



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

MISCELLANEOUS APPLICATION NO. 6 OF 2018

WILLY KIPKOECH KIRUI

(Appealing as the legal representative of

John K. Arap Rotich – Deceased).....**PROPOSED APPELLANT/APPLICANT**

VERSUS

PETER KIPLANGAT RONO.....**PROPOSED 1ST RESPONDENT**

MANINI AUCTIONEERS AND GENERAL

AGENCIES LIMITED.....**PROPOSED 2ND RESPONDENT**

RICHARD KIBII MUTAI.....**PROPOSED 3RD RESPONDENT**

RULING

Introduction

1. This ruling is in respect of the applicant's application dated 9th June 2016 in which he seeks inter alia that he be granted leave to appeal out of time against the judgment in Kericho CMCC No. 106 of 2014. He also seeks an order of injunction to restrain the respondents from alienating or otherwise interfering with land parcel number KERICHO/KIPCHIMCHIM/2192. The application is predicated upon the grounds set out in the Notice of Motion and the applicant's affidavit sworn on the 9th June 2016. It is opposed by the Proposed 1st Respondent through his affidavit sworn on the 25th July 2016.

2. The parties agreed to maintain the status quo pending the hearing and determination of this application and to canvass the application by way of written submissions.

Background

3. A brief background of the facts giving rise to this application is necessary in order to put the matter into perspective.

4. The applicant is the son and legal representative of the estate of John K. Arap Koech Deceased. The deceased was sued by the 1st Respondent in Kericho CMCC No. 106 of 2014. In the said suit the 1st Respondent sued the deceased for the sum of Kshs. 500,000 being a refund of the purchase price in respect of land parcel number KERICHO/KIPCHIMCHIM/2196 together with Kshs. 420,600 being special damages as well as 30% of the agreed purchase price. The deceased neither entered appearance nor filed a Defence and an ex parte judgment was entered against him on 28th May 2014 for the decretal sum of Kshs1421,595. On 18th June 2014, the 1st Respondent made an application to rectify what he termed as an error in the parcel number to read KERICHO/KIPCHIMCHIM/2192 instead of 2196. He then proceeded to instruct the 2nd Proposed Respondent to execute the decree. As soon as the deceased's property was proclaimed for sale the deceased's son George Kirui instructed the firm of Chepkurui Koech and Company Advocates who filed an application seeking to stay execution and set aside the ex-parte judgment. In his supporting affidavit sworn on the 26th August 2014 he deponed that the deceased who was his father had a mental incapacity and had therefore nominated him to represent him in the matter. He attached a medical report showing that the deceased had suffered a stroke in 2005 as a result of which his mental faculties had been impaired. The application was opposed by the 1st Proposed Respondent. Counsel sought directions from the court on how to proceed in view of the mental status of the deceased and the court directed that the application should be argued. He then proceeded to strike out the applicant's affidavit for having been sworn by a stranger to the

proceedings and consequently dismissed the application. The judgment dated 6th May 2014 therefore stood and the decree flowing therefrom was subsequently executed by selling the deceased's land parcel number KERICHO/KIPCHIMCHIM/2192 to the 3rd proposed Respondent at a public auction. It is against this judgment that the applicant herein seeks leave to appeal out of time. In the meantime, the deceased passed away on 12th June 2015.

Applicant's Submissions

5. In his submissions counsel for the applicant has submitted that the deceased was mentally incapacitated and unable to defend himself in the lower court. He casts doubts on the application to set aside the judgment filed by the firm of M/s Chepkurui Koech & Co Advocates even though the applicant at paragraph 12 depones that he was aware that his late father had instructed the said firm to represent him. He submits that the intended appeal has high chances of success as judgment was entered against the deceased for special damages without proof thereof by way of formal proof. He also submits the auction of the deceased's land was unlawful as what the court approved was sale of one acre and not the entire 4 acres. He submits that no prejudice will be occasioned to the proposed 3rd respondent as he never furnished proof that he paid for the suit property. Counsel did not make any submissions with regard to the prayer for injunction.

