



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MERU

CIVIL MISC. APPL. NO. 49 OF 2015

JEREMIAH THANARA ITHIGUA.....APPLICANT

V E R S U S

DOMIZIANO K. MWIKA.....RESPONDENT

R U L I N G

1. The Notice of Motion dated 2nd July, 2015 seeks the following orders:-
 - a. The application be certified urgent and the same be heard expeditiously , on priority basis and exparte in the first instance.
 - b. The applicant be granted leave to file/bring an appeal out time against the ruling of Honourable C.N Maundu SPM Maua dated 25/09/2013 in Maua C.M.C.C. NO. 192 of 2009.
 - c. Costs of the application be provided for.
2. The Application is based on the following grounds:-
 - a. Failure by the applicant to file the intended appeal within time was not intentional.
 - b. The applicant's intended appeal is arguable.
 - c. The applicant stands to suffer irreparable loss and prejudice if the reliefs sought herein are not granted.
 - d. It is in the interest of Justice that the orders sought be granted.
3. The Applicant has also filed a Supporting Affidavit where he has deponed as follows: -
 1. That I am the applicant herein competent to swear this Affidavit.
 2. THAT I am the Plaintiff in Maua C.M.C.C 192 /2009 which is the subject of this application.
 3. THAT the Court below had heard and determined the suit exparte.
 4. THAT immediately after delivery of the judgment, I applied for proceedings and paid for the same. Annexed and Marked "JT1 1" is a receipt.

5. THAT however , the proceedings were not typed, within the period allowed by law to file an appeal.

6. THAT even after the proceedings were typed, the Court file went missing until May, 2015.

7. That I had instructed counsel to file the appeal for me but apparently, he too did not execute my instructions.

8. THAT had the proceedings been typed in time and my previous advocate followed up strictly with the missing file, I would have had my appeal filed within time.

9. THAT I am still aggrieved by the exparte judgment and all the subsequent orders therefrom.

12. THAT I am eager to file an appeal against the entire judgment and the ruling dated 25/09/2013 by Honourable Mr. Maundu SPM and which intended appeal, I believe has high chances of success. Annexed as "JT1 2" is a copy of my proposed memorandum of Appeal.

11. That the subject matter of the suit in the Lower Court is my family land and I will suffer prejudice if I am not allowed to file and challenge the lower Court's judgment and ruling.

12. THAT the respondent will suffer no prejudice if the application is granted.

13. THAT all I have stated is true to the best of my knowledge and belief.

4. Applicant has sworn an affidavit stating that he was dissatisfied with the ruling delivered by Senior principle Magistrate C. M. Maundu in maua CMCC NO.192 OF 2009. The ruling was delivered on 25/9/13.

5. Applicant states that he applied for the proceedings but the same were not availed on time. He instructed his counsel to lodge the appeal. The file then went missing.

6. In his submissions, applicant avers that he is still in occupation of the land which is family land and that execution has not taken place.

7. On his part the respondent has avered that he obtained the decree way back on 12/5/2010 and that the decree was subsequently executed. He states further that he is the one in occupation and has carried out extensive developments on the land.

8. The Respondent states that the delay of one year and 10 months in not reasonable.

9. Respondent has submitted that it is not true that the lower court file was missing. He further states that the applicant had two advocates on record and none of them filed an appeal.

10. Respondent has also submitted that the intended appeal has no merits in view of the fact that the the respondent is the owner of the land and that the applicant is not in possession of the land

11. The issues that this court will determine are ;

i. Was the delay in filing the appeal in ordinate and in excusable.

ii. Any merits in the intended appeal?

12. **Delay.**

The applicant has given an account of why the matter delayed. The only document that the applicant has shown the court indicating that he was pursuing the proceedings is the receipt of sh 900.However, one

does not require proceedings to lodge the appeal. There is also no evidence to show that applicant had instructed his counsel to file the appeal.

13. However going by the ruling of 25/9/13 one cannot tell the point at which an aggrieved party was supposed to lodge the appeal. The ruling captures the date interlocutory judgment was entered (19/11/09), the date the applicant filed the application to set aside the the default judgment and the consequential orders (12/3/13) and the date of the ruling. Against this background , I am inclined to find that the delay though inordinate is excusable to a certain extent.

14. Merits of the Appeal.

I find that the Respondent has averred that he is the owner of the land .His document marked as annexure DK 4 buttresses this allegation. Applicant has not rebutted that averment. It follows that on the face of it ,the respondent is the owner of the suitland.

15. That notwithstanding , it is possible for a person to have an interest in land which one does not own. The applicant has stated that this was family land. In the interest of justice, it is only fair and just that the merits of the appeal be considered by allowing the application.

16. This court grants orders as follows;

- i. The appeal to be filed and served within 21 days.
- ii. No stay is granted. The decree in Maua SPMS court no.192/09 to remain in force
- iii. Applicant is to pay the costs of this application.

DELIVERED IN OPEN COURT AT MERU THIS 10TH DAY OF MAY, 2017 IN THE PRESENCE OF:-

CA: Janet

Carl Peters Mbaabu h/b for H. Gitonga for Respondent- present

Ndubi for Applicant -present

HON L.N. MBUGUA

JUDGE