REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPLICATION NO. 32 OF 2016

MARTIN WANJALA WAFULA.....APPLICANT

VERSUS

MARGARET WAIRIMU MBIRUA.....RESPONDENT

RULING

This is in respect to the Applicant's Notice of Motion dated 19th September 2016 seeking the following orders:

> ***1. Spent.***
>
> ***2. That this Honourable Court do grant leave to admit an appeal against the judgment delivered on 30th September 2015 by the Principal Magistrate M.W. MUTUKU in THIKA CHIEF MAGISTRATE'S COURT CIVIL CASE No. 439 of 2010 out of time.***
>
> ***3. That there be a temporary stay of judgment dated 30th September 2015 pending hearing and determination of this application.***
>
> ***4. That the judgment dated 30th September 2015 was only in respect of prayers 1 and 2 of the Plaintiff's Chambers Summons dated 29th April 2010.***
>
> ***5. That there be a stay of execution in the said THIKA CHIEF MAGISTRATE'S CIVIL CASE No. 439 of 2010 pending filing, hearing and determination of the intended appeal.***
>
> ***6. Spent.***
>
> ***7. That the costs of this application be provided for.***

The application is premised on the grounds set out therein and is also supported by the affidavit of **DOLA INDIDIS** advocate.

The gravamen of the application is that the judgment was based on a false affidavit and that the trial magistrate who had no jurisdiction did not grant the Applicant a fair hearing. That the judgment dated 30th September 2015 was obtained through trickery and the Applicant being aggrieved by the said judgment wishes to appeal against it and has good grounds of success. That the judgment was read without notice to counsel for the Applicant and it took time to trace and peruse the file at the registry. That the decree dated 30th September 2015 was based on the decision of **KORIR. J.** in **NAIROBI JUDICIAL REVIEW CASE No. 139 of 2011.** The supporting affidavit of **DOLA INDIDIS** who is the Applicant's counsel simply has various annextures including the memorandum of appeal, copies of

affidavit etc.

In opposing the application, the Respondent has filed a replying affidavit terming it an abuse of the process of the Court, vexatious and un-meritorious. The other averments in that replying affidavit are not really of much help to this Court as it simply refers to some injunctive orders issued on 29th April 2010 and which were defied by the Applicant who subsequently filed a Judicial Review Application that was dismissed etc etc.

Submissions have been filed by counsel for both parties as directed on 7th December 2016 but this file was only brought to my attention on 26th June 2017 just prior to the commencement of the vacation hence the delay in delivering this ruling.

I have considered the application, the rival affidavits and annextures as well as the submissions by counsel.

Although the application seeks several orders including stay of execution of the judgment dated 30th September 2015, it is clear to me that the main prayer is the one seeking leave to appeal against the said judgment out of time. The other prayers are hinged on whether or not that prayer will be granted. I will therefore first consider the prayer for leave to file appeal out of time.

Section 79G of the Civil Procedure Act 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".*** Emphasis added

In the case of ***BAGAJO VS CHRISTIAN CHILDREN FUND INC (2004) 2 K.L.R 273 RINGERA*** **Ag. J.A** (as he then was) while considering an application under ***Rule 4 of the Court of Appeal Rules*** laid down the following principles which would equally apply in an application under ***Section 79G of the Civil Procedure Act***. These are:

- ***the length of the delay***
- ***the explanation for the delay***
- ***is the intended appeal arguable***
- ***the prejudice that may be caused to the Respondent if the application is allowed***
- ***the public importance of the matter***
- ***the requirements of the interest of justice of the case***.

