss and their Appeal might be rendered nugatory in the event the Appeal is successful. This is so because the Applicants are seeking not to be restrained from the suit property and stop eviction and if **the orders are not stayed the Appeal may be rendered nugatory**.

The Court makes this finding taking into account that it is not the duty of the Court to deny a successful litigants the fruits of his/her Judgment. Further, the Appellant should also have an assurance that his Appeal will not be rendered nugatory. However, taking into account that the Appellants herein were in possession, then they have satisfied this Court that they will suffer substantial loss if the orders sought are not granted.

This Court in allowing the Applicant to file the Appeal out of time notes that there was no delay in filing the Application as reasons have been explained to the satisfaction of this Court. It is therefore this Court’s opinion that there is no inordinate delay in filing the Application.

On the issue of security of costs, the Court notes that the lower Court did give damages of **Kshs.300,000/=**. In order to balance the needs of the Applicants and protect the Respondents in ensuring that the interest of Justice are protected, this Court finds that the Appellants do provide security of **Kshs.300,000/=** within **30 days** from the date hereof. Equally, the Court herein finds that the **Order** sought of Stay of execution would protect and preserve the suit property

Having now carefully considered the instant application, the written submissions, the cited authorities and the relevant provisions of law, the Court finds that the application dated **28th May 2019**, is merited and it is allowed entirely with a condition that the Appellants do deposit

Kshs.300,000/= as security of costs within **30 days** from the date hereof.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of December 2019.

L. GACHERU

JUDGE

19/12/219

In the presence of

M/S Mbole holding brief for Mr. Odhiambo for Applicant

M/S Mwangi holding brief for Mr. Njenga for 1st Respondent

No appearance for 2nd Respondent

Lucy - Court Assistant

Court – Ruling read in open court.

L. GACHERU

JUDGE

19/12/2019