REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 77 OF 2009

LILIAN SAYO AGOLA.....PLAINTIFF/RESPONDENT

VERSUS

JACOB WAFULA MUSUNGU.....DEFENDANT/APPLICANT

R U L I N G

1. The applicant brought an application dated **18/6/2018** seeking the following orders:-

(1) That this application be certified as urgent and service thereof be dispensed with in the first instance.

(2) That pending the hearing and determination of this application inter partes, there be stay of execution of the judgment delivered on 11th October, 2016 and the subsequent decree issued on 19th September, 2016.

(3)That pending the hearing and determination of the intended appeal, there be stay of execution of the judgment delivered on 11th October, 2016 and the subsequent decree issued on 19th September, 2016.

(4) That this honourable court be pleased to extend time within which the applicant may file a Notice of Appeal from the ruling and order of this honourable court delivered on 13th March, 2017.

(5) That costs of this application be provided for.

2. The application is brought under **Section 7 of the Appellate Jurisdiction Act Cap 9, Order 42 Rule 6, order 51 rule 1 of the Civil Procedure Rules 2010, Sections 1A,!B, 3,3A & 63(e) of the Civil Procedure Act Cap 21 and Article 159 (2) (d)** of the **Constitution Of Kenya.** It is also premised on the grounds set out at the foot of the notice of motion as follows:-

(a) In 11th October, 2016 this honourable court delivered an ex parte judgment against the applicant herein and a decree was subsequently issued on 19th September, 2016.

(b) On 13th March, 2017 this honourable court delivered its ruling dismissing the applicant's application dated 19th October, 2016 and 19th September, 2016 which sought to set aside the judgment delivered on 11th October, 2016, the subsequent decree and all proceedings to enable the defendant be heard on merit.

(c) By dismissing the said applications, the applicant was exposed to execution the respondent having already applied for warrants of arrest in execution of the decree issued herein and the applicant is likely to be arrested any time yet the applicant is aggrieved by the ruling of this court delivered on 13th March, 2017 and would like to appeal against the same.

(d) The applicant is aggrieved by the said ruling delivered on 13th March, 2017 and would like to appeal against the same.

(e) If stay of execution is not granted, the applicant will be exposed to execution and risks being arrested hence the applicant will be highly prejudiced and suffer substantial loss and the object of this application and of the intended appeal will be defeated and rendered nugatory.

(f) The defendant/applicant has an arguable appeal with a high probability of success against the ruling and subsequent order.

(g) The delay in filing the Notice of Appeal was not intentional but was occasioned by the applicant's former advocates who

failed to execute the applicant's instructions and also failed to advise the applicant appropriately.

(h) The applicant should not be punished for the mistake of his advocates.

(i) Under Section 7 of the Appellate Jurisdiction Act, this honourable Court has power to extend to time for giving notice of intention to appeal for a judgment of this court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

(j) This application has been made without any unreasonable delay and any delay has been explained.

3. The application is supported by the affidavit of the applicant dated **18/6/2018.**

4. The respondent filed a replying affidavit dated **28th June,2018** and opposed the application dated **18/6/2018** claiming that it is misconceived and bad in law and it should be rejected; her grounds for opposing the application are mainly that judgment was delivered in **2016**, that the defendant is still in occupation of the land and that he has refused to settle the mesne profits, that the applicant has not come to court with clean hands, that no appeal has been preferred, that the legal provisions do not justify the issuance of the orders sought.

5. The applicant avers that the delay in filing the Notice of Appeal was not intentional and that it was occasioned by the defendant's earlier advocates who failed to execute the applicant's instructions and also failed to advise him appropriately. The applicant is of the opinion that the delay in lodging his application which is approximately one year and four months (by the respondent's calculation and opinion, estimated to be 463 days and thus inordinate and unexplained) has been adequately explained in his affidavit evidence and that his prayers are merited.

6. The applicant cites the case of **Edward Njane Nganga and Another -vs- Damaris Wanjiku Kamau and Another 2016 eKLR** for this proposition.

