



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO

E.L.C CASE NO 22 OF 2015 (O.S)

IN THE MATTER OF LAND PARCEL KERICHO/KAPTEBENGWET/450

AND

IN THE MATTER OF SECTION 36 OF THE LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)

BETWEEN

GILBERT KIMUTAI KOECH .....PLAINTIFF/APPLICANT

VERSUS

WILSON KIPNGENO KOECH.....DEFENDANT/RESPONDENT

RULING

### Introduction

1. What is before me is the Plaintiff/Applicant's application dated 3<sup>rd</sup> July, 2018 wherein the Plaintiff/Applicant inter-alia seeks the following prayers:

1. Spent

2. THAT this Honourable Court do hereby make an order that the Applicant be granted leave to appeal out of time against the whole Judgment and decree delivered on 18<sup>th</sup> May, 2018.

3. THAT there be temporary stay of execution against the Judgment and decree of this Honourable Court pending hearing and determination of the Plaintiff/Applicant's appeal in the Court of Appeal against the whole of the Judgment delivered by this Honourable Court on the 18<sup>th</sup> May, 2018.

2. The Defendant/Respondent on his part filed a replying affidavit opposing the Plaintiff's said application relying on the major ground that the Plaintiff's said application does not raise any serious issues of law that are arguable and/or appealable as required by law. The Defendant further responded that the application is devoid of merit, bad in law and an abuse of court process. The Defendant therefore averred/argued that the Plaintiff's application should be dismissed with costs

### APPLICANT'S CASE

3. The Application is supported by the annexed supporting affidavit sworn by the Plaintiff/Applicant wherein it is averred that the Judgment in this matter was delivered on 18<sup>th</sup> May 2018.

4. It is the Plaintiff's case that he was dissatisfied by the said judgment delivered by the Honourable Court, however, he was not in a position to give out instructions to his advocates on record to file an appeal on time since he had been involved in a road traffic accident on 11<sup>th</sup> May, 2018 and such he was indisposed for a while.

5. As per the aforementioned Judgment, the Plaintiff/Applicant's suit was dismissed with costs which means that if the Defendant/Respondent executes the said Judgment, the Plaintiff together with his entire family including his aging mother whose matrimonial home is comprised in the subject land, will be rendered homeless for the same is the only home they have known and that the Plaintiff/Applicant's father's grave will be desecrated.

6. It is the Plaintiff's further contention that he is afraid that unless the execution of Judgment is stayed, the Defendant/Respondent shall execute his decree and evict him from the land which he has occupied for the last 40 years or thereabouts and made several substantial developments. He has annexed a bundle of photos showing the said developments.

7. The Plaintiff/Applicant further contends that the Defendant/Respondent on the other hand, has never been in occupation and/or possession of the suit parcel of land herein and, therefore, he will not suffer any prejudice if the stay order is granted pending the hearing and determination of the intended appeal in the Court of Appeal.

8. It is the Plaintiff's case that if the execution is carried out, he stands to suffer substantial loss and damages which cannot be compensated in monetary terms in the event that his intended appeal succeeds and that execution of Judgment shall render his appeal to the court of appeal nugatory.

### **RESPONDENT'S CASE**

9. The application is opposed by the Respondent through his Replying Affidavit sworn on the 13<sup>th</sup> July 2018. It is the Defendant/Respondent's case that the application seeking leave to appeal out of time does not raise serious issues of law that are arguable and/or appealable as required by the law. He avers that the Plaintiff/ Applicant is not entitled to stay of execution pending appeal.

10. He further stated that the application is devoid of merit and abuse of court process.

### **ISSUES FOR DETERMINATION**

The following issues arise for determination:

1. Whether the Applicant has satisfied the conditions for leave to file appeal out of time?
2. Whether the Applicant is entitled to order of stay of execution pending appeal?

11. Section 79(G) of the Civil Procedure Act, Cap 21 Laws of Kenya provides that the High Court is vested with jurisdiction to grant leave to file appeals out of time.

12. The Applicant nonetheless contends that though the jurisdiction of the High Court to grant leave to file appeal out of time has never been ousted, it is now shared between it and courts of equal status i.e Environment and Land Court and the Employment and Labour Relations Court (ELC and ELRC).

13. In support of this position, the Appellant relies on the findings of the court in *Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR* where it was held as follows:

*...it will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.*

14. The court has a wide discretion to extend time as long as such power is exercised judicially.

15. 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"*

16. 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:

*"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*

17. In the instant case the Applicant's failure to promptly file the appeal has been attributed to his involvement in a road traffic accident. Even though I do not doubt this, it is intriguing that apart from the annexed photograph of the car that was involved in the accident, no medical records were attached to his affidavit. I will however accept this explanation.

18. With regard to stay of execution the applicant has indicated that he stands to suffer substantial loss if a stay of execution is not granted. This stems from the fact that he has been staying on the suit property with his mother for more than forty years. His late father was buried thereon and he fears that if the suit land is sold, his father's grave will be desecrated. These are valid concerns which the court does not take lightly. It is however not lost to the court that the parties to this suit are step-brothers and the Respondent has dismissed the Applicant's fears as unfounded.

19. The prayers sought by the Applicant are discretionary and the court must act judicially by balancing the interests of the parties. On one hand we have the Respondent who has a Judgment in his favour and who is entitled to enjoy the fruits of his Judgment. On the other hand, the applicant has a right of appeal against the said judgment which should not unnecessarily be scuttled.

20. Even though I do not wish to venture into the merits of the intended appeal, I am satisfied that the Applicant has made out a strong case for leave to appeal out of time.

21. The upshot is that I find merit in the Applicant's application and I grant it on the following terms:

a) *The Applicant is granted leave to appeal out of time against the whole judgment and decree delivered on 18<sup>th</sup> May, 2018. The appeal shall be filed within 14 days from the date hereof.*

b) *A stay of execution is hereby issued against the judgment and decree of this Honourable Court pending hearing and determination of the Plaintiff/Applicant's appeal in the Court of Appeal on condition that the Plaintiff deposits the sum of Kshs. 75,000 as security for costs within 21 days, time being of essence. If the said amount is not deposited within the stipulated period the order for stay of execution shall automatically lapse .*

c) The costs of this application shall be borne by the Plaintiff/Applicant.

**Dated, signed and delivered at Kericho this 30<sup>th</sup> day of August 2018**

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

Mr. Sang for the Defendant/Respondent

Plaintiff present in person

Court Assistant: Rotich