Proposed Respondents' submissions

6. In opposing the application counsel for the proposed respondents has submitted that the application is incompetent as the applicant lacks the capacity to institute it since he obtained a Limited Grant in Succession Cause No. 96 of 2015 for purposes of defending ELC Civil Case No. 52 of 2013. He further submits that the application is belated as the applicant was represented in the case in the lower court and there is an affidavit sworn by David Acholla Advocate to the effect that he notified the deceased's counsel about the ruling in CMCC No. 106 of 2014. He faults the applicant's counsel for giving evidence from the bar through his submissions.

Issues for Determination

7. I have considered the affidavits on record as well as counsels' submissions and the following issues fall for determination:

- i. Whether the applicant has the locus standi to make this application
- ii. Whether the applicant has made out a case for leave to appeal out of time
- iii. Whether the applicant is entitled to injunctive orders
- iv. Whether the orders sought can be issued against all the proposed respondents

Analysis and Determination

8. The applicant has filed this application in his capacity as the legal representative of the estate of John K Arap Rotich by virtue of a limited Grant issued to him on 30th November 2015 in Kericho HC Succession Cause No. 96 of 2015. The said Grant states that it is for purposes of filing a suit. The 1st Respondent's objection therefore has no basis.

9. Regarding the second issue, the court has a wide discretion to extend time as long as such power is exercised judicially. In the case of **Aviation Cargo Support Limited V St. Mark Freight Services Limited (2014) eKLR** the Court of Appeal in determining an application for leave to file and serve a record of appeal out of time stated as follows:

“The order whether or not to grant extension of time to file and serve the record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merits. For the court to exercise its discretion in favour of an applicant the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate, the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable.

In the normal vicissitudes of life deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to these facts. When this happens, the reasons why this occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time”

10. What can be gleaned from the above case is that the power to grant an extension of time against a final decision in a case must be exercised judicially. As per the case of *Sayers V Clarke Walker (a firm) 2002 EWCA Civ 645* the Supreme Court of Judicature Court of Appeal, Civil Division observed as follows:

11. “The courts should consider all the circumstances of the case including:

- a. The interest of the administration of justice
- b. Whether the application for relief has been made promptly
- c. Whether the failure to comply was intentional

- d. Whether there is a good explanation for the failure
- e. The extent to which the party in default has complied with other rules, practice directions and court orders
- f. Whether the failure to comply was caused by the party or his legal representative
- g. The effect which the failure to comply had on each party and
- h. The effect which the granting of relief would have on each party

12. Based on the explanation given by the applicant, particularly the mental capacity of the deceased, the lapse of time between the date of judgment and execution and all other attendant factors, I am satisfied that the applicant has made out a good case for leave to appeal out of time.

13. On the third issue, no submissions were made either for or against granting injunctive orders and I cannot state with certainty whether the principles in *Giella V Cassman Brown & Co Ltd* (1973 E.A 358 have been met by the applicant. The lapse of time from the date the judgment was passed also militates against granting such relief.

14. With regard to the fourth issue, the intended appeal can only be made against the person who was a party in the case from which the intended appeal arises and I consider it irregular to enjoin other parties at the appellate stage.

15. Accordingly, I grant the application in terms of prayer 2, 5 and 6 and direct as follows:

- a. That Wily Kiprotich Kirui the legal representative of the late John K Arap Rotich the defendant in CMCC No. 106 of 2014 be made a party to proposed appeal
- b. That the proposed appellant be and is hereby granted leave to appeal out of time against the whole of the judgment and consequential orders in CMCC No. 106 of 2014
- c. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served upon payment of the requisite court fees.
- d. The costs of this application be in the appeal

Dated at Kericho this 18th day of April 2018

J. M ONYANGO

JUDGE

In presence of:

Mr. Koech for Miss Ngetich for the respondents

No appearance for the Applicant's

Court Assistant; Rotich