7. The respondent relies on **Paul Wanjohi Mathenge -vs- Duncan Gichane Mathenge Nyeri CA Appl. No 50 of 2010. (2013) eKLR** for the proposition that there are factors that the court has to consider in exercising its discretion in respect of extension of time.

8. In the respondent's submissions emphasis is made of several conditions for the exercise of this court's discretion on the basis of the decision in **Paul Wanjohi Mathenge vs Duncan Gichane Mathenge Nyeri CA Appl. No. 50 Of 2010. (2013) eKLR**

9. On the length of the delay the respondent thinks it is excessive as stated above. She avers that the applicant was represented and that it is not contended that the applicant or his counsel were not aware of the court's ruling yet nothing was done for 463 days the applicant relied on ***CMC Holdings Ltd -vs- Nzioki (2004) 1 KLR 173*** where it was held that discretion must be exercised judiciously and for reasons. The applicant submits that the litigants needs not be punished for every delay where reasons have been proffered. He cites the case of **Philip Kiptoo Chemwolo -vs- Augustine Kubende (1986) KLR 495** which was cited with approval in **Lucy Bosire -vs- Kehancha Divisional Land Disputes Tribunal & 2 Others (2014) eKLR** for the proposition that mistakes of advocates should not be visited on their clients.

10. On the reasons for the delay the respondent avers that the former advocate for the applicant are wrongly blamed by the applicant. She avers that although the said advocate are said to have been instructed to file a notice of appeal and that they failed to do so there is absolutely no evidence of such instruction or evidence of payment of fees in respect of such instruction.

11. The respondent submits that an application was filed for orders that the decretal amount be paid in installment by the said advocates but when the application came up for hearing it was withdrawn on 13/6/2018 on which date the current advocate came on record and filed the instant application. The respondent submits that the matters in the affidavit filed by the earlier advocate on 23/5/2018, purportedly without instructions, contains averments which could only have been within the knowledge of the applicant. On this basis the decision of the applicant to lodge an appeal against the ruling of 13/3/2017 is depicted as a pure afterthought. Reliance is made on the dicta of ***Luka Kimaru J. Savings and Loan Limited -vs- Susan Wanjiru Muritu Nairobi Milimani HCCC 397 of 2000 quoted in Edney Adaka Ismai -vs- Equity Bank (2014) eKLR*** for the proposition that it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court.

12. The respondent also relied on ***Nairobi CA Application 166 of 1994 Itute Ingu and John Malava Mutungu -vs- Isumael Mwakavi*** as per the ***dicta Justice R.S.C. Omolo***. The respondent submits that no notice of appeal was filed in the present case and no certified copies of proceedings were applied for and that there is nothing to demonstrate that the advocate have been instructed to appeal and therefore no mistake has been established on the part of the counsel. It is true that no Notice of Appeal was filed or certified copies applied for.

13. On the chances of the appeal succeeding the respondent submits that the applicant was in court when the case proceeded, that he had been served and he was present when the judgment date was given. He never filed witness statements or a list of documents and only denies that he was a trespasser and that indeed he had no claim to the land and one Alphas Wafula was the one in occupation. It is submitted there was no wrongful exercise of discretion by this court in dismissing the application dated 13/3/2017.

14. On the degree of prejudice the respondent submits that her husband is the registered owner of the suit land and that there was no counter claim by the applicant.

15. The respondent submits that this court cannot stay the execution of the judgment issued on 11/10/2016 first because no appeal was preferred against that judgment and it is not the one sought to be appealed against, and the ruling sought to be appealed merely dismissed with costs the application to set aside that judgment. Citing the case of ***Nguruman Limited -vs- Shompole group Ranch & Another Nairobi CA Civil Application No. 90 of 2013 (2014) eKLR*** it is stated that negative orders are not normally capable of being stayed by the court. However the applicant differs with the respondent's submission that an application for stay can only be considered when there is a valid

