



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: HANNAH OKWENGU, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 5 OF 2017

BETWEEN

STEPHEN CHERUIYOT CHERONO.....APPLICANT

AND

KENNETH KIPTUM KANDIE.....RESPONDENT

(Application for leave to file a notice of appeal and file a record of appeal out of time against the decision of (Ombwaya, J.) made on 12th July, 2016

in

Eldore E & L Court Case No. 366 of 2015)

RULING

[1] By a notice of motion dated 9th December, 2016, **Stephen Cheruiyot Cheron**, hereinafter referred to as the applicant has moved this Court under Rule 4 of the Court Rules for orders that the time within which a notice of appeal may be filed and an appeal pursued against the decision of the Environment and Land Court at Eldoret made on 12th July, 2016 in Land Case Number 366 of 2015 be extended.

[2] The background to the application is that the applicant was the plaintiff in Eldoret ELC 366 of 2015. He had sued Kenneth Kiptum Kandie (the respondent herein). The subject of suit was property known as Uasin Gishu/Moiben Settlement Scheme/18.

[3] The applicant claimed that he was the lawful registered owner of the suit property but that the respondent had through fraud, and or misrepresentation had the suit property transferred and registered in his name. the applicant therefore sought to have a declaration that the respondent obtained title to the suit property un-procedurally and fraudulently; an order issued for cancellation of the registration and the title issued to the respondent; and an order of permanent injunction issued restraining the respondent from charging, selling, trespassing on or in any way interfering with or dealing with the suit property.

[4] The respondent filed a defence and counter-claim to the applicant's suit in which he denied the applicant's claim and maintained that the transfer of the suit property to him and the title issued to him were legally and regularly done. In his counter-claim the respondent maintained that the suit property was lawfully transferred to him by the applicant who is also known as Shaheen Saif Saeed; that the transfer was in part settlement of a debt of Kshs.22 million owed to the respondent by the applicant, and that the applicant signed all the necessary documents for the transfer including obtaining the Land Control Board consent. The respondent therefore prayed for a declaration that he was the legal owner of the suit property; and an order of a permanent injunction restraining the applicant and his agents from interfering with his peaceful occupation.

[5] Before the hearing of the suit the respondent raised a preliminary objection to the applicant's suit contending that the suit was incompetent as the applicant lacked the capacity to file the suit having been declared bankrupt in Kisumu High Court, Bankruptcy Cause No.5 of 2015, and the suit in ELC No. 366 of 2015 having been filed without leave of the court contrary to section 9 of the Bankruptcy Act Cap 53 Laws of Kenya.

[6] In a ruling delivered on 12th July, 2016, Ombwaya, J upheld the preliminary objection and struck out the applicant's suit with costs. It is this ruling that the applicant wishes to appeal against.

[7] In his affidavit sworn in support of the motion, the applicant contends that he has an arguable appeal as the person who was declared Bankrupt in Kisumu Bankruptcy Cause No.5 of 2015 was Shaheed Saif Saled, who is a different person; that he was unable to file the notice of appeal within time as he only became aware of the ruling delivered on 12th July 2014 after the 14 days period had expired; that he had a disagreement with his previous advocate and had to instruct another counsel who had to seek leave of the court before he could come on record; that the new advocate also had to familiarize himself with the proceedings; and that all these factors contributed to the delay.

[8] The applicant urge the court to grant his application maintaining that the delay was not inordinate and that the respondent would not be prejudiced if the application is granted.

[9] During the hearing of the motion, the counsel for the respondent, although served did not attend court. The hearing of the motion therefore proceeded ex-parte.

[10] I have considered the motion before me. The grounds upon which the court can grant an application for extension of time to file an appeal are well settled having been stated in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application No. Nai.255 of 1997 (unreported)**, and **Mwangi vs Kenya Airways Limited [2003] KLR 486**.

[11] Therefore the court has to determine whether the intended appