REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 335 OF 2012

LOISE CHEMUTAI NGURULE…….....……..1ST PLAINTIFF

JACOB ANGUYA NGURULE….....……...……..……2ND PLAINTIFF

VERSUS

WILFRED LESHWARI KIMUNG'EN….....……1ST DEFENDANT

WILFRED ABUYE KIMUNG'EN…….....…….2ND DEFENDANT

KENNETH ROTICH……..…….…….....…….……3RD DEFENDANT

RULING

(Application to lodge Notice of Appeal out of time; whether High Court and courts of equal status have jurisdiction to entertain such application; held that High Court and Courts of equal status have jurisdiction; proper case on the facts to allow the application; application allowed)

1. The application before me is that dated 3 March 2015 filed by the unsuccessful defendants. The application is brought under the provisions of Section 7 of the Appellate Jurisdiction Act, and Rules 12 and 42 of the Court of Appeal Rules and seeks the following prayers :-

> *1. spent*
>
> *2. That pending inter partes hearing and determination of this application, a stay of execution of the judgment of this Honourable Court delivered on 30th January 2015 together with all other consequential orders be and is hereby issued.*
>
> *3. That this application be heard and enlargement of time within which to lodge the notice of appeal be granted.*

2. The application is strongly opposed by the plaintiffs. Before I go to the gist of the application, I think it is necessary that I give a little background.

3. The suit itself was over the land parcel Nakuru/Mariashoni/980 which the 1st plaintiff claimed to be the owner. The 2nd plaintiff is son to the 1st plaintiff. What prompted the case was that the defendants moved into the land and started cutting down trees and threatened the plaintiffs with eviction. The defendants filed defence in which it was inter alia pleaded that the plaintiffs have no title documents to prove

ownership of the land and that the plaintiffs' entitlement was to another parcel of land. The case proceeded for hearing, and vide a judgment delivered on 30 January 2015, my predecessor, Lady Justice L.N. Waithaka, held that the plaintiffs have proved their case against the defendants. She also awarded the plaintiffs Kshs. 100,000/= as general damages for trespass and Kshs. 70,000/= being compensation for the cut trees. The plaintiffs also got costs of the suit. It is this judgment that the defendants intend to appeal. However, no Notice of Appeal was filed within the 14 days set out in the Rule 74 of the Court of Appeal Rules, hence this application.

4. In the supporting affidavit to the application, it is admitted that the defendants' then counsel, Mr. Peter Ogeto, was aware of the delivery of the judgment and that he did inform the defendants. It is averred that the defendants being aggrieved, instructed counsel to lodge an appeal. The defendants then visited the offices of Mr. Ogeto on 27 February 2015 to inquire on the position of the appeal, only to learn that the appeal had not been filed. This prompted them to withdraw instructions from him and they appointed the firm of M/s Geoffrey Otieno & Company Advocates to come on record on their behalf in place of the law firm of M/s Ogeto & Ogeto Advocates. It is averred that the mistakes of counsel ought not to be visited upon them, and that time needs to be enlarged, so that they may lodge the Notice of Appeal.

5. The application is opposed. The plaintiffs filed a Replying Affidavit sworn by the 2nd plaintiff and also filed a Notice of Preliminary objection. The arguments compassed in the Replying Affidavit and in the Preliminary objection are that, the defendants cannot seek stay of execution before the filing of an appeal; that the High Court has no jurisdiction to enlarge time as this is the preserve of the Court of Appeal; that Rule 12 of the Court of Appeal Rules allows the filing of documents even if these are late and therefore there is no need to seek leave to file the Notice of Appeal out of time; that no good reason has been given why three and a half months down the line, the applicants have not given any probable reason for not filing their Notice of Appeal.

6. Mr. Kanyi for the respondents, in support of the above, relied on the case of ***Halai & Another v Thornton & Turpin (1963) Ltd (1990) KLR 365,*** which held that stay of execution cannot be sought before filing of an appeal. He also argued that enlargement of time is contained in the Court of Appeal Rules and that Section 7 of the Appellate Jurisdiction Act is not applicable. It was further his view, that in any event, Rule 12 of the Court of Appeal Rules, does allow the filing of late documents and therefore it is not necessary to seek leave to file a Notice of Appeal out of time.