notice of appeal on record. He avers that the applicant is praying that there be a stay pending the determination of the intended appeal and that the proper construction of ***Section 7 of the Appellate Jurisdiction Act Cap 9 Laws of Kenya*** is that there need not be a valid notice of appeal on the record for an application for stay to be considered. Further he disagrees with the submission that prayer for stay of execution cannot be included in an application for extension of time within which to appeal and relies on ***Article 159 (2) (d)*** to state that a prayer for stay cannot simply be dismissed just because it has been included in an application for extension of time. He relies on the case of ***Mukuma – vs- Abuoga (1988) KRL 645 and Turbor Transporters Ltd –vs- Absolom Dova Lubasi HCCA No. 37 of 2012***. It is submitted that in the **Mukuma case** the court termed substantial loss as the cornerstone of the discretion by the court in granting stay of execution.

16. Regarding the issue of substantial loss it is denied that the applicant can suffer such loss because the land is registered in the respondent's late husband's name and the applicant is not claiming the ownership of the land.

Determination.

17. The main prayer in the application seeks extension of time to file a Notice of Appeal. The defendant relies on **Section 7** of the Appellate Jurisdiction Act. It states as follows:

> **Power of High Court to extend time**
>
> **The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:**
>
> **Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.**

18. That section allows the High Court to extend time for the filing of a Notice of Appeal when the time provided for the filing of such a notice has expired. This court being of equal status is necessarily covered by the provision.

19. Rule 75 of the **Court of Appeal Rules** provides for the Notice of Appeal as follows:-.

> ***75. Notice of appeal.***
>
> ***(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.***
>
> ***(2)Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.***
>
> ***(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.***
>
> ***(4)When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.***
>
> ***(5) where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.***
>
> ***(6)A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.***
>
> **Rule 4** of the **Court of Appeal Rules** states as follows:
>
> ***4. Extension of time***
>
> ***The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.***

20. It would appear then that from the above provisions of the Act and the Rules the Environment and Land Court and the Court of appeal have jurisdiction to entertain and discretion to grant where merited, an extension of time to file a Notice of Appeal. This view is supported by the case of **Edward Njane Nganga and another -vs- Damaris Wanjiku Kamau and Another 2016 eKLR** in which the court cites the Court of Appeal decision in **Kenya Airports Authority & Another Vs Timothy Nduvi Mutungi, Nbi Ca Appl. No. Nrb 165/2013 (UR 113/2013) (2014) eKLR.**

21. The question is whether in the circumstances obtaining in this case that discretion may be exercised in the applicant's favour. The case of **Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Co. Ltd 2015 eKLR** is cited in the case of **Edward Njane Nganga (supra)** as follows:

"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."

22. I have also considered the decision of the Court of Appeal in **Fakir Mohamed vs Joseph Mugambi & 2 Others Civil Appl. No. Nai 332 of 2004** as cited in the **Njane case** above, and again agree with the court in the **Njane case** when it states that each case may raise matters peculiar to it alone for consideration in the exercise of this discretion. Indeed this is appropriate as not all cases are alike.

23. First, concerning the delay. In the **Njane case** the court cited **Port Reitz Maternity Vs James Karanga Kabia Civil Appeal No. 63 of 1997** on the issue of delay, citing a plausible and satisfactory explanation of delay as "*the key that unlocks the court's flow of discretionary favour*."

24. The applicant in the instant case blames his advocate. I agree with the respondent when she submits that there is no evidence of communication between the applicant and his counsel that would make this court believe that the instructions to file a notice of appeal were ever issued or that fees in respect to those instructions were never paid.

25. Nevertheless, it is a generally observable feature that this court is also aware of that in the greater part of litigation that does not involve corporates in Kenya, much of the communication that is exchanged between advocates and their individual clients is not reduced into writing, especially when it is from the client's side.

26. So is the excuse for delay proffered by the applicant sufficient when measured against the submission by the respondent that he has not tendered evidence? Society must keep on improving and even individual litigants must now, in this competitive scene, be compelled by the need for future security to resort to proper methods of reliable communication and record keeping as it aids not just the litigants but also a court in such a situation as the instant one if the court is to make a decision that favours him.

