



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 66 OF 2019

BETWEEN

MARIA MUTISYA.....APPLICANT

AND

KIENZL HEMUTH.....RESPONDENT

(Being an application for extension of time within which to file record of appeal against the Judgment of the Environment and Land Court at Mombasa (Yano, J.) delivered on 20th September, 2018 in ELC No. 8 of 2015)

RULING

1. In a judgment delivered on 20th September 2018, the Environment and Land Court at Mombasa allowed the respondent's suit against the applicant and declared that the property known as Subdivision Number 1723 (Original No. 386/11) Section III Mainland North, which was until then registered in the joint names of the parties, belongs to the respondent solely. The court ordered that the name of the applicant be expunged from the entries in the lands office and that the applicant be restrained, by permanent injunction, from dealing with or interfering with the property. It was the applicant's case that the property belonged, jointly, to the applicant and herself, having purchased it as husband and wife.
2. Dissatisfied with the judgment, the applicant duly filed a notice of appeal dated 21st September 2018 through the firm of Wandai Matheka & Co Advocates. By a letter dated 8th October 2018, filed before the ELC on 9th October 2018, the applicant, through the firm of Okanga & Company Advocates applied to the Deputy Registrar for certified copies of the proceedings and judgment. Over 10 months later, the present application was on 1st August 2019 filed by the firm of Gicharu Kimani & Associates seeking an order for extension of time within which to file her record of appeal.
3. Urging the application before me, learned counsel for the applicant **Mr. Gicharu Kimani** referred to the grounds in support of the application appearing on the face of the application and his supporting affidavit and urged that the delay in filing the record of appeal was occasioned by the applicant's "*erstwhile advocate on record*" whose mistake should not be visited on the applicant.
4. Opposing the application, **Ms. Omollo**, learned counsel for the respondent referred to a replying affidavit sworn on 16th August 2019 in which the respondent depones that the application is overtaken by events in that he no longer owns the property having sold and transferred the same.
5. It was urged that the applicant should first furnish security for costs arising from an application that was dismissed by the ELC; that the firm of Gicharu Kimani & Associates is not properly on record in this matter; that in any event no explanation has been given why the appeal was not filed in time; that whilst blame is attributed to "*the applicant's erstwhile advocate*" there is pending before the Court at Mombasa, Civil Application No. 50 of 2019 filed on behalf of the applicant by Ms. Okanga & Company Advocates seeking an order of stay of execution of the very judgment the subject of the present application.
6. In his brief reply, Mr. Gicharu conceded that there is indeed pending before the Court at Mombasa, Civil Application No. 50 of 2019 being an application by the applicant through the firm of Ms. Okanga & Company Advocates seeking an order of stay of execution of the judgment the subject of the intended appeal but argued that that application is not properly before the Court as there is no appeal.
7. I have considered the application, the affidavits and the rival submissions. For a start, it has been brought to the attention of the Court by

the respondent that the applicant, for reasons that are not clear, has engaged the firm of Gicharu Kimani & Associates to present the present application whilst at the same time retaining the firm of Okanga & Company Advocates to prosecute, in a parallel application in the Court at Mombasa, an application for stay of execution in respect of the same matter. This is untenable and an abuse of the court process which can result in the Court giving contradictory orders in the same matter. The applicant should determine which firm of advocates represents her in the matter but cannot have separate firms pursuing different applications in different fora over the same matter. On that basis alone I would strike out the present application with costs to the respondent.

8. Even if I was to consider the present application on merits, all the applicant says is that the delay in filing the record of appeal was occasioned by her “*erstwhile advocate on record*”. It is unclear what is meant by that sweeping statement. Besides, the so-called “*erstwhile advocate*” is the same firm of advocates that continues to act for the applicant in Civil Application No. 50 of 2019 at Mombasa.

9. As the Supreme Court of Kenya stated in ***Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR*** extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

10. If I was to consider the applicant’s application on merits, it is not evident that the applicant has laid a basis for the exercise of the Court’s discretion in her favour.

11. However, having concluded that the application before me is incompetent, I will refrain from expressing concluded views on the merits or otherwise of the application.

12. The application presented by the applicant herein on 1st August 2019 is hereby struck out with costs to the respondent.

Dated and delivered at Nairobi this 3rd day of April, 2020.

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

I certify that this is a true *copy of the original*.

Signed

DEPUTY REGISTRAR