



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA NO 21 OF 2019

CHARLES MWANGI MBURU.....1ST APPLICANT

PAUL WAITHAKA MBURU.....2ND APPLICANT

VERSUS

PETER NDUNGU KARIUKI (suing as the administrator of the estate of

PRIMUS OLOO OBWAYO).....RESPONDENT

RULING

1. The application seeks the following orders;

a. Spent

b. The Court be pleased to grant the Applicant leave to file an Appeal against the exparte judgement entered on the 13/12/18 in CMCC No 246 of 2013 out of time.

c. That pending the hearing and determination of the Applicant's intended Appeal there be temporary stay of execution of the judgement entered on the 13/12/18 against the Respondents together with all subsequent decree and or orders issued thereafter.

d. Costs of the application

2. The grounds of the application set out in the Notice of Motion and the supporting affidavit of the lawyer of the Applicants one Ms Pauline Ngendo Mwaniki are that; the judgement was delivered in their absence and became aware when they were served with a notice of the intended eviction and they immediately sought for stay and setting aside of the judgment vide the application dated the 20/6/19; their application for setting aside and stay of execution was dismissed on 25/7/19; by the time the Applicants realized that the suit was heard exparte the time for filing of the Appeal had expired and hence this application for orders to extent time; the Applicants have been notified to vacate the suit land; there is no delay in bringing the application.

3. Under para 8 of the supporting affidavit aforesaid, the deponent states that the Applicant's Advocates were never served with the judgment notice nor the amended decree given on the 25/4/19 and that the Applicants became aware of the decree when they were served with a 30 day notice to vacate the suit land.

4. Further that the Respondent has already executed the decree with the consequence that the suit lands are now registered in the names of the Respondent.

5. That the Applicants are innocent and that the mistake of their Advocates should not be visited upon them. That they stand to be prejudiced if the Respondent executes the decree as their intended Appeal shall stand to be defeated and will be an exercise in futility.

6. The application is opposed vide grounds of opposition dated the 28/8/19 on the grounds that; the application is overtaken by events; the Appeal is an afterthought after failing in the review application and are therefore estopped from pursuing the Appeal; no sufficient reasons have been given for filing Appeal out of time; Applicants were present in Court when the decree was amended and indeed consented to the amendment; the notice to vacate the suit land was given on the 3/6/19 and they did not Appeal; the Memorandum and Notice of Appeal filed in Court without leave is an illegality.

7. Parties filed written submissions which I have read and considered.

8. The key issue for determination is whether the Applicant is entitled to orders to file the Appeal out of time.

9. Section 79G of the Civil Procedure Act states 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”.

10. The background of this case is that the suit in the lower Court was filed on the 31/7/13. According to the record the matter was fixed for hearing on the 9/8/18 by consent of the parties on the 28/11/18. Come the hearing date the Applicants and their Advocates were absent in Court. The record does not attest to the reason given for their absence and the hearing proceeded exparte. The judgement of the honorable Court was delivered on the 13/12/18.

11. Order 21 Order 21 Rule 1 provides:-

“In suits where a hearing is necessary, the Court, after the case has been heard, shall pronounce judgment in open Court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their Advocates”.

12. I note that the judgement in this was delivered in the absence of the Applicants and their Advocates. The record is silent whether they were served or not. The above rule requires that notice of judgement must be given to the parties or their Advocates.

13. The record further attests that the Respondent extracted the decree and sought to amend the same vide an application which was served on the Applicants on the 20/3/19. The Applicants Advocate Messrs Kenga holding brief for Mr Ochera for the Applicants consented to the said amendment of the decree.

14. It is therefore misleading for the Applicant’s Advocate to aver that the Applicants only became aware of the decree when they were served with the notice to vacate on the 24/5/19. It is on record that by the 25/4/19, the Applicants had been served with the decree vide the Notice of Motion in March 2019 and had consented to the terms of the said decree on the 25/4/19.

15. It is also on record that the said Applicants filed a Notice of Motion on the 20/6/19 to interalia set aside the judgement of the Court delivered on the 13/12/18 pending review and or Appeal; to stay the execution of the decree or set it aside pending the review and or Appeal of the said judgement.

16. It is on record that the said Notice of Motion was dismissed on the 25/7/19.

17. In the case of **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 Others** [2013] eKLR, the Supreme Court set out the following principles that should be considered in exercise of a Court’s discretion in extension of time:-

“a. 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.

b. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;

c. Whether the Court should exercise discretion to extend time is a consideration to be made on a case to case basis;

d. Where there is a reasonable cause for the delay. The delay should be expressed to the satisfaction of the Court;

e. Whether there will be any prejudice suffered by the Respondents, if extension is granted;

f. Whether the application has been brought without undue delay and;

g. Whether in certain cases, like Election Petitions, public interest should be a consideration for extending time.”

18. In the instant case time for filing of the Appeal started running from the delivery of judgment on the 13/12/18 (less the days excepted by the law in respect to the Christmas holidays which is the 20th December upto and including the 13th day of January in the next year). Given that there is evidence on record that the Appellants were not served with the judgement notice as they should have and given that they were not served with the decree notice, I was going to be lenient and allow them the latitude if this was the case. However the Applicant has to surmount the other factors to be considered.

19. However, it is on record and admitted that the Applicants got to know about the decree on the 20/3/19 when they were served with the application to amend the said decree. It is on record as stated in the preceding paras that they consented and approved the said decree.

20. As stated in the SCOCK case above, 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 discretion to extend time is a consideration to be made on a case to case basis.

21. Being a matter of the Court's discretion, it is trite that that discretion has to be exercised judiciously and not capriciously or whimsically. For one to Appeal on the discretion of the Court, there has to be full and frank disclosures to the Court and show what action the person took when the issue came to his knowledge. If you sleep on the action you cannot wake up from slumber and expect the Court to help you. Equity loathes laxity.

22. In this case the Applicant has not explained the delay in not filing the Appeal within time. There has not been any explanation as to why the Appellants approved and consented to the decree and two months later changed mind and sought to Appeal or review the said decree.

23. The explanation that the Appellants have labored to give is in respect to the reasons why they did not attend the hearing. That is not the matter before the Court. What is before the Court is an application for extension of time to file an Appeal.

24. The second issue to check is if there is going to be prejudice to the Respondents. In this case there is evidence that the judgment has been fully executed with the titles registered in the name of the Respondent (Primus Oloo Obwayo).

25. It is not clear to me why the Appellants did not seek to set aside the judgment for purposes of being heard on merits. Instead they preferred to Appeal and review the exparte judgement. This was not explained by the Applicants.

26. In the end this application is for dismissal. It is dismissed with costs to the Applicants.

27. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANGA THIS 5TH DAY OF DECEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Mwaniki for the 1st and 2nd Appellants/Applicants

Nyakariga HB for Ndungu for the Respondent

Irene and Njeri, Court Assistants