27. The period of delay in the instant case contrasts sharply with that in the **Njane case** where a notice of appeal had been filed within time and only the record of appeal was pending. The appeal itself in the Njane Case was late by just 9 days. Evidence was exhibited in the Njane Case that certified copies had been sought from the Deputy Registrar. There was also evidence that they had been paid for. That is not the case in the instant application. The court granted the application for leave to file the appeal out of time in the Njane Case, and no doubt the actions of the applicants therein as enumerated in this paragraph influenced the court to exercise discretion in the applicant's favour in that case. I find that the delay here is inordinate and insufficiently explained and there are no such supporting actions as in the Njane Case.

28. Regarding the chances of the appeal succeeding it is necessary to look beyond the decision of 13/3/2017 in this case. In **paragraphs 16 - 19** of its ruling dated **13/3/17,** this court examined the merits of the defendant's defence and stated as follows:

"16. The defendants' application now lies on the ground moribund; the only hope in its resuscitation lies in the successful examination of whether the defendant has a good defence that raises triable issues, on the basis of which this court may exercise its discretion in favour of the applicant.

There was a defence filed on behalf of the defendant in this matter on 1/7/2009. Having found that there was proper service of the hearing notice it behoves the court to examine whether the defence raised any triable issues, the overriding being intent being that of doing justice to the parties.

17. The plaintiff's case against the defendant was that the defendant during or about the year 2008 for no lawful or justifiable cause moved into land Title Number Trans-Nzoia/Cherangani/35 and forcefully and without the plaintiff's permission remained on that land todate; that the defendant is a trespasser and should be evicted. A declaration was sought that the plaintiff is the legal owner of the land comprised in that title. A claim for mesne profits in the sum of Kshs.200,000/= upto the year 2009 and Kshs.100,000/= per year with effect from the year 2010 upto the date of judgement was included.

18. The defendant's defence through Ms. Onyancha & Co. Advocates stated that he denied the alleged trespass; stated that no demand has been issued to him; denied that the plaintiff is entitled to mesne profits or eviction; alleged that the defendant is wrongly enjoined; claimed that he has been sued by another person over the same land; asserted that one Alphas Wafula is in occupation of the whole suitland; and that the defendant will pray for a stay of this suit in favour of the suit commenced against him. The reply to defence filed on 17/9/2009 reasserted that it is the defendant who is in occupation of the land and that the defendant is not a party to Kitale HCCC No. 129 of 2007. There was no response to this reply to defence either by amendment of defence or otherwise.

19. Related to this issue is the subsequent notice of motion filed on 8/4/2010 seeking judgement against the defendant. Annexed to the affidavit in support thereto is a copy of a letter from the Chief, Makutano location, marked as "MKJ" addressed to the defendant giving the defendant 14 days to vacate the subject land. By the date of the hearing the defendant had not filed his list of documents, bundle of documents, and his own statement of witness statements. Besides Ms. Onyancha & Co. Advocates who were granted leave to cease acting for the defendant cited the defendant's communication to Mr. D.N. Onyancha that he does not need the firm's representation.

29. In my view there is nothing new in the instant application and the supporting affidavit that may alter this opinion. The defendant's defence was simply poor from the beginning and even when all other criteria upon which the application may be granted fail, as they have in the present case, this is not the kind of defence that can move this court to exercise its discretion in favour of an applicant seeking extension of time to appeal, as it is simply not plausible and does to support the probability of an arguable appeal.

30. For the foregoing reasons I find that the application dated **18th June 2018** has no merit and the same is dismissed with costs to the respondent.

Dated, signed and delivered at Kitale on this 31st day of July, 2018.

MWANGI NJOROGE

JUDGE

31/7/2017

Coram:

Before - Mwangi Njoroge Judge

Court Assistant - Picoty

Mr. Kiarie for plaintiff

Mr. Majanga holding brief for Teti for the defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

31/7/2018