



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO 45B OF 2013

ANNAN WAIRIMU MWANGI.....PLAINTIFF

VERSUS

DAVID KAMAU KIMANI.....DEFENDANT

RULING

1. Before me for determination is a Notice of Motion application dated 10th March 2017. The Plaintiff Annan Wairimu Mwangi prays for the following Orders:-

1. ...

2. ...

3. That the Honourable Court be pleased to order a stay of all proceedings and/or execution in this matter pending the hearing and determination of an Intended Appeal.

4. That the Court be pleased to extend the time within which the Applicant may file her Notice of Appeal out of time and further grant leave to the Applicant to file her Appeal out of time against the Judgment delivered on 17th July 2015.

5. That the cost of the application be in the cause.

2. The said application is supported by the Plaintiff's Affidavit sworn on 10th March 2017 and is premised on the grounds inter alia:-

i) That on 17th July 2015, the Honourable Justice Angote delivered Judgement in this matter dismissing the Plaintiff's case and allowing the Defendants counterclaim;

ii) That upon conclusion of the hearing, parties were given a Judgment date for 25th May 2015. Unfortunately the Court did not sit on that day and as such the Judgment was not delivered;

iii) That no notice was ever issued subsequently to the Applicant and the Judgment was delivered on 17th July 2015 in the absence of both parties;

iv) That before she learnt of the same, she was shocked to be served with a notice to show cause in execution whereas she had not received any notice of delivery of the Judgment;

v) That the decree obtained herein is irregular as the same was obtained before being served upon the applicant and/or her advocate for approval as required under the rules of procedure;

vi) That there has been no inordinate delay in bringing this application from the time the applicant learnt of the developments;

vii) *That the Plaintiff is not satisfied by the said Judgment and intends to appeal against the same; and*

viii) *That the Applicant has an arguable appeal with high chances of success and stands to suffer irreparable loss if the execution herein proceeds.*

3. In a Replying Affidavit sworn and filed herein on 3rd April 2017, David Kamau Kimani, the Defendant herein agrees with the Plaintiff that they did not receive notice of the date of delivery of Judgment after it was earlier postponed and that accordingly, both parties were absent when the Judgment was delivered. The Defendant however avers that he wrote several letters to the Deputy Registrar in 2016 and he was finally informed that the Judgment was delivered on 17th July 2015.

4. While not denying that the decree was not sent to the Plaintiff for approval, the Defendant avers that he experienced similar difficulties in extracting the order and the Decree which was subsequently issued on 13th September 2016. It is his case that the same cannot be disputed as it simply states that the Plaintiff should pay the Defendant the amount of KShs 200,000/= plus interest at Court rates and that it is based on the admission of the Plaintiff in Court.

5. The Defendant therefore avers that there are no arguments that should necessitate an Appeal and that this application is yet another of the Plaintiff's efforts to frustrate his counterclaim and to delay justice.

6. I have considered the Application before me and the response thereto. I have equally considered the written submissions filed herein by the Learned Advocates for both the Applicant and the Respondent.

7. Order 50 Rule 6 of the Civil Procedure Rules provides:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon search terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same was not made until after the expiration of the time appointed or allowed.”

8. In *Nicholas Kiptoo Arap Korir Salat –vs- The Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR*, the Supreme 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 the 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.

9. The Supreme Court in the above case then went on to derive the principles that a Court should consider in exercising such discretion to be that:-

i) 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;

ii) A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;

iii) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to –case basis;

iv) Where there is a reasonable(cause) for the delay, (the same should be expressed) to the satisfaction of the Court;

v) Whether there will be any prejudice suffered by the respondents, if extension is granted;

vi) Whether the application has been brought without undue delay; and

vii) Whether in certain casespublic interest should be a consideration for extending time.”

10. The scenario in the matter before me is fairly straight forward. The Applicant herein has given the reasons for the delay herein as the fact that she was not aware of the Judgment and she was not present either in person or by her advocates on the date when the Judgment was pronounced. It is her case that she came to learn of the Judgment only upon being served with a Notice to show cause in execution by which time the time for filing the Notice of Appeal had expired.

11. The Respondent has admitted this fact and the circumstances leading to the absence of both parties in Court on the date the Judgment was delivered. Those circumstances are that on 25th May 2015 when the Court was due to deliver Judgment, the Court did not sit, and on follow up, the advocates for the parties were advised that a notice of delivery of Judgment would be issued to them.

12. As it were, both parties never received the said notice. According to the Defendant, he wrote several letters asking about the position and it was only then that on an undisclosed date in the year 2016, he was informed by the Deputy Registrar of this Court that the Judgment had been delivered on 17th July 2015. Having learnt that the Plaintiff's case was dismissed, and his counterclaim upheld, the defendant commenced the process of extracting the decree which was eventually issued on 13th September 2016. It is the commencement of the

prosecution proceedings that precipitated the filing of the application before me.

13. Arising from the foregoing, I am satisfied that there was a justifiable reason for the delay in filing the Notice of Appeal and the Appeal on time. The Plaintiff could surely not have been expected to file a Notice of Appeal in time against a Judgment which she was not aware had been delivered.

14. In the circumstances it is only prudent that this Court exercises the powers bestowed upon it by the law to extend the time to file the Notice and the Appeal. I am equally satisfied that unless an order staying execution is issued, the Defendant could go ahead and execute the decree and thus render the appeal nugatory.

15. The upshot is that I find merit in the application dated 10th March 2017. The same is allowed as prayed. The Applicant shall have 21 days from today to file and serve the Notice of Appeal.

16. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 3rd day of May, 2018.

J.O. OLOLA

JUDGE