



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OUKO, (P) (IN CHAMBERS))**

**CIVIL APPLICATION NO. 5 OF 2020**

**BETWEEN**

**MOSES MBUGUA MEHTA.....APPLICANT**

**AND**

**KENYA COMMERCIAL BANK LTD .....1<sup>ST</sup> RESPONDENT**

**FAIZA ABDALLAH SAID AL ARMY.....2<sup>ND</sup> RESPONDENT**

**WARDA A. SAID AL ARMY.....3<sup>RD</sup> RESPONDENT**

*(Being an application for leave to file Notice of Appeal out of time and stay the*

*judgment of the High Court at Mombasa (A.Omollo, J) dated 27<sup>th</sup> November, 2019*

*in*

*Civil Case No. ELC No. 440 of 2017)*

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**RULING**

The applicant defaulted in the repayment of a mortgage facility advanced to him by the 1<sup>st</sup> respondent. Consequently, the 1<sup>st</sup> respondent exercised its statutory power of sale and sold the suit property known as L.R No. MN/1/14414 (Originating Number 11179/8 Section 1 Mainland North) to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent through a public auction. The sale took place on 20<sup>th</sup> December, 2013.

On 7<sup>th</sup> January, 2014, the applicant instituted an action together with an application for, *inter alia*, an injunction to restrain the 1<sup>st</sup> respondent from transferring the suit property to a third party, taking possession or interfering with the suit property and; a declaration that the sale of the property was unlawful, illegal and to have the sale set aside.

In a ruling made on 13<sup>th</sup> February, 2014 the trial court ordered the maintenance of *status quo* between the applicant and 1<sup>st</sup> respondent pending the hearing and determination of the suit. By the time this ruling was delivered, the suit property had already left the hands of the 1<sup>st</sup> respondent on 13<sup>th</sup> January, 2014 in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

The judgment itself came on 27<sup>th</sup> November, 2019 wherein the Environment and Land Court allowed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' counter-claim against the applicant with the result that: a permanent injunction was issued against the applicant restraining him, his agents, servants or employees from entering, trespassing, harassing or in any other manner interfering with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' right of ownership and interest of the suit property; an injunction ordering the applicant to vacate or be evicted from the suit property; an award of *mesne* profits to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents at Kshs. 80,000 per month from 10<sup>th</sup> February, 2017 until vacant possession was delivered to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and; the applicant was granted 60 days from the date of judgment to voluntarily surrender vacant possession or face eviction. The respondents were awarded costs of the suit.

The applicant was aggrieved but did not take the necessary steps to challenge within 14 days the decision against which he desires to appeal. He was required by **Rule 75(2)** of the Court of Appeal Rules to have given to the respondents a notice of his intention to appeal the decision.

Where a party, like happened here fails to give a notice of intention to appeal, **Rule 4** gives the Court the discretion to extend time to enable the party give notice. It is a discretion exercised on behalf of the Court by a single judge. It is wide and unfettered. See **Leo Sila Mutiso vs. Rose Wangari Mwangi** (1999) 2 EA 231.

It is pursuant to that window that the applicant now approaches the Court in an omnibus application for extension of time and for stay of execution of the judgment. The power to determine an application for stay of execution is not within the jurisdiction of a single judge, accordance to **Rule 5(2)(b)** of this Court's Rules. What is properly before me is the prayer for enlargement of time within which to file the notice of appeal.

Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. See **Athuman Nusura Juma V. Afwa Mohamed Ramadhan**, CA No 227 of 2015.

According to the applicant the delay in filing the notice of appeal was for 10 days and a further 10 days in bringing this application. The reasons proffered for delay was that the judgment was delivered on 27<sup>th</sup> November, 2019 in the absence of the applicant's advocates; that the applicant's advocates were never notified of the date of delivery of the judgment; that it was not until 19<sup>th</sup> December, 2019 that the applicant's advocates became aware of the judgment upon being served with a letter from the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's advocates requesting for approval of the draft decree; that on 20<sup>th</sup> December, 2019 the applicant's advocates wrote 2 letters to the Deputy Registrar of the High Court at Mombasa one inquiring as to how the respondent's became aware of the judgment and another, an explanation as to why the judgment was delivered without notification of the applicant. No explanation was received. However, on the same day the applicant's advocates requested for a copy of the judgment and proceedings and on 27<sup>th</sup> December, 2019 the applicant's advocates filed a notice of appeal. By this time, the time within which this ought to have been done had lapsed. Based on that background, the applicant explained that the delay could not be attributed to him or his advocate; that this application and the record of appeal have been filed without undue delay and that the intended appeal has high chances of success.

The 1<sup>st</sup> respondent opposed the application on the ground that the delay has not been sufficiently explained and that in any event no decree has been issued in the matter; that the 1<sup>st</sup> respondent has not been served with any notice of appeal **contrary to the provisions of Rule 77(1)** of the Court of Appeal Rules which requires that service of such notice of appeal be effected to affected parties within 7 days after lodging of the notice of appeal.

Further, it was contended that the applicant has not been able to demonstrate that his appeal is arguable, especially following the sale of the suit property on 20<sup>th</sup> December, 2013 after the applicant admitted that he had defaulted in the repayment of the loan and when it was in arrears; the statutory notices were sent by registered post to the applicant's last known postal address; that there was no evidence of fraud or illegality alleged against any of the respondents or any allegation that the suit property was undervalued to benefit the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents equally opposed the application. It was their position that the notice of appeal was filed 30 days out of time; that the allegation that the applicant was not served with a notice of delivery of judgment is false as the trial court duly issued such a notice; that the applicant has no valid reason for the delay and the reasons given are not plausible; that allowing this application would prejudice the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who have not collected rent since they purchased the property in 2013 but continue to pay land rates while the applicant is still in possession of the suit property.

On the chances of success, it was posited that the intended appeal has no merit for the reason that the applicant was in default of the loan facility advanced to him by the 1<sup>st</sup> respondent; that the 1<sup>st</sup> respondent lawfully exercised its statutory power of sale and sold the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents by public auction; that the applicant sued the 1<sup>st</sup> respondent after the auction had taken place on 20<sup>th</sup> December, 2013 and the registration of transfer of the property done on 13<sup>th</sup> January, 2014 when there was no order stopping the registration. Again, the order of *status quo* between the applicant and 1<sup>st</sup> respondent came on 13<sup>th</sup> February, 2014, by which time, again, the suit property had left the hands of the 1<sup>st</sup> respondent; that the doctrine of *lis pendens* did not apply to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents since they were not parties to the pending suit by then.

It was submitted that the sale by public auction was lawful, the applicant was served with a statutory notice of sale dated 18<sup>th</sup> March, 2013 by way of registered post and the 1<sup>st</sup> respondent was issued with a certificate of postage which address the applicant confirmed belonged to him as such the appellant does not have an arguable appeal. It was posited that in any event, the applicant still has a recourse against the 1<sup>st</sup> respondent if the exercise of power of sale was to be found to be irregular.

I reiterate that the judgment was delivered on 27<sup>th</sup> November, 2019. Therefore, the last day of filing the notice of appeal was 11<sup>th</sup> December, 2019 which is 14 days as required by the provisions of **Rule 59(1)**. The applicant has to explain the reason for delay between 12<sup>th</sup> December, 2019 and 27<sup>th</sup> December, 2019 when he filed the notice of appeal and the delay thereafter between 27<sup>th</sup> December, 2019 to 10<sup>th</sup> January,

2020 when he filed this application. According to the applicant, the delay in filing the notice of appeal was 10 days while that of filing the application was 10 days. The 2nd and 3rd respondents estimate the delay to be 30 days. It will be noted that part of the period in question fell within Christmas recess hence **Rule 3 (e)** applied. It provides for computation of time as follows:

**“Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions—**

**(e) unless the Court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time.”**

Accordingly, the length of delay was only 8 days, excluding the public holiday on 12<sup>th</sup> December as well as the Christmas recess. Furthermore, the applicant, having filed this application on 10<sup>th</sup> January, 2020, which was still within the recess period, the rest of the days between 27<sup>th</sup> December, 2019 when he filed the notice and 10<sup>th</sup> January, 2020 are excluded. The total length of delay remains 8 days. An excess of 8 days out of 14 days is not, by any measure, inordinate.

The reasons proffered for delay are hinged upon the fact that the applicant was not served with the notice of delivery of the judgment; that he only learnt that the judgment had been delivered on 19<sup>th</sup> December, 2019, some 22 days later, upon being served with a letter from the 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ advocates requesting for approval of the draft decree. Annexed to the application are correspondence from the applicant’s advocates to the advocates of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as well as to the Deputy Registrar complaining that the judgment was delivered on 27<sup>th</sup> November, 2019 without any notice to the applicant.

From my perusal of the record, the respondents closed their case on 13<sup>th</sup> February, 2019 and directions were taken that parties to exchange and file written submissions. When the case was mentioned on 9<sup>th</sup> April, 2019, it was noted that the applicant had not complied with the directions. On a further mention on 13<sup>th</sup> June, 2019, there was no appearance by the applicant or counsel, while all parties were represented. Onesmus, who was holding brief for Mr. Maina for the 1<sup>st</sup> respondent was categorical that he was not holding brief for Mr. Wachira for the applicant. In addition, save for the applicant, all the other parties had their written submissions on record. According to the record, Omollo, J gave a blanket leave to the applicant to file his submissions by 30<sup>th</sup> August, 2019 and reserved 17<sup>th</sup> October, 2019 as the date for delivery of the judgment. Judgment was, however, not delivered as scheduled on 17<sup>th</sup> October, 2019 but instead on 27<sup>th</sup> November, 2019. On that day, apart from Mr. Mwakirete for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, no other party was represented in court.

It follows from the above account that the initial judgment date was taken in the absence of the applicant; that there is no proof that he was served with the notice for the ultimate date; and finally that upon getting to know that the judgment was delivered, he protested and straight away filed the notice and the record of appeal. What can be concluded from these events is that the applicant was rather slacken in filing his submissions, he was, upon learning of the judgment, keen to challenge it. No doubt the resolution of this dispute has taken over 5 years, during which parties must take equal blame, as they filed application after application. Two suits were filed in Mombasa and in Nairobi before the latter was ultimately transferred to Mombasa.

As I have indicated, it cannot be for a single judge to determine the chances of success of the intended appeal. However, there are issues such as the award of *mesne* profits, service of the statutory notice on the applicant, notification of sale, among others, which, in my respectful view, are not idle.

For these reasons, this application succeeds. The notice and record of appeal, already filed, are deemed to be properly filed. The applicant to serve the respondents with them within 14 days from the date of this application. Costs will be in the appeal.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2020.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**