The Supreme Court in the case of ***NICHOLAS KIPTOO arap KORIR SALAT VS I.E.B.C & OTHERS (2014) e K.L.R*** laid down the following principles to guide a Court in considering an application such as this one:

- ***extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court***
- ***a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court***
- ***whether the Court should exercise its discretion to extend time is a consideration to be made on a case to case basis***
- ***whether there is a reasonable reason for delay, it should be explained to the satisfaction of the Court***
- ***whether there will be any prejudice suffered by the Respondent if the extension is granted***
- ***whether the application has been brought without undue delay; and***

- ***whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

It is clear therefore that whether or not to grant an extension of time to appeal is discretionary, such discretion is to be exercised judicially with a view to doing justice to the parties involved with each case being considered on its own peculiar circumstances. The Applicant must give a plausible explanation for the delay before such discretion is exercised in his favour.

It is common ground that the judgment sought to be appealed was delivered on 30th September 2015. This application was filed one year later on 20th September 2016. That delay of one year is clearly in-ordinate. What is the explanation for the delay? This is found in paragraph No. (h) of grounds of the application where it is stated as follows:

> ***"That the delay to the appeal (sic) was not intentional as the judgment was read without notice to the counsel for the Applicant and therefore took time to trace and peruse file at the registry".***

It is indeed possible that the judgment dated 30th September 2015 was read in the absence of the Applicant and without notice to his counsel.That is of course wrong but is a common practice which must be discouraged. I have heard Judicial officers occasionally complain that parties and their counsels sometimes do not turn up for their judgments and rulings even when notified. I think all steps available must be taken to notify parties and counsel about the dates when judgments and rulings will be delivered especially in cases where the date is not pronounced in Court in their presence. After all, such judgments and rulings belong to the parties and not to the Court. Only when the parties and their counsel have notice of the judgment will they be able to decide what steps to take either in compliance or by seeking stay or pursuing an appeal.

Having said so, this Court would have expected the Applicant and counsel to inform it when exactly they eventually learnt about the judgment dated 30th September 2015. That has not been done and in the absence of such evidence, it is difficult for this Court to exercise its discretion in the Applicant's favour. All that this Court is told is that the Applicant "***took time to trace and peruse file at the registry***". However, we are not told when exactly the file was traced and perused yet that is important for purposes of this application. In the absence of that information, the Court can only rely on what is on record and which is that the judgment sought to be appealed was delivered on 30th September 2015 a year before this application was filed. That delay is inordinate and has not been explained as required. There is therefore no evidence placed before this Court to demonstrate that the Applicant "***had good and sufficient cause for not filing the appeal in time"*** as required by ***Section 79G of the Civil Procedure Act.*** Clearly, where the delay is inordinate and has not been explained as is the case herein, there can be no basis upon which this Court can exercise its discretion in extending time within which to appeal. Indeed, I take the view that both the ***Oxygen Principles*** contained in ***Sections 3A and 3B of the Civil Procedure Rules*** or ***Article 159 of the Constitution*** cannot aid the Applicant in this case for the simple reason that no evidence has been placed before this Court to warrant the exercise of my discretion in favour of the Applicant. As was held by the Court of Appeal in ***CITY CHEMIST & ANOTHER VS ORIENTAL COMMERCIAL BANK C.A CIVIL APPEAL No. 302 of 2008***, the ***Oxygen Rules*** were not meant to totally up-root well established principles and precedents meant to guide this Court in the exercise of its discretion which is a judicial process devoid of whim and caprice. I must therefore reject the prayer seeking leave to extend time to appeal against the judgment of the subordinate Court dated 30th September 2015. It follows therefore that the application for stay of execution of that judgment must likewise be dismissed as it cannot stand on its own.

The up-shot of the above is that the Applicant's Notice of Motion dated 19th September 2016 and filed on 20th September 2016 is devoid of merit. It is accordingly dismissed with costs.

B.N. OLAO

JUDGE

6TH OCTOBER, 2017

Ruling dated, delivered and signed in open Court this 6th day of October, 2017

Ms Waweru for Mr. Muthomi for Respondent present

Mr. Munene for Mr. Dola for Applicant present.

B.N. OLAO

JUDGE

6TH OCTOBER, 2017