



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

MISC. APP. NO. 43 OF 2016

TOM MBOYA ODHIAMBO.....APPLICANT

AND

TOBIAS OKUMU OTIENO.....RESPONDENT

RULING

1. The applicant, Tom Mboya Odhiambo who was the defendant in Homa Bay Chief Magistrate's Civil Case No. 63 of 2010 by a Notice of Motion dated 14th March 2016 brought under Section 79G of the Civil Procedure Act seeks orders:-

(a) That the applicant be granted unconditional leave to lodge an appeal out of time against the order of the learned Resident Magistrate Hon. Nelly W. Kariuki dated 31st October 2014 and upon such terms that are just and expedient.

(b) That the costs of the application be provided for.

2. The application is grounded on the annexed supporting affidavit of Tom Mboya Odhiambo and on the following grounds set out on the face of the application:-

(i) That the delay in lodging the appeal was due to financial constraints and death of family members.

(ii) That the affected parcel of land is family land and forms part of the matrimonial home.

(iii) That the applicant has arguable and reasonable appeal.

3. The brief background to this matter is that the plaintiff/respondent obtained an ex parte judgment against the defendant/applicant for the refund of kshs. 480,000/= together with interest and costs on account of an abortive sale transaction to the plaintiff of land parcel **Kasungu/Kamreri/4021** by the defendant pursuant to which the plaintiff had paid the said amount to the defendant. The record from the availed copy of proceedings show that on 4th May 2011 the costs of the suit were assessed by consent at kshs. 68,500/= and stay of execution granted for 30 days. The defendant's initial application dated 8th June 2011 (not included in the record) for stay of execution was dismissed by the court on 28th December 2011 apparently for want of prosecution.

4. The defendant filed a further application for stay of execution dated 28th February 2012 and the court at the ex parte stage on 5th March 2012 issued an interim stay of execution by attachment and sale of the

defendants land parcel number **Kasungu/Kamreri/4021** pending the hearing of the application on 13th March 2012. The parties on the date scheduled for hearing recorded a consent on the following terms:-

“By consent of the parties the execution process already set in motion be and is hereby stayed on the following terms:-

- 1. That the defendant do and has paid the plaintiff kshs.355,000/= as part of the decretal sum.**
- 2. The balance of the decretal sum of kshs. 277,310/= shall be paid to the plaintiff within 60 days from today.**
- 3. The defendant do pay the auctioneer kshs. 40,000/= as part of the Auctioneer’s cost pending the assessment of any costs that may be due to the auctioneers and the said payment shall be paid on or before the 23rd March 2012.**
- 4. The caution registered in respect to land parcel No. Kasungu/Kamreri/4021 be and is hereby ordered lifted.**
- 5. In default of payment of the balance of the decretal sum as stated in clause 2 and further in default of payment of auctioneers fees as stated in clause 3 then execution to proceed and an order of inhibition be and shall be registered against land parcel No. Kasungu/Kamreri/4021.”**

5. The plaintiff/respondent stated that the defendant defaulted on the consent order and consequently execution proceeded and the subject property was sold on 20th July 2012 in execution of the decree. On 9th June 2014 the defendant/applicant filed the application which gave rise to the ruling of 31st October 2014 which the defendant now seeks leave to be allowed to appeal against out of time. The application dated 9th June 2014 sought the following substantive orders:-

- 1. That the honourable court be pleased to set aside unconditionally the attachment and subsequent sale by public auction of the applicant’s said parcel No. Kasungu/Kamreri/4021.**
- 2. That the subsequent entries of the purchaser Sarman Group Co. Ltd as the bonafide purchaser and owner be deemed as nullified and cancelled from the register.**
- 3. That the applicant Tom Mboya Odhiambo be restored as the registered proprietor.**

6. The learned Resident Magistrate in a considered ruling delivered on 31st October 2014 dismissed the defendant’s application. The defendant sought and was granted leave by consent to appeal against the ruling on 31st March 2015. The instant application by the defendant seeking leave to lodge an appeal out of time was filed on 18th March 2016 nearly one year later. The principle ground that the defendant gives for the delay is that he fell into financial difficulties and encountered family misfortunes occasioned by deaths within the family which prevented him from instructing counsel who he also owed money. The applicant states he has an arguable and a reasonable appeal as per the exhibited draft memorandum of appeal marked **“TM06”**. He further avers the respondent would suffer no loss or prejudice that cannot be compensated by way of costs. Section 79G of the Civil Procedure Act, under which this application is made provides as follows:-

79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

7. The plaintiff/respondent in the filed replying affidavit in opposition to the defendant/applicant's application avers that execution proceeded after the applicant failed to honour the terms of the consent order of 13th March 2012 pursuant to which stay of execution of the decree had been granted. Further the respondent averred that the suit property had since been sold and the applicant's appeal would be inconsequential. The respondent further stated that the applicant had the opportunity to redeem the property but failed to do so and further the delay by the applicant is inordinate.