7. Mr. Geoffrey Otieno for the applicants submitted that this court has jurisdiction to entertain the application by virtue of the provisions of Section 7 of the Appellate Jurisdiction Act. It was his view that Rule 12 of the Court of Appeal Rules, in relation to receipt of late documents, is merely administrative.

8. I have considered the application and the rival arguments. Although a lot was said about the application being incompetent in so far as it seeks stay pending appeal before an appeal is filed, I think this is not what is sought in this application. It will be seen that the prayer for stay in this application, is not for stay pending appeal, but for interim stay pending hearing of this application. The application is not for stay pending appeal.

9. The substantive prayer in the application is for extension of time within which to file a Notice of Appeal. A Notice of Appeal is supposed to be filed within 14 days of the judgment as required by Rule 74 (2) of the Court of Appeal Rules. Judgment herein was delivered on 30 January 2015 and the 14 days for lodging the Notice of Appeal have lapsed. It was argued that there is no need to seek extension of time because Rule 12 of the Court of Appeal Rules does allow the receipt of late documents. That provision is couched in the following terms :-

Rule 12 Acceptance of documents lodged out of time

10. It is true that Rule 12 of the Court of Appeal Rules does allow the receipt of late documents, but the mere receipt of late documents, does not mean that any defect in the documents is cured. The fact that a late document may be received does not infer that the said document has been admitted out of time. The document is only received as it is, and as filed, but the court may reject the same as having been filed out

of time. The purpose of the provisions of Rule 12 is to remove discretion from Registry Staff to reject documents that have been filed out of time. They need to receive them as filed; Rule 12 does not oust the need to apply for extension of time to have admitted a document filed out of time. In fact it is necessary to apply for extension of time otherwise any document filed stands to be rejected as having been filed outside time. The argument that it is not necessary to seek leave for extension of time to lodge a Notice of Appeal out of time, simply because such late document will be received at the Registry, does not therefore hold any water.

11. It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of ***Simon Towett Martim v Jotham Muiruri Kibaru, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004)eKLR***. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to the Court of Appeal to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.

12. With respect I disagree with the above decision. Section 7 of the Appellate Jurisdiction Act, CAP 9, 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.*

13. It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.

14. Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned. That provision is drawn as follows :-

Rule 4 : Extension of time

> *The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior count, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.*

15. In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the Court of Appeal Rules which provides as follows :-

16. One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.

17. The matter indeed arose in the case of ***Kenya Airports Authority & Another vs Timothy Nduvi Mutungi, Court of Appeal, Civil Application NO. NAI 165 of 2013 (UR 113/2013) (2014) eKLR***. In the case, an application for extension of time to lodge Notice of Appeal was filed in the High Court and the High Court declined to hear it, instead asking the applicant to file the application in the Court of Appeal. Githinji JA, had this to say on that point :-

> *"The application of 10th December, 2012* (the application for extension of time to lodge Notice of Appeal out of time)*, was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal Rules* (sic) (clearly meant Section 7 of the Appellate Jurisdiction Act) *which provides :-* (Section 7 of the Appellate Jurisdiction Act set down)*… Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined…"*

18. It will be observed that the Court of Appeal did hold that the application for extension of time to lodge a Notice of Appeal out of time had been filed properly in the High Court and the High Court ought to have determined it.

19. I do not therefore agree with the argument that this court has no jurisdiction to entertain the present application in so far as it seeks extension of time to lodge a Notice of Appeal out of time. I will now go to the merits of the application.

20. The reasons given by the applicants is that they instructed their erstwhile counsel to file a Notice of Appeal but this was not done. When they went to see the advocate, 27 days after the judgment, they realized that no Notice of Appeal had been filed and they then instructed their current advocates. This is what prompted this application which was filed on 5 March 2015, 36 days after judgment and 22 days after the expiry of the period for lodging the Notice of Appeal. In my view, the delay is well explained and is not inordinate. On the merits, I am of the view that good reason has been provided and the application ought to succeed.

21. I therefore allow the application, and extend time to the defendants to lodge their Notice of Appeal out of time. I further direct that the Notice of Appeal be filed and served within the next 14 days.

22. On costs, the applicants will shoulder the costs hereof.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of May 2014

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:-

Mr Geofrey Otieno for defendants/applicants.

Mr Kanyi for the plaintiff/respondents.

Court Assistant: Janet.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU