



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT KERICHO

MISCELLANEOUS APPLICATION NO.12 OF 2017

ELKANA SAMWEL MAIN MATU.....APPLICANT

VERSUS

**TERESIAH NJOKI MATU (suing as the administrator of the estate of
Joseph Matu Macharia).....RESPONDENT**

RULING

Introduction

This ruling determines the application dated 20th April 2017 brought pursuant to section 79G, 1A, 3A and 63 (c) and(e) of the Civil Procedure Act. The application seeks two main prayers namely;

- a) That the honourable court be pleased to grant leave to the Applicants to file an appeal out of time against the trial Magistrates' orders of 1st March 2017 and 18th January 2017 and any other subsequent orders.**
- b) That the respondent be restrained from trespassing, leasing, selling, parting with possession, mortgaging, pledging, carrying on business and/or interfering with the 2nd Applicant's furniture, fixtures, and fittings on the suit premises standing on plot number 631/111/305 Kericho Municipality pending the hearing and determination of this application**

The application is predicated on the grounds stated on the face of the application and the joint supporting affidavit of the applicants sworn on the 20th April 2017. A brief background of the facts is necessary in order to put the case into perspective.

In April 2016, the Respondent filed suit against the Applicant vide Kericho CMCC No. 149 of 2016 seeking the following prayers;

- a) Surrender of the suit premises to the Respondent
- b) An order of permanent injunction against the applicant
- c) An order of accounts for the price of disposal of the suit property by the applicant
- d) An order of mandatory injunction compelling the 1st Applicant to pay to the estate of the late Joseph Matu Macharia (deceased) the proceeds of sale together with interest. Together with the Plaintiff, the Respondent filed an application under certificate of urgency seeking orders for injunction to restrain the 1st applicant from occupying, using, possessing, selling or disposing of the suit property.

On 21st April 2016 the trial magistrate granted ex – parte orders certifying the application as urgent and granting a temporary injunction to restrain the 1st Applicant from occupying the suit premises. The orders were extended a number of times and on 14th October 2016 the Court confirmed the ex-parte order placing the custody of the suit premises in the hands of the Respondent pending the hearing and determination of the main suit.

The said orders were made before the 1st and 2nd applicants were served with the application. After the 1st and 2nd applicants were served, they moved the court to join the 3rd applicant as an interested party and for review of the orders of injunction issued on 17th October 2016.

On 18th January 2017 the court allowed the interested party to be enjoined in the suit but declined to review the order for injunction and instead ordered that the matter proceeds to full hearing.

On 25th January 2017 the 1st and 2nd applicants filed their defence and raised a Preliminary Objection to the effect that the court lacked jurisdiction to hear the matter as it related to a dispute between a tenant and a landlord.

In its Ruling dated 1st March 2017, the court dismissed the Preliminary Objection and ordered that the suit proceeds to hearing. It is against this Ruling that the applicants intend to appeal. This application therefore seeks leave to file the intended appeal out of time.

The parties agreed to canvass the application by way of written submissions.

In his submissions learned counsel for the applicants has submitted that the delay in filing the appeal was occasioned by the fact that there were attempts to resolve the matter amicably and the court fixed a mention on 15th March 2017 at 2.00pm for purposes of confirming whether the parties had reached a settlement.

It is further submitted that on the said date, the trial magistrate mentioned the matter in the morning and when the parties and their advocates went to court at 2.00pm, the Magistrate had left and the file was nowhere to be found. When counsel later perused the file, he learnt that the matter had been adjourned to 24th May 2017. The applicant's counsel then applied for a certified copy of the proceedings. The proceedings were received on 18th April 2016 and this application was filed on 20th April 2017.

It has therefore been submitted that the delay in bringing the application is not deliberate nor is it inordinate.

The second limb of the applicants' submissions is that the Magistrates court had no jurisdiction to hear and determine the case as the dispute was about a tenancy over L.R No. KERICHO MUNICIPALITY PLOT NO.631/111/305. Counsel for the has submitted that the dispute should have been filed either in the Business Premises Rent Tribunal or in the Environment and Land Court established under Article 162(2) of the Constitution.

The third limb of the applicants' submission is that the court having granted an ex-parte mandatory injunction allowing the Respondent to take possession of the suit property, it was just and fair that an injunction be granted to restrain the Respondent from selling the business, furniture and fittings as the applicants were likely to suffer irreparable loss and damage if the prayers sought were not granted.

Respondent's Submissions

The application was opposed by the Respondent through Replying Affidavit sworn on the 5th June 2017. In the said affidavit she deponed that the application was mischievous and was an abuse of the court process as the applicants had participated in subsequent proceedings after the court's Ruling. She further deponed that the intended appeal had no chances of success and the orders for injunction were superfluous and unnecessary as there was no risk of the property being alienated or sold as the Respondent had been running it a shop as one of the family's sources of income and had paid rent to the 3rd Applicant upto May 2017.

Counsel for the Respondent submitted that the applicants have no valid reason for their failure to file their appeal within the stipulated period of time. He submitted further that the applicants have no arguable appeal as the initial dispute was not one between landlord and tenant but was between two competing tenants. The 3rd Applicant was only enjoined as an interested party to shed light on the correct position.

He faulted the applicants for swearing a joint affidavit as it offends the law which requires that a deponent swears to facts which within his or her knowledge. He relied on the case of **Thomas Malinda Musau & 2 Others V Independent Electoral and Boundaries Commission & 2 Others (2013) eKLR** where the court held that jointly sworn affidavits offend the express provisions of the law, defeat their primary purpose and are incurable under the provisions of Article 159 (2) (d) of the Constitution.

Issues for Determination and Analysis

The following issues emerge for determination:

- i. Whether the applicants have demonstrated that they have good and sufficient cause for not filing the Appeal in time*
- ii. Whether the applicants have demonstrated that they have an arguable appeal.*
- iii. Whether the applicants have met the conditions for the grant of an order of injunction*
- iv. Flowing from the above, whether the applicants are entitled to the reliefs sought.*

With regard to the first issue, 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 30 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 required for the preparation and delivery to the appellant of a copy of the decree or order.”

Under the proviso to section 79G of the Civil Procedure Act, an appeal may be admitted out of time if the appellant satisfies the court that he has a good and sufficient cause for not filing the appeal in time.

The Supreme Court in the case of **Nicholas Kiptoo Arap Korir V Independent Electoral and Boundaries Commission and 7 Others Supreme Court Application no 16 of 2014** laid down the following underlying principles that the court should consider in the exercise of its discretion to extend time:

- i. Extension of time is not a right of a party. It is an equitable remedy that is available to a deserving party at the discretion of the court.*
- ii. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.*
- iii. As to whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis.*
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court*
- v. Whether there will be any prejudice to be suffered by the Respondents if extension is granted.*
- vi. The application should be brought without undue delay and;*
- vii. In certain cases like election petitions, public interest should be a consideration for extending time*

Applying the above principles, the question is whether the applicants have shown good and sufficient cause for the delay in filing the appeal. The applicants have explained in detail why they were unable to file the appeal in time. The Ruling was delivered on 1st March 2017. Thereafter the court urged the parties to negotiate an out of court settlement and fixed the case for mention on the 15th March 2017 at 2.00pm. When the parties and their advocates went to court on the said date at 2.00 p.m, the matter court was not sitting and the file could not be traced. It was eventually traced on 30th March 2017 and counsel for the Applicants applied for a certified copy of the proceedings and Ruling.

Ideally the Appeal ought to have been filed on 31st March 2017 but the instant application was filed on 20th April 2017 as the proceedings were made available on 17th April 2017. A delay of less than one month from the time when the appeal ought to have been filed cannot be said to be inordinate.

Additionally, the Respondent has not demonstrated what prejudice she will suffer if time is extended. I am therefore persuaded that the reasons are plausible and sufficient.

On the question as to whether the applicants have an arguable appeal, I have looked at the Memorandum of Appeal as well as the proceedings of the lower court and in my view the issues raised are not frivolous and deserve consideration on appeal.

The third issue relating to whether or not an injunction should be granted to restrain the Respondent from transferring, leasing selling or interfering with the suit property has not been adequately addressed by the applicant. The applicant has not placed sufficient material before the court to demonstrate that they have met the conditions for the grant of an injunctive order.

Before I determine whether the applicants are entitled to the prayers sought let me address the issue of the joint affidavit. Order 19 Rule 5 of the Civil Procedure Rules provides as follows:

“Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject”.

Counsel for the Respondent has urged the court to strike out the applicants’ affidavit on the grounds that it is jointly sworn by the applicants. According to him the case of Thomas Malinda Musau cited above held that jointly sworn affidavits offend the express provisions of the law, defeat their primary purpose and are incurable under the provisions of Article 159 (2) (d) of the Constitution.

With respect I beg to differ. The learned judge stated as follows:

“Order 19 of the Civil Procedure Rules requires an affidavit to be drawn in the first person form and allowing a plural affidavit like the one deposed herein will be doing injustice to the Respondents. The mischief cannot be cured by Article 159 (2) (d) of the Constitution. This would call for striking out of the affidavit”.

Before arriving at the above conclusion the learned judge observed as follows:

“The question I must pose at this point is whether more than one person can swear an affidavit. It is possible for more than one person to swear an affidavit jointly especially so if they are deposing to the same facts. However, cases would differ depending on the circumstances.”

I agree with the learned judge that this may pose a challenge where the deponents don’t all agree to the same facts and this is not clear from the way the affidavit is drafted who is deposing what. Where the latter situation obtains, the court would be justified in striking out the affidavit and affidavits should be considered on a case by case basis.

In any event Order 19 rule 7 of the Civil Procedure Rules provides a way out as follows:

“The court may receive any affidavit sworn for the purposes of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or any technicality”

In the instant case, even though the affidavit is jointly sworn by the 3 applicants one can easily single out the paragraphs that are attributed to each of the applicants and I see no reason to strike it out.

Conclusion

The upshot is that the application succeeds in terms of prayer (b) only. I exercise my discretion and allow the applicants to file their intended appeal out of time. The appeal shall be filed within 14 days from the date hereof. If the appeal is not filed within the stipulated period, the leave herein granted shall lapse automatically.

Each party shall bear their own costs.

Dated, signed and delivered at Kericho this 14th day of December 2017

J.M ONYANGO

JUDGE

In the presence of:

Ms Ngetich for Kiprono for the Respondent

No appearance for the Applicant

Court Assistant: Rotich