8. The plaintiff/respondent also filed a Notice of Preliminary Objection dated 23rd March 2016 to the applicant's application on the basis that the Homa Bay High Court where the application had been filed lacked the jurisdiction to handle the matter since the matter related to land and hence should have been filed in the Environment and Land Court pursuant to Articles 162 2 (b) and 165 (5) (b) of the Constitution and Section 13 of the Environment and Land Court Act. When the application came before **Majanja, J.** for directions on 5th April, 2016 he directed thus:-

“As this is a matter concerning land it is hereby transferred to the Environment and Land Court at Kisii for further orders, directions for hearing. Mention before that court on 18th April 2016.”

9. On 27th September 2016 this court directed the parties to argue the preliminary objection and the applicant's application by way of written submissions. The parties have complied and have filed their respective submissions. I have reviewed and considered the submissions filed by the parties and the issue that this court requires to determine is whether the applicant is entitled to have the court exercise its discretion to allow the filing of the appeal out of time. The issue of jurisdiction is no longer an issue as **Majanja, J.** recognizing that the High Court lacked the requisite jurisdiction to deal with the matter, transferred the matter to this court which has the jurisdiction. Having regard to the provisions of Articles 48 and 50 of the Constitution regarding access to justice and fair hearing, I am persuaded **Majanja, J.** acted properly in ordering the transfer of the matter to this court.

10. As I have observed earlier in this ruling the power of the court to extend time to file an appeal out of time is discretionary. Discretion of the court is not exercised at the whims of the court but judiciously. A party seeking the discretion to be exercised in his favour to be allowed to file an appeal out of time must give the court a basis to exercise that discretion. The party must give a credible reason for the delay in filing the appeal. In making its decision to grant or not to grant leave for the appeal to be filed out of time the court will consider all the attendant circumstances and that explains rather the detailed background I set out at the beginning of this ruling. The conduct of the applicant is a relevant factor to be considered. The record as per the typed proceedings of the lower court reveals that the defendant/respondent was absent on most of the occasions the matter was scheduled for hearing. That although the subject property was sold by public auction on 20th July 2012 and the purchaser was registered as owner on 11th July 2013 as per the copy of search and abstract of title annexed as **“TMO5(a) and (b)”** respectively the applicant did not file the application seeking to set aside the sale until 9th June 2014. This points to the dilatory conduct of the applicant.

11. In the application before the court, the applicant says he had financial difficulties and family misfortunes. No details are furnished. If parties were allowed to plead impecunity to explain delays in taking action where the law provides timelines, the courts would be inundated with such excuses and the courts have no means of validating such excuses. Where a party has genuine financial difficulties and cannot file an appeal by reason of being financially handicapped, Order 44 of the Civil Procedure Rules provides an outlet for such party and provides under Rule 1 that such a person may apply to be allowed to appeal as a pauper. This is what the applicant should have done if indeed he was financially incapacitated to file an appeal.

12. In the case of **Olivia Wamuhu Kinyanjui –vs- Margaret Njeri Ndirangu [2015] eKLR** referred to the court by the respondent **Janet Mulwa, J.** stated thus:-

“The decision of a court to extend time or not, to file an appeal out of time is discretionary

which discretion ought to be exercised in a principled manner with reason and justice by weighing and balancing the rival interests and all relevant factors before it.”

She further went on to state thus:

“Section 1A, 1B and 3A of the Civil Procedure Act does not facilitate granting of orders seeking leave to extend time to file appeal out of time where the applicant has not shown to the satisfaction of the court that the delay is not inordinate or it has been sufficiently explained. See case of Ivita –vs- Kyumbu [1984] KLR where the court held that prolonged delay to take an action is inexcusable unless the delay is sufficiently explained.”

13. I agree with the learned Judge’s view and taking into consideration the totality of all the facts and circumstances of the present matter before the court I am not satisfied that the applicant deserves to have the discretion exercised in his favour. He has not sufficiently explained the delay in filing the appeal and in my view the delay is inordinate and inexcusable and no sufficient explanation has been given.

14. There is another issue that has given me considerable anxiety. The subject property has to the knowledge of the applicant been transferred to a third party, **Sarman Group Co. Ltd** and the applicant was so aware at the time he filed the application dated 9th June 2014. The abstract of title indicates a charge was registered against the title to the land on 8th October 2013. The 3rd party buyer and the chargee of the property have acquired interest in the property and their interests would have to be considered in any further dealings with the property. The trial magistrate questioned why the 3rd party buyer was not enjoined to the proceedings yet the application before her had sought the cancellation and nullification of the title registered in the 3rd party’s favour. On consideration of the 3rd party’s interests which have crystallized on the subject property, I am not able to say the applicant would have an arguable and reasonable appeal as argued by the applicant.

15. The upshot is that I find no merit in the applicant’s application dated 14th March 2016 and the same is dismissed with costs to the respondent.

Orders accordingly.

Judgment dated, signed and delivered at Kisii this 17th day of March, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the applicant

..... for the respondent

..... Court assistant

J. M. MUTUNGI

JUDGE