IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 190 OF 2018

BETWEEN

NAIROBI CITY COUNTY.....APPLICANT

AND

SALIMA ENTERPRISES LIMITED.....RESPONDENT

(Being an application for stay of execution pending an appeal under ***Rule 5 (2)(b) of the Court of Appeal Rules*** *in*

ELC Case No. 1144 of 2013)

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RULING

The respondent, who is the registered owner of L.R. No. 1870/IX/170-Westlands, Nairobi, sued the applicant claiming that the latter, having expressed an interest in purchasing the suit property failed to complete the transaction but instead, sometime in June, 2013, forcefully moved on to the suit property and embarked on the construction on it of what was marked as Westlands Market; that the applicant's officers, together with the contractor, totally blocked the respondent from accessing the suit property and fenced it off; that in the process, it was denied rent that would have accrued from the space estimated at Ksh 200,000 per month; and that the suit property was, at the time the case was filed, valued at Ksh 325,000,000/=. Contending that the applicant's actions amounted to forceful acquisition without compensation, the respondent prayed for judgment for;

i. Mesne profits in the sum of Ksh 200,000/= per month with effect from 1st June, 2013 till the applicant vacates.

ii. An order of injunction restraining the applicant, its servants, workmen, licensees, agents or any other person acting on its behalf from howsoever trespassing, entering, encroaching, remaining in, taking over, dispossessing, alienating, reclaiming and or harassing the respondent or interfering with its peaceful entitlement and possession of the suit property.

iii. An order to pull down any structures erected by the applicant on the suit property.

iv. In the alternative, the respondent prayed that the applicant be compelled to compensate it in the sum of Kshs. 325,000,000/= or such other appropriate market value.

v. General damages, costs and interest thereon.

The plaint was served on the applicant who entered appearance but failed to file a defence. Satisfied from the affidavit of service sworn by Kennedy Mugo, a process server, to the effect that he served the plaint upon Mr. Wanyonyi Advocate of COOTOW & Associates who were on record for the applicant, the learned Judge, Gitumbi, J. granted a request for judgment on 23rd January, 2013, and the respondent was directed to set the suit down for formal proof.

After hearing Hanif Ali Gulam, one of the respondent's directors and Kimani Mbugua Mkunga, a valuer from the firm of Transcountry Valuers Limited, who estimated the value of the suit property at Kshs. 325,000,000, the Judge was convinced that the respondent had demonstrated that it owned the suit property after producing a certificate of title and a certificate of search confirming that it was the registered proprietor of the suit property; and that from the photographic evidence showing on-going construction on the suit property, the applicant had wrongfully dispossessed the respondent of the suit property.

For these reasons, the Judge was satisfied that the respondent was entitled to compensation for the illegal dispossession and awarded Kshs. 325,000,000, being the market value of the suit property. She also awarded Kshs. 200,000 per month from 1st June, 2013 to the date of the judgment for mesne profits.

The costs of the suit was to be borne by the applicant.

This decision was rendered on 4th July, 2014.

On 22nd July, 2014, the applicant approached the court below for orders that the execution of the orders made in the ruling of 4th July, 2014 be stayed pending the hearing and determination of the application; that the court be pleased to issue an order that the Attorney General be joined in the suit; and that the judgment dated 4th July, 2014 be set aside and/or reviewed and applicant be granted leave to defend the suit. The applicant also prayed that the draft defence annexed to the application be deemed to have been duly filed upon payment of the requisite filing fees.

The applicant explained that upon being served with the suit, it instructed the firm of Cootow & Associates Advocates to take up the conduct of this matter; that the law firm filed a Memorandum of Appearance on 30th September, 2013 after which it wrote various letters to the applicant for instructions and information to enable them to defend the suit, which letters were drawn to the attention of one of the applicant's employee by the name Abwao Erick Odhiambo a staff in the legal department of the applicant; that the officer took no action with the result that time elapsed. This conduct led the applicant to initiate internal investigation into the issue with a view to commencing disciplinary measures against any person who may have deliberately concealed the information. As a result of these reasons, the law firm did not have the relevant information and materials to enable it to defend the action to which it had a strong defence.

In her ruling of 12th June, 2015, the learned Judge set out **Order 10 Rule 11** of the Civil Procedure Rules, 2010 as the basis for the exercise of her judicial discretion. The Order provides that:

> **"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."**

On the merit of the application, she first observed that she was disappointed by the failure of the applicant to defend the action bearing in mind the sums of money claimed by the respondent would ultimately be paid by the taxpayers, and that ;

> **"..unfortunately, the defendant failed to file a defence and, though represented in court during every single court appearance including the hearing, the Defendant remained a spectator in this suit. I have carefully considered the reason advanced by the Defendant/Applicant as to why they failed to defend this suit. The reason given is that the employee mandated to handle this matter failed to inform other persons who are not named who presumably have the authority to give instructions in this matter. It appears that even the counsel for the Defendants, Cootow & Co. Advocates, were frustrated by the failure of the Defendant to give them instructions on how to defend this suit. On the other hand, the Plaintiff took all the necessary precautions to ensure that the Defendant was aware of these proceedings and they prosecuted their suit with diligence. In the circumstances, I have to say that I do not consider it just to interfere in any way with the Judgment entered herein. The Defendant has failed to convince me that they deserve to have this court's discretion exercised in their favour. The internal problems and issues that the Defendant is facing cannot be used as an excuse to deny the plaintiff justice".**

With that, the application for setting aside the judgment was dismissed on 12th June, 2015 with no orders as to costs.

