



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 6 OF 2003

CHERUIYOT CHEPKWONY ALIAS MAPENGO.....PLAINTIFF

VERSUS

SARAH CHESIELE BARTA1ST DEFENDANT

KIPLANGAT BARTA.....2ND DEFENDANT

RULING

(Application for extension of time to file record of appeal out of time; application for stay of execution of judgment; extension of time to file record of appeal purview of court of appeal; nothing to stay as suit property has already been altered pursuant to a decree in another suit; application dismissed)

This suit was commenced by way of Originating Summons (O.S) filed on 30th January 2003. In the suit, the applicant (whom I will also refer to as the plaintiff), sought to be declared owner of 2 acres out of the **land parcel Kericho/Kimulot/514** through adverse possession. This claim was refuted by the respondents (whom I will also refer to as defendants), who filed a replying affidavit to the O.S. The suit was dismissed on 3rd August 2009 , Ang'awa J holding that the matter had already been decided in a previous suit, **Kericho HCCC No. 32 of 1997**. A notice of appeal was filed by the plaintiff and lodged on 11th August 2009.

The matter seems to have gone quiet until an application dated 21st March 2012, the subject of this ruling, was filed on even date. The application seeks various orders, but in a nutshell, three principal orders are sought. The first is for substitution of the now deceased plaintiff; the second is for stay of execution pending hearing of the appeal; and the third is for leave to file the record of appeal out of time. The application is said to be brought under the provisions of **Order 8 Rules 3,4,5,8, and 9** and **Order 25** of the **Civil Procedure Rules**, and **Sections 3A** and **95** of the **Civil Procedure Act**, and "all other enabling provisions of the law." In support of the application, it was averred that the applicant has lodged an appeal; that the 2nd respondent has already obtained sub-division orders against the estate of the plaintiff; that the plaintiff died after lodging the Notice of Appeal; that there was delay in typing proceedings; and that the delay was occasioned by circumstances beyond the control of the applicant. It is averred that the applicants stand to suffer substantial loss if the orders sought are not allowed.

The 2nd respondent filed a replying affidavit to oppose the application. In the Replying Affidavit, he has averred that the plaintiff's claim ought to have been against the 1st defendant only, as he (plaintiff) had made purchase of the 1st defendant's share of the suit property. He has averred that there was a previous suit between the two defendants, being **Kericho HCCC No. 32 of 1996** wherein it was ordered that the property **Kericho/Kimulot/514** be sub-divided equally between the two defendants. He has stated that

that decree has already been effected, and the land has now been sub-divided into the **land parcels Kericho/Kimulot/1551** and **Kericho/Kimulot/1552**. He has stated that he owns the **parcel No. 1151** whereas the 2nd defendant owns **parcel No. 1552**, and that the plaintiff's claim ought to be directed against the **land parcel No.1552**. He has pointed out that the land **parcel Kericho/Kimulot/514** is no longer in existence. He has annexed search certificates for the land parcels in issue.

Mr. Motanya for the applicant relied on the supporting affidavit and stated that a Notice of Appeal was filed on 11th August 2009. He stated that thereafter, he did apply for proceedings on 10th August 2009 and paid a deposit for the fees on the same date. He further stated that he paid Kshs. 2,000/= on 24th February 2015 for proceedings. Mr. Mutai for the respondents did not oppose the application for substitution but opposed the prayers for stay of execution pending appeal. He however opposed the aspect of the application seeking stay of execution pending appeal. He pointed out that the Notice of Appeal was filed on 3rd August 2009, yet to date, no appeal has been filed. He was further of the view that the application has been overtaken by events given that the suit property has already been sub-divided and no longer exists as claimed.

I have considered the application. There having been concession on the prayer for substitution, what remains for determination are the prayers for extension of time to lodge a record of appeal out of time, and stay of execution pending appeal.

Strictly, the record of appeal is to be filed within 60 days of filing of the Notice of Appeal according to **Rule 81** of the **Court of Appeal Rules**, although the time consumed in the preparation of proceedings may be excluded if an application for the proceedings is made within 30 days of the decision. The application as drawn, has mostly relied on **Order 8** of the **Civil Procedure Rules**, and **Sections 3A** and **95** of the **Civil Procedure Act**. These in my view are not applicable. **Order 8** deals with amendment of pleadings. On the other hand **Sections 95** and **3A** of the **CPA** are drawn as follows :-

95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

True, **Section 95** does give the Court power to enlarge time and **Section 3A** does give the court inherent power to make such order as may be necessary for the ends of justice. However, **Section 95** will only be applicable where the action is prescribed or allowed under the Act, and the Act being referred to is the **Civil Procedure Act**. Extension of time to lodge the record of appeal out of time, is not covered by the **Civil Procedure Act**, but by the **Appellate Jurisdiction Act, CAP 9, Laws of Kenya**. There is power given to the High Court, by **Section 7** of the **Appellate Jurisdiction Act**, to extend time, but that is only limited to extension of time to lodge the Notice of Appeal. That section is drawn as follows :-

S. 7 Power of High Court to extend time

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.

I have not been provided with any provision of law where the High Court (or other courts of equal status) has power to extend time for filing the record of appeal to the Court of Appeal. That to me, is the domain of the Court of Appeal. The request by the applicant to be allowed to file record of appeal out of time is therefore not within my jurisdiction to give or to deny. The applicant needs to approach the Court of Appeal for that prayer.

That leaves only the prayer for stay of execution pending appeal. I am not sure what the plaintiff wants stayed, for the judgment simply dismissed his case for the reason that the issue had been decided in a previously instituted suit, which is the case **Kericho HCCC No. 32 of 1996**. In this suit, the plaintiff had claimed 2 acres out of the **land parcel No. 514**. That land no longer exists owing to execution of the decree in the case **Kericho HCCC No. 32 of 1996**. It was sub-divided into two portions so as to bring forth the **land parcels No. 1551 and 1552**. What then am I supposed to stay ? As mentioned by Mr. Mutai for the respondent this application has been overtaken by events and I do agree with that submission.

The upshot of the above is that I find no merit in this application. I hereby dismiss it with costs.

It is so ordered.

Dated, Signed and delivered on this 29th day of May, 2015

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Ms Chelangat holding brief for Mr. Motanya for Applicant

Mr. Joshua Mutai present for Respondents

C/A; Emmanuel