



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC. CASE NO. 1288 OF 2007**

**JOHN NDUNGU MBUGUA.....PLAINTIFF**

**VERSUS**

**CHARLES G. MUCHOHI.....1ST DEFENDANT**

**RUIRU M. MUCHOHI.....2ND DEFENDANT**

**LEAH W. MUCHOHI.....3ND DEFENDANT**

**KURIA M GIKONYO.....4TH DEFENDANT**

**(SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MUCHOHI GIKONYO (DECEASED))**

**RULING**

Coming up before me for determination is three applications, namely:

1. Defendant's Notice of Motion dated 10<sup>th</sup> March 2016.
2. Plaintiff's Notice of Motion dated 10<sup>th</sup> October 2016.
3. Plaintiff's Notice of Motion dated 19<sup>th</sup> October 2016.

In the Defendant's Notice of Motion dated 10<sup>th</sup> March 2016, the Defendant seeks for an order to review the Judgment dated 24<sup>th</sup> March 2015 by issuing an order to uplift the order made on 30<sup>th</sup> August 2007 by Lady Justice Mary Ang'awa (as she then was) registered on 7<sup>th</sup> September 2007 as entry no. 15 against the title of the parcel of land identified as Dagoretti/Riruta/770 (hereinafter referred to as the "suit property").

This Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Defendant, Leah W. Muchohi, sworn on 10<sup>th</sup> March 2016, in which she averred that on 24<sup>th</sup> March 2015, this court delivered Judgment in this suit wherein it dismissed the Plaintiff's entire suit. She further averred that earlier on, on 24<sup>th</sup> June 2013, she applied to have the order of this court dated 30<sup>th</sup> August 2007 and registered against the suit property uplifted to enable the Defendant deal with the suit property as she deems fit. She added that in a Ruling on that application delivered on 29<sup>th</sup> January 2014, this court ruled that it would rather deal with the entire suit and accordingly ordered the parties to put in their submissions. She further averred that both parties complied with the court's order and the matter was heard on 18<sup>th</sup> February 2015 and a Judgment delivered on 24<sup>th</sup> March 2015 dismissing the Plaintiff's entire suit. She further averred that having dismissed the Plaintiff's entire suit, it behoves this court to lift the order of 30<sup>th</sup> August 2007 as she cannot otherwise deal with the suit property. She added that there is need to review the Judgment by issuing a further order uplifting the court order of 30<sup>th</sup> August 2007.

This Application is contested by the Plaintiff/Respondent, John Ndungu Mbugua, who filed his Replying Affidavit sworn on 19<sup>th</sup> October 2016 in which he averred that he is still in occupation of the suit property wherein he has carried out extensive developments. He further averred that he came to learn of the Judgment very late, is dissatisfied with it and has instructed his new advocates to appeal against it.

The issue that I am called upon to determine in the Defendant's Application is whether or not to uplift the court order issued by Lady Justice Mary Angawa (as she then was) on 30<sup>th</sup> August 2007. I have perused the court record carefully and have ascertained that the court order that

the Defendant seeks to be uplifted is the one issued on 31<sup>st</sup> August 2007 by Lady Justice Mary Angawa (as she then was) in her Ruling in respect of the Plaintiff's Chamber Summons dated 29<sup>th</sup> August 2007. In her Ruling, Lady Justice Angawa allowed the following two prayers:

***“3. That the Defendants whether by themselves their servants agents representatives and or assigns and all those deriving title from them or any one of them whatsoever be restrained from evicting and or removing the Plaintiff from the property known as Dagoretti/Riruta/770 or in any manner whatsoever interfering with the Plaintiff's peaceful occupation and actual possession of the said property pending the hearing and determination of this suit.*”**

***4. That the Defendants whether by themselves their servants agents representatives and or assigns and all those deriving title from them or any one of them whatsoever be restrained from selling leasing charging disposing or interfering with or in any other manner whatsoever dealing with the property known as Dagoretti/Riruta/770 that is inconsistent with the Plaintiff's rights therein pending the hearing and determination of this suit.”***

Lady Justice Angawa's Ruling was as follows:

*“The prayer for injunction is hereby granted as I find this matter has merits.”*

Lady Justice Angawa clearly granted the above prayers as prayed. This is very key in this Defendant's Application which in my view was totally unnecessary for the reason that the orders of injunction allowed by Lady Justice Angawa on 31<sup>st</sup> August 2007 were only to subsist pending the hearing and determination of this suit. They therefore lapsed on the date the Judgment was delivered on 24<sup>th</sup> March 2015. It was therefore unnecessary for the Defendant to file this Application as those orders are no longer in force. This court finds that the Defendant's Application is unnecessary and proceeds to dismiss it with no order as to costs.

The other two applications coming up for determination are both by the Plaintiff and are Notices of Motion dated 10<sup>th</sup> and 19<sup>th</sup> October 2016. In Notice of Motion dated 10<sup>th</sup> October 2016, the Plaintiff seeks for an order to issue restraining the Defendants whether by themselves, through agents, servants and or all claiming under them from dealing in any manner whatsoever including disposing of any interest or transferring and or interfering with the occupation of the suit property pending the hearing and determination of the application and the intended appeal. I will not delve very far into this particular Application for the reason that Judgment was delivered by this court on 24<sup>th</sup> March 2015 in which the Plaintiff's entire suit was dismissed. There is no pending appeal in this matter. In the circumstances, Notice of Motion dated 10<sup>th</sup> October 2016 has no leg to stand on and is hereby dismissed with costs to the Defendant.

In Notice of Motion dated 19<sup>th</sup> October 2016, the Plaintiff seeks for an order to appeal out of time against the Judgment delivered on 24<sup>th</sup> March 2015. The same is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, John Ndungu Mbugua, sworn on 19<sup>th</sup> October 2016 in which he averred that he filed this suit against the Defendants seeking to be registered as the owner of the suit property. He further averred that the suit was heard and determined and a Judgment was delivered on 24<sup>th</sup> March 2015 in his absence. He further averred that he has been sick for a long time and had to undergo an operation and had not been able to visit his then advocates to discuss the said Judgment and to give formal instructions for the filing of an appeal. He further averred that he is still in occupation of the suit property and the Defendants have threatened to evict him and his tenants. He further averred that he is desirous of appealing against the Judgment and prayed for leave to appeal out of time.

The Application is contested by the Defendant, Leah W. Muchohi, who filed her Replying Affidavit sworn on 7<sup>th</sup> November 2016 in which she averred that it is not true that the Plaintiff was not aware of the court's Judgment that was delivered on 24<sup>th</sup> March 2015. She averred that following that Judgment, the Plaintiff's then lawyers M/s Theuri Wanjohi & Co. Advocates wrote to her advocates a letter dated 15<sup>th</sup> April 2015 acknowledging the said Judgment and offering to purchase the suit property from her. She added that the same advocates wrote further letters dated 11<sup>th</sup> May 2015 and 2<sup>nd</sup> July 2015 still urging that she sell the suit property to them as they had even made financing arrangements with their bankers. She further averred that indeed a meeting was duly held on 4<sup>th</sup> August 2015 between her lawyers and the Plaintiff's lawyers where a purchase price was agreed upon and the terms of any such sale agreed upon. She averred further that by a letter dated 11<sup>th</sup> September 2015, the Plaintiff's lawyers wrote to her lawyers and confirmed that the Plaintiff was indeed agreeable to the proposed sale and prayed for about two weeks to concretize his own internal arrangements. It was her averment that from that time, the Plaintiff never wrote again and she and her lawyers therefore assumed that the Plaintiff was no longer interested in purchasing the suit property from her. She further averred that this court lacks the jurisdiction to extend time to appeal and that the power to do so solely lies with the Court of Appeal. On those grounds, she sought for the dismissal of the Plaintiff's Notice of Motion dated 19<sup>th</sup> October 2016.

On the question of the jurisdiction of this court to extend time to appeal, I believe that **section 7 of the Appellate Jurisdiction Act** is quite instructive and it states as follows:

***“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.”***

Clearly, going by this provision, this court has the jurisdiction to extend time to appeal. Should the court allow the Plaintiff's application to appeal out of time? To my mind, I consider that the important factor to consider is whether or not the delay in filing the Appeal is unreasonable. Delay was discussed in the case of **Agip (Kenya) Ltd versus Highland Tyres Limited (2001) KLR 630** as follows:

***“Delay is a matter to be decided on the circumstances of each case where a reason for the delay is offered. The court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit.”***

Having regard to this matter, I note that the Judgment was delivered on 24<sup>th</sup> March 2015 while the Plaintiff/Applicant filed this Application one and a half years later. His reason for the delay in filing his appeal is that he was absent in court when the Judgment was delivered. He also told the court that he had health challenges including undergoing an operation hence the delay in filing his appeal. I note from the court record that his Advocate was present in court when the Judgment was delivered. The Plaintiff/Applicant has also not refuted the claims by the Defendant that he had taken steps to purchase the suit property from the Defendant. My finding is that the Plaintiff was generally slow in arriving at a decision to appeal. His claims on health challenges are all mere allegations with no supporting evidence. It appears to me that the Plaintiff had been keen on buying the suit property from the Defendant but had an afterthought of delaying his eviction out of the suit property by filing an appeal. I am not satisfied that the Plaintiff was keen on filing an appeal in this matter and accordingly decline to extend time within which to appeal. Plaintiff's Notice of Motion dated 19<sup>th</sup> October 2016 is hereby dismissed with costs to the Defendant.

It is so ordered.

**SIGNED AND DATED BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI**

**THIS 17TH DAY OF OCTOBER 2018.**

**MARY GITUMBI**

**JUDGE**

**DELIVERED BY JUSTICE BERNARD EBOSO AT NAIROBI**

**THIS 22ND DAY OF OCTOBER 2018.**

**B. M. EBOSO**

**JUDGE**