This outcome aggrieved the applicant. Under **Rule 4** By **Rule 75(2)** of the Court of Appeal Rules, the applicant was required to give to the respondent a notice of their intention to appeal the decision within 14 days of the decision. They did not do so and instead took out this motion on 29th June, 2018 under **Rules 4** and **5(2)(b)** of the Court of Appeal for orders that it, (the applicant), be permitted to file the notice and record of appeal out of time to challenge the decision made on 12th June, 2015; and that in the meantime, there be an order of stay of execution. The last prayer is beyond a single judge's remit.

The power to extend the time for filing a notice of appeal or record of appeal is essentially discretionary.

By **Rule 4;**

> **"The Court may, <u>on such terms as it thinks just,</u> by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these 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".** (Emphasis).

In exercising it, the matters that a single Judge may take into account include, the length of the delay, the reason for the delay, the degree of prejudice and (possibly), the chances of the appeal succeeding if the application is granted.

See **<u>Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi</u>** (1999) 2 EA 231.

On the delay, it must be borne in mind that the first step ought to have been taken within 14 days from 12th June, 2015. The application should have been lodged the notice of appeal on or before 6th July, 2015. This application has been brought after a delay of three years. By any standards, to wait for three years for the doing of an act one was required to do in 14 days is clearly inordinate. The respondent could be excused for having believed that no appeal would be proffered, having waited for it for 3 years. It is five years since the decision was made. To enlarge time, five years later to do what ought to have been done 14 days from June, 2015, will no doubt be prejudicial to the respondent.

What reasons has the applicant given for the delay? It is averred that the applicant's erstwhile advocates failed to inform it of the decision sought to be appealed against; that immediately it discovered this, it promptly instructed its current advocates; that the subject matter of the intended appeal is an *ex parte* judgment in which the court below granted the respondent compensation in the sum of Kshs. 325,000,000/= and *mesne* profits of Kshs. 200,000/= per month since 2013; that the intended appeal has overwhelming chances of success as the suit property was vested in the applicant in 1965 by the Ministry of Lands for the purpose of construction of a market; that the suit property was unlawfully transferred to the respondent; and that should it fail to obtain leave to challenge the decision in question, it will suffer substantial loss.

Apparently, after the judgment, the respondent sought its enforcement through H.C. Misc. C. No. 309 of 2015 (J.R) in which it was represented by Kithi & Co. Advocates. The applicant fully participated by filing affidavits on 30th November, 2015 and 10th February, 2016. That application was likewise dismissed in a decision of 7th June, 2016.

In the first place, the applicant has not disclosed when exactly it learnt that the ruling had been delivered. That date was crucial in computing time for consideration whether the delay was prolonged or not. It has also not disclosed that, throughout the period in question, it took part in H.C. Misc. C. No. 309 of 2015 (J.R), brought to court in September, 2015. Clearly, it cannot be true that the applicant was not aware of the outcome of its application for the setting aside of the judgment. The applicant had opportunity to bring this application earlier and within the year (2015). It is strange that before this Court the applicant is making the very mistake it made in the court below, treating this important matter in a casual and indifferent manner.

No plausible explanation has been offered for the prolonged delay. Every delay of even one day must be explained. The Supreme Court in the case of **County Executive of Kisumu vs. County Government of Kisumu & 8 others,** Civil Application No. 3 of 2016 stressed this fact as follows;

> **"[23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court."** (My Emphasis)

See also, **Moses Onchiri (Suing on behalf and in the interest of 475 persons being former inhabitants of KPA, Maasai Village within Nairobi) vs. Kenya Airports Authority & 4 others,** (2019) eKLR.

The final consideration is, whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity. By taking into account the prospects of the intended appeal, a single Judge cannot determine definitively the merits of the intended appeal. It is only the full court that is authorized to do that after hearing the representations in the appeal. In **Athuman Nusura Juma vs. Afwa Mohamed Ramadhan,** CA No 227 of 2015, this Court warned that a single judge must exercise care in considering whether the intended appeal has merit as that question can only be determined with finality by a full bench. That explains why, in virtually, all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word **"possibly"**.

The High Court in a judgment rendered on 7th June, 2016 in H.C. Misc. C. No. 309 of 2015 (J.R), ordered the issuance of *mandamus* against the respondents in that application, which included the respondent herein, compelling them to;

> **"immediately pay the sum of Kshs 325,000,000.00 mesne profits of Kshs 200,000 per month with effect from 1st June, 2013 till payment in full, costs of Kshs. 6,744,612.00 plus accrued interests at 12% p. a. with effect from 4th July, 2014 till payment in full as decreed in Nairobi HC ELC 1144 of 2013 Salima Enterprises Limited vs. Nairobi City County".**

There is an averment that against this decision, a notice of appeal was lodged. Its status is not apparent. The concern is; even if time was extended to file a notice of appeal as sought in this motion and the above orders have not been set aside, no purpose will be served.

Secondly, this Court (Omolo, Pall, JJ.A. & Bosire Ag. JA) in a judgment issued on 24th day of October, 1997 in the case of **Nairobi Permanent Markets Society & 11 others vs. Salima Enterprises & 2 others** [1997] eKLR, which involved the applicant's predecessor, found that the respondent was the registered proprietor of the suit property and had the absolute and indefeasible title since there was no allegation it was a party to any fraud or misrepresentation or that it had any knowledge or was a party to any irregularity in the transaction.

Then there is the evidence that in January, 2018, the applicant settled part of the claim to the extent of Kshs. 125,000,000/=; that subsequently on 9th January, 2018, the applicant and the respondent recorded a consent in which it was agreed that the outstanding sum of Kshs. 600,000,000/= (all inclusive) would be paid in full within 21 days of the date of the consent and in default, execution would ensue. Looking at all these and without expressing any firm view, it is doubtful if the intended appeal would have a chance of success.

Accordingly, the application fails and is dismissed. I make no orders as to costs.

Dated and delivered at Nairobi this 5th day of June, 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