



IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L MISC APPLICATION NO. 39 OF 2013

Formerly HMCA 107 OF 2013

KIPRUTO MUTAI.....DEFENDANT/APPLICANT

VS

TINGA KOBOT KABUNOT.....PLAINTIFF/RESPONDENT

RULING

(Application for leave to file appeal out of time and for stay pending appeal; principles to be applied; S. 79G Civil Procedure Act; Application filed close to 3 years after decision; applicant opting to file another suit instead of filing appeal; whether the subsequent suit was a mistake of counsel; no good and sufficient cause shown; application dismissed.)

The application before me is a Motion dated 12 July 2013. It basically seeks two orders :-

- (a) Enlargement of time for purposes of filing an appeal out of time.
- (b) A stay of the judgement and decree pending appeal.

The application is supported by the affidavit of the applicant and is opposed by the respondent who has filed a replying affidavit of her own.

The background to this application is as follows.

The applicant was defendant in the suit Kapsabet Principal Magistrate's Civil Suit No. 37 of 2008 which had been filed by the respondent. In the suit, the respondent as plaintiff, sought the following principal orders which I have paraphrased:-

- (a) The removal of a caution placed by the defendant (applicant herein).
- b) A permanent injunction to restrain the defendant from the land parcel Nandi/Baraton/214.

The applicant as defendant, filed a counterclaim in which he contended that the plaintiff held the land in trust for him. The applicant is the step-son of the respondent. After a full hearing of the matter, the trial magistrate held for the plaintiff (respondent herein) and dismissed the counterclaim by the defendant (applicant herein). The judgement was read on 30 September 2010, in the presence of counsel for the defendant. The court recorded a right of appeal within 28 days.

The applicant, as the unsuccessful defendant, did not file the appeal within the days given or at all. Instead, he filed another suit in the High Court at Eldoret, being Eldoret HCCC No. 56 of 2011, which was later transferred to the Environment & Land Court and registered as Eldoret E&L No. 703A of 2012. In that suit, the applicant sought to claim the land parcels Nandi/Baraton/214 and Nandi/Baraton/1534 by way of adverse possession. The respondent, vide an application dated 10 June 2011, sought to have that suit struck out as being an abuse of the process of court. The application was heard, and vide a ruling delivered on 13 March 2013, I dismissed that suit as being an abuse of the process of court. It was my view, that there being a court order permanently barring the applicant from the land parcel No. Nandi/Baraton/214, he could not claim adverse possession over it, since any occupation of the land would be in contempt of court and could be said to be quiet possession. Neither did I see any deposition in the supporting affidavit to the Originating Summons claiming adverse possession, which demonstrated any occupation of the land parcel Nandi/Baraton/1534. For those reasons, I thought that the suit was clearly misguided and I dismissed it.

The applicant has now filed this application, seeking to be allowed to file appeal out of time from the original judgement of the Kapsabet court, which as I have stated, was read on 30 September 2010. This application was filed on 17 July 2013, which is close to three years after the judgement. The grounds upon which this application is based are that :-

- (1) *The respondent herein filed suit against the applicants in the year 2008.*
- (2) *The claim before the court concerned land namely Nandi/Baraton/214 whose value in 2008 exceeded Kshs. 2,000,000/= and as such the Court to which the case was filed lacked the requisite pecuniary jurisdiction as per provisions of Section 159 Registered Land Act, Chapter 300, Laws of Kenya.*
- (3) *The learned trial Magistrate erroneously dismissed the counterclaim which specifically pleaded a trust in favour of the applicant.*
- (4) *The delay in lodging appeal was not the making of the applicant and he should not be penalized for the delay.*
- (5) *Instead of lodging an appeal a suit for adverse possession was wrongly filed before the High Court.*
- (6) *That it is trite law that the mistake of an advocate should not be visited upon the client.*
- (7) *The proposed appeal has high chances of success.*
- (8) *Leave to appeal out of time should be granted in the interest of justice.*
- (9) *The land in issue Nandi/Baraton/214 belonged to the late Kimutai Bwalei and ought to have been distributed to the dependants in line with Nandi traditional customs as the Law of Succession Act had not yet come into force.*
- (10) *The respondent will not be prejudiced in any way.*

In his supporting affidavit, the applicant has averred that after the judgement in the Kapsabet case, he was "not adequately advised on the proper way forward" and instead of lodging an appeal, a suit for adverse possession was filed. He has averred that he has now sought wise counsel and he has been advised that the proper route ought to have been to file an appeal on the issue of jurisdiction and trust. He has pleaded that the mistakes of his previous counsel ought not to be visited upon him. Perhaps to demonstrate that he stands to suffer loss if stay of the judgement is not granted, he has deponed that no execution of the Kapsabet decree has been effected, but that if it is effected, he will have no access to his tea plantation and house which are on the land parcel Nandi/Baraton/214 (the suit land). He has deponed that the land was owned by his late father and that no succession was ever done.

In her response, the respondent has inter alia averred that after judgment, the decree was registered at the land's office in Nandi and that the applicant then proceeded to pay the costs of the suit. She has averred that the suit land is in a rural area and its value cannot exceed Kshs. 500,000/=. She has further deposed that the issue was canvassed in the proceedings, and although she has sought to annex a ruling as annexure TKK-5, no such ruling was annexed. She has alluded to the suit for adverse possession and has pointed out that the same was dismissed. It is her view that the intended appeal is an abuse of the process of court, and that counsel who filed the suit for adverse possession had full instructions, and that the allegation of mistake of counsel is "neither here nor there". It is deposed that the applicant is engaged in a fishing expedition to find a court that will give him the suit land yet he has no claim whatsoever. It is further stated that there is no genuine reason given for the delay in not filing the appeal within time.

In his submissions, Mr. C.F. Otieno, counsel for the applicant, submitted that the applicant has a good case on appeal, inter alia because the value of the subject matter exceeded the jurisdiction of the Magistrate's Court, and therefore the court had no jurisdiction. He further submitted that the choice to file the suit for adverse possession cost the applicant time. He stated that the decision was that of counsel and that it is trite law that the mistake of counsel should not be visited upon the client. He further argued that the applicant has met the conditions for stay pending appeal. On the issue of jurisdiction, counsel relied on the cases of *Wasike v Swala (1985) KLR 425* and *Econet Wireless Kenya Ltd v The Minister for Information & Communications of Kenya & Another, Nairobi Miscellaneous Application No. 1640 of 2003*. He also referred to the case of *Maritim v Kibaru (2005) 2 EA 162* as setting out the matters to be considered in an application seeking extension of time to file appeal out of time.

On the other hand, Mr. Magare for the respondent, argued that the applicant has not met the test, so as to be allowed to file appeal out of time. He referred to the cases of *Niazsons (K) Limited v China Road and Bridge Corporation, Nairobi Civil Application No. 109 of 2000* and *Amran Ahmed Musa v Sikany Lengeny & Another, Nakuru High Court Misc. Civil Application No. 151 of 2012*. It was his view that the delay is too long, that the reasons for the delay are not plausible, that the appeal is hopeless, and that there will be great prejudice occasioned to the respondent.

It is with the above background and submissions that I need to decide this application. It will be noted that the application is two pronged as it seeks leave to file appeal out of time, and a stay of execution pending appeal. It follows that if I am to deny the leave sought, then I need not decide on the issue of stay pending appeal, since no appeal will be filed. I will therefore first proceed to determine whether the applicant is deserving of the order to appeal out of time.

The relevant provision of the law is Section 79G of the Civil Procedure Act, CAP 21, Laws of Kenya, which provides as follows :-

S. 79 G 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.

Although the learned trial magistrate gave the applicant 28 days within which to appeal, the respondent could as of right, file an appeal within 30 days as noted in S.79 G above. It will also be noted that the court has discretion to admit an appeal out of time, if the appellant satisfies the court that he has good and sufficient reason for not filing appeal within time.

Both counsels are in agreement about the matters that may guide the court in an application of this nature. Mr. Otieno cited the case of *Maritim v Kibaru* whereas Mr. Magare cited *Niazsons v China Road*. Both are court of appeal decisions. In both cases it was held that the power to allow a litigant to file appeal out of time is discretionary, but four issues need to be taken into consideration. These are :-

- (a) The length of the delay.
- (b) The reason for the delay.
- (c) (Possibly) the chances of success of the appeal; and
- (d) the degree of prejudice to the respondent.

These principles had earlier been pronounced in the case of ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No. NAI 255 of 1997.***

We have already seen that the judgment sought to be appealed against was delivered on 30 September 2010 and that this application was filed on 17 July 2013. Close to three years had lapsed before this application was filed. That by any definition is a significant duration of time taking into consideration that the prescribed period within which to lodge an appeal is 30 days. I find that to be an inordinately long time, which if good reason is not given, the application ought to fail.

There is only one reason given for the delay, which is that the applicant was misadvised to file a new suit for adverse possession instead of pursuing an appeal. It has been stated that this was a mistake of counsel which should not be visited upon the applicant. I do not think so. The decision to file the suit for adverse possession cannot be said to have been a choice of counsel but that of the applicant. An advocate works on instructions, and it has not been said that counsel proceeded to file suit for adverse possession despite being instructed not to do so. True, counsel may and ordinarily do advise on the avenue to take, but once a litigant pursues the avenue prescribed, that decision is not a decision of counsel, but a decision of the litigant. It is not the advocate who instructs the litigant but the litigant who instructs counsel. This is so, even in instances where the litigant is following the advice of his advocate. It follows that the litigant must bear the full consequences of the decision and cannot be heard to complain that he was mis-advised. It cannot therefore be argued that the ill advice provided to the applicant by his counsel, was a mistake of counsel. The applicant decided to gamble on the suit for adverse possession, which gamble badly backfired. He made his bed and he must lay in it and I am not convinced that good reason has been given for the delay. Although the applicant has contended that the respondent will not suffer prejudice, it is not difficult to see that the respondent will indeed suffer great prejudice. Given my above findings, I do not think that it is necessary for me to go into whether the applicant has a good case on appeal.

From the foregoing, I am not persuaded that the applicant has shown *good and sufficient cause* for not filing the appeal within time.

Having found that there is no good and sufficient cause for not filing the appeal within time, it follows that the prayer for leave to file appeal out of time must fail and it is hereby disallowed.

With that, the prayer for stay pending appeal must inevitably fail. It is also disallowed.

The net effect is that I find no merit in the subject application. I proceed to dismiss the same with costs to the respondent. For the avoidance of doubt, all interim orders are hereby vacated.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF JUNE 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

1. ***Miss S.W. Karuga h/b for M/s. C.F. Otieno & Company Advocates for the applicant***

2. Mr. J.K. Korir h/b for M/s. Magare & Company advocates for the respondent