



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

JUDICIAL REVIEW APPLICATION NO. 2 OF 2013

EVANS KALEKA SOGOMI.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR, UASIN GISHU.....1ST RESPONDENT

AND

JOHN MWANGI NJUGUNA.....1ST INTERESTED PARTY

JAMES MUASYA MUTUNGA.....2ND INTERESTED PARTY

WENDANI S. H. G. TRUSTEES.....3RD INTERESTED PARTY

FRANCIS KARANJA KIANDA.....4TH INTERESTED PARTY

GEOFFREY NGIGI KIBE.....5TH INTERESTED PARTY

JAMES KAMAU MUCHIRI.....6TH INTERESTED PARTY

RULING

James Muasya Mutunga has come to court vide Notice of Motion dated 17.3.2016 seeking orders that the court be pleased to stay the execution of its order/judgment dated 4.12.2015 pending the filing and disposal of an appeal to the Court of Appeal. That the court be pleased to extend the period for filing and service of the Notice of appeal and that the annexed Notice of Appeal be deemed as a proper notice of appeal upon payment of the requisite court fees.

The application is premised on the grounds that this cause is one of Judicial Review which was heard by way of written submissions and judgment reserved for 28.9.2015 but was pushed forward to a date to be notified. That Judgment appears to have been read on 4.12.2015 without notice to the interested parties/applicants or their counsel and that a decree was extracted by the exparte applicant/respondent on 11.12.2015 without Notice to the interested parties/applicants as required by Order 21, Rule 8 Civil Procedure Rules. The interested parties/applicants are aggrieved by the judgment and decree of this court and desire to go to the Court of Appeal for another opinion. That by the time the applicants knew of the judgment and decree of this court, the time prescribed to file Notice of Appeal had lapsed. The exparte party/respondent has already commenced execution proceedings to bring into effect the judgment/decreed of court. Unless this court stays the execution of its decree and judgment herein, the intended appeal to the Court of Appeal will be rendered nugatory. This application has been presented timeously and without delay in the circumstances. Finally that greater interest of justice will be served in allowing this application.

The application is supported by the affidavit of James Muasya Mutunga who states the interested parties/applicants were not notified of the judgment herein and only became aware when execution commenced. The applicants are aggrieved by the judgment of this court and desire to appeal to the Court of Appeal. That he is advised by their lawyer on record that to appeal to the Court of Appeal, they should first issue Notice of Appeal and serve it on all interested parties. That as at the time of filing this application, him and the other applicants had already applied for and paid for certified copies of proceedings and judgment. That he personally resides on the suit property known as L.R. Eldoret Municipality Block 21(King'ong'o) 3734 whereat he has erected his house and he resides there with his family. That he knows for a fact that they have an arguable appeal to the Court of Appeal which they should be given a chance to litigate. That the manner in which judgment and decree was delivered deprived him and his fellow applicants their right to appeal to the Court of Appeal. The applicant knows of his own knowledge that there are impending criminal proceedings against the exparte applicant, which were initiated by the Land Registrar, Uasin Gishu on suspicion of being presented with fake title to land.

Pending the appeal to the Court of Appeal and the criminal proceedings and or directions from the Director of Public Prosecutions (DPP), it is in the interest of all concerned that the property be preserved lest it passes to other parties thereby complicating this matter further. That they are ready, able and willing to abide by any terms and conditions that may be imposed by court in allowing this application. Unless the orders sought in this application are granted, the applicants stand to lose their investment for a mistake committed by the Registrar of Lands.

Evans Kaleka Sogomi filed a replying affidavit stating that the application is bad in law, incompetent and lacks merit and an abuse of court process and should be dismissed. The respondent argues that the applicant should deposit security of Kshs.10 million for the due performance of the decree. Moreover that there is nothing to be stayed as the decree has been executed.

I have considered the application and the record of proceedings and do find that there is an error apparent on the face of record as the judgment was read in the open court on 7.12.2015 in the presence of Mr. Korir, learned counsel for the exparte Applicant and M/s Kiplagat for Ngigi Mbugua for Interested Parties and no appearance for the Attorney General. The judgment is erroneously dated 4.12.2016. I do exercise the court's inherent jurisdiction to correct the error for the judgment to read as delivered and dated 7.12.2015. This court also observes that the manner in which the Interested Party was notified is not recorded and therefore is justified in seeking for extension of time to file the Notice of Appeal out of time. For avoidance of doubt this court has jurisdiction to extend time within which to file the notice of appeal by dint of section 7 of The Appellate Jurisdiction Act Cap 9 Laws Of Kenya which gives power to the High Court to extend time within which a Notice Of Appeal can be filed hence the court has jurisdiction. This section applies as follows:-

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

The discretion to extend time ought to be exercised judiciously and not capriciously. Judicial discretion is always exercised judiciously and for reasons which are stated. The aims that should be encapsulated in the reasons given for the refusal to exercise discretion are meant to further the cause of justice, and to prevent the abuse of the court process. Judicial discretion is never exercised capriciously or whimsically.

See the cases of; Mbogo & Another V Shah 1968 EA 93 at page 95, Sir Charles Newbold P. held;

“...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a

whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.....”

Matiba v Moi & 2 Others, 2008 1 KLR 670, where the Court of Appeal held that:

“The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges’ discretion with its own discretion. It had to be shown that the Judges’ decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision”.

I do find that there are good reasons for extension of time given by the interested parties. In view of the above errors, this court is inclined to grant the Interested Party an extension of time within which to file the Notice of Appeal and the Notice of Appeal filed on 17.3.2016 is deemed as duly filed. To preserve the subject matter, this court orders that there be no further dealings in respect of the suit property until the determination by the Court of Appeal of the envisaged appeal. This order to last for only 100 days subject to the applicant's liberty to apply for further orders. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF MAY, 2016.

ANTONY OMBWAYO

JUDGE