

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 344 OF 2014

JOAN MUSULUVE MUHINDI.....PLAINTIFF/RESPONDENT

VERSUS

JOHN OBAMO MUHINDI.....DEFENDANT/APPLICANT

RULING

The application is dated 23rd November 2017 and brought under Section 7 of The Appellate Jurisdiction Act, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rules 1 & 3 of the Civil Procedure Rules 2010 seeking the following orders;

1. THAT this application be heard ex-parte in the first instance and service be dispensed with as a matter of urgency on the ground, inter alia, that execution of the decree passed on the 11th of October, 2017 against the defendant/applicant will render this application and intended appeal otiose or nugatory.
2. THAT pending the hearing and determination of this application inter parties there be an interim order of stay of execution of the decree dated 11th of October, 2017 by way of eviction of the defendant/applicant from L.R. TIRIKI/GISAMBAI/645 until the hearing and determination of this application inter parties and/or until further orders of this court.
3. THAT pending the hearing and determination of the defendant/applicant's appeal in the Court of Appeal, there by a stay of execution of the decree dated 11th of October, 2017 by way of eviction of the defendant/applicant from L.R. TIRIKI/GISAMBAI/645 until the hearing and determination of the appeal.
4. THAT the honourable court do extend time to lodge and serve a Notice of Appeal.

The applicant submitted that, due to financial difficulties, he was unable to engage the services of the advocates to the logical end hence he filed a notice to act in person and proceeded with the hearing on his own. That the court delivered the judgment herein in his presence on 11th of October, 2017. That the judgment was in favour of the plaintiff against him wherein the court made orders, inter alia that the defendant is given six (6) months to vacate and in default an eviction order to issue forthwith to him for the suit land L.R. TIRIKI/GISAMBAI/645. Costs of the suit to the plaintiff.

That he is aggrieved by the entire decision of the court and he intends to appeal to the Court of Appeal against the judgment and decree of the honourable court. That due to the complexities of appealing to the Court of Appeal and with assistance of his relatives, he has sought the services of Mr. Charles Anyona Advocate whom he has extensively consulted on this matter last week on 8th November 2017 and has advised him, that the time to file a Notice of Appeal as a matter of right expired 14 days after delivery of judgment on 25th January 2017 hence no competent appeal can be lodged without extension of time to lodge the Notice of Appeal by the court. That to demonstrate his seriousness and desire to appeal, his advocate has requested for copies of proceedings and certified copy of the decree in readiness of preparing a record of appeal as and when this court grants him leave to file a Notice of Appeal out of time. (See exhibit marked JOM 1a, b & c). That his failure to lodge a Notice of Appeal was completely out of ignorance of the law about the time lines of filing the same. That the land subject matter of this suit, that is to say, L.R. TIRIKI/GISAMBAI/645, is where he has lived the whole of his life and his uncle held it in trust for him having taken it from his father. That in the event that this application is allowed, he shall endeavour to take all such necessary actions and to obtain all such documents as are required for the preparation and lodgment of Notice of Appeal and Record of Appeal, respectively. That in the circumstances, his genuine mistake should be considered and the court should grant him leave to file Notice of Appeal out of time and within the extended time. He strongly believes he has a solid appeal raising solid issues of law and fact with a high probability of success, that is to say his intended appeal is not frivolous at all. Annexed and marked "CM-2" is true copy of Notice of Appeal and Draft memorandum of Appeal. That this application is extremely urgent in that the court ordered he vacates the disputed parcel of land within six (6) months from 11th October 2017 and he will be vulnerable to eviction proceedings if the orders are not granted. That if the orders of stay are not granted at this juncture, both the application and intended appeal will be rendered nugatory as he is apprehensive the respondents will have executed the decree by evicting him from the disputed piece of land and would have completely destroyed the substratum of the appeal which seeks to set aside the judgment of the court to the effect that he vacates the disputed parcel within six months. That the application is timeously filed and there is no delay or in-ordinate delay at all. That in all the circumstances of this case and in the interests of justice and fair-play, the orders sought in this Notice of Motion annexed hereto ought to be granted.

The respondent submitted that, the application is misconceived, bad in law and an abuse of the due process of this court and is merely intended to frustrate the plaintiff herein from enjoying the fruits of her judgment. The said application is laced with falsehoods and it is not true that the defendant at any time withdrew instructions from his advocate and or file and notice of intention to act in person. The defendant/applicant is guilty of laches in filing his Notice of Appeal within time which have not been explained. She stands to suffer irreparable losses if the orders sought herein are granted because the defendant herein has been very violent to her family and he is infringing on her right to enjoy her suit property to date, the parcel of land TIRIKI/GISAMBAI/645. That in any event the defendant and his family have

an alternative place to live, that is TIRIKI/GISAMBAL/966 that is registered in the name of their father. That the defendant does not have an arguable appeal with high chances of success as the registration of the suit property in her name is indefeasible and he failed to prove that either her husband or herself hold the suit property in trust of his family.

This court has carefully considered both the applicant's and the respondent's submissions therein. The grounds of the application are as follows; the defendant has the whole of his lifetime to date been living in LR. TIRIKI/GISAMBAL/645. That the defendant/applicant being aggrieved by the whole of the decision of the honourable court dated 11th of October, 2017 intends to appeal as he applied and paid for the proceedings and judgment on 24th October 2017. That by mistake of the applicant, a Notice of Appeal was not lodged on time and hence need for extension of time to lodge the same. That the mistake of the applicant is excusable for want of knowledge of law to lodge the notice of appeal within 14 days of delivery of judgment. That the defendant is desirous of filing an appeal which appeal is anchored on very strong grounds of law and facts; it is not a frivolous appeal. That if the orders sought are not granted, both the instant application and the intended appeal will be rendered nugatory as the defendant will have been evicted hence the substratum of appeal destroyed. That if stay of execution is not granted it will defeat the grant of extension of time to file a Notice of Appeal. That the applicant shall suffer immense and irreparable loss not compensable by any award of damages if the plaintiff/respondent carries out eviction. That unlike the applicant, the respondent will not suffer any prejudice if the orders are granted as the applicant has been staying in the disputed parcel of land for the whole of his life and stay will only amount to maintaining status quo as at 11th of October, 2017.

The applicant submitted that he was aggrieved by the entire decision of the court and he intends to appeal to the Court of Appeal against the judgment and decree of the honourable court. That due to the complexities of appealing to the Court of Appeal and with assistance of his relatives, he has sought the services of Mr. Charles Anyona Advocate whom he has extensively consulted on this matter last week on 8th November 2017 and has advised him, that the time to file a Notice of Appeal as a matter of right expired 14 days after delivery of judgment on 25th January 2017 hence no competent appeal can be lodged without extension of time to lodge the Notice of Appeal by the court. This is not true. I have perused the court file and find that the applicant was always represented by counsel. M/S Anyona & Company Advocates filed their notice of appointment to act for the applicant on the 18th November 2014. The applicant never filed a notice to act in person nor did he ever proceed with the hearing on his own. When the case came up for hearing on the 11th April 2017 as per the record, Mr. Anyona Advocate was present for the applicant. On the 21st September 2017 Mr. Anyona Advocate conducted the defence hearing ably to its conclusion. Reasons given are inexcusable and an abuse of the court process. I find that this application is merely intended to frustrate the plaintiff herein from enjoying the fruits of her judgment. The said application is laced with falsehoods and it is not true that the defendant at any time withdrew instructions from his advocate and or file a notice of intention to act in person. The defendant/applicant is guilty of laches as the judgement was delivered way back on 11th October 2017. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE