



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPEAL NO. 328 OF 2015

JOSEPH NJOROGE.....APPLICANT

-VERSUS -

REUBEN WAWERU MBERIARESPONDENT

RULING

Section 79G of the Civil Procedure Act, Chapter 21 Laws of Kenya provides as follows;

“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.?

It is clear from the foregoing that the power to extend time to file an appeal is discretionary. In the case of, Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 others [2014] e KLR that was cited by the respondent, it was held that the court’s discretion to extend time is unfettered but the applicant has to explain the reasons for the delay in making the application for extension and whether there are extenuating circumstances that can enable the court to exercise its discretion in his favour.

In this case, judgment was entered against the applicant in the Chief Magistrate’s Court at Milimani on 30th April, 2015. Under Section 79 (c) of the Civil Procedure Act aforesaid, the applicant was supposed to file an appeal against that judgment and decree by 30th May, 2015 if he wished to do so. The applicant did not file an appeal within the prescribed time. In the meantime, the lower court issued a further order on 23rd November, 2015 for the eviction of the applicant from the suit property namely, Plot No. 148/Kware, Ongata Rongai Trading Centre under the supervision of the Officer Commanding Ongata Rongai Police Station.

What is now before me is an application brought by the applicant by way of Notice of Motion dated 18th December, 2015 seeking extension of time to appeal against the lower court judgment of 30th April, 2015 aforesaid and a stay of the eviction orders which were issued by the lower court on 23rd November, 2015. The application was brought on the grounds that soon after delivery of the judgment by the lower court, the applicant requested for copies of typed proceedings and judgment of the lower court to enable him to decide whether or not he should file an appeal against the same. The applicant contended that he did not receive copies of typed proceedings and judgment until 11th November, 2015. The applicant averred that

the delay in the filing on the intended appeal was occasioned by the time it took the lower court to supply him with typed copies of proceedings and judgment.

The application was opposed by the respondent through a replying affidavit sworn on 27th April 2016. The respondent averred that the applicant's application was brought after inordinate delay. The respondent contended that the reasons given by the applicant for the delay in filing of the intended appeal were unsubstantiated since the applicant had not exhibited a certificate of delay issued by the lower court indicating the time it took to supply the applicant with typed copies of the proceedings and judgment. The respondent contended that the applicant was not diligent in bringing and prosecuting the present application. The respondent contended that the applicant was not deserving of the exercise of this court's discretion. The respondent contended that the applicant's intended appeal had no chances of success. The respondent accused the applicant of material non-disclosure. The respondent averred that the applicant had failed to disclose to the court the fact that as at the time he was coming to court, he had been evicted from the suit property and had made forceful re-entry thereon. The respondent averred that the applicant was seeking discretionary remedies with unclean names.

The applicant filed a supplementary affidavit on 15th July, 2016 in which he averred that the delay in filing of the appeal was occasioned by his illness and financial constraints. The applicant denied that he was guilty of inordinate delay. He averred that the delay if any was not as a result of his own fault.

The application was argued by way of written submissions. I have considered the application together with the affidavits filed in support thereof. I have also considered the affidavit filed in opposition to the application and the submissions on record. The applicant has sought leave to appeal out of time and stay of execution. The issues that I need to determine in the present application are whether I should exercise my discretion in favour of the applicant in relation to his prayer for extension of time and whether the applicant has satisfied the conditions for grant of stay of execution. The only reason that was put forward by the applicant for the delay in filing the appeal in time was lack of copies of typed proceedings and judgment. The applicant has not placed any evidence before the court as to when he applied for typed copies of proceedings and judgment and when the same were made available to him. I am in agreement with the respondent that the applicant's claim that he was prevented from filing the appeal due to the delay on the part of the lower court to furnish him with copies of typed proceedings and judgment is not substantiated. That said, I am of the view that the failure by the applicant to furnish the court with a certificate of delay issued by the lower court alone cannot fetter the exercise of the discretion of the court in favour of the applicant. Considering the material before me in totality, I am satisfied that the applicant is desirous of exercising his right of appeal against the decision of the lower court. I have noted that as soon as the applicant obtained certified copies of the proceedings of the lower court on or about 10th November 2015, the applicant filed an application in the High Court on 16th November 2015 for leave to appeal out of time. When the applicant's application came up for hearing on 24th November 2015, the applicant was informed that the application had been filed in the wrong court. The applicant thereafter filed the present application on 17th December 2015. Since the filing of the present application, the applicant has diligently pursued the same contrary to the allegations contained in the respondent's affidavit. The applicant has a statutory right of appeal to this court. That right has to be exercised in accordance with the provisions of the Civil Procedure Act and rules made thereunder. I am of the view that a person who has expressed an intention of exercising a right conferred upon him by law should not be denied the opportunity to exercise the right save for special reasons. In this particular case, I am not satisfied that special reasons exist that would warrant denying the applicant leave to appeal. The lower court in its judgment had made an order for the eviction of the applicant from the suit property which the applicant claims to have occupied as his home for over 30 years. The applicant is not satisfied with that judgment and wishes to challenge the same before this court. I am of the view that in the circumstances of this case, justice and fairness dictate that the applicant be accorded an opportunity to exhaust all remedies available to him. I am not satisfied that the respondent would suffer prejudice which cannot be compensated in costs if the applicant is granted leave to appeal out of time.

The limb of the application which sought a stay of the orders made by the lower court on 23rd November, 2015 are spent by this ruling since the prayers were sought pending the hearing and determination of the

application. The applicant had also sought an order that the Notice of Appeal and the Memorandum of Appeal he had filed be deemed as duly filed. In appeals this court, it is not necessary to give notice of appeal. The prayer for the notice to appeal to be deemed duly filed is superfluous in the circumstances. With regard to the Memorandum of Appeal, the applicant will have to file the same afresh after being granted leave. What is before me is a miscellaneous application and not an appeal. The applicant cannot be allowed to file appeal in a miscellaneous application.

The upshot of the foregoing is that the application dated 18th December, 2015 succeeds in part. The same is allowed in term of prayer 2 thereof. The appellant shall file an appeal within 21 days from the date hereof. The costs of the application shall be in the intended appeal.

Delivered and signed at Nairobi this 27th day of June, 2017

S. OKONG'O

JUDGE

Ruling delivered in open court in the presence of:

N/A for Appellant

Mr. Chege h/b for Namisi for Respondent

Kajuju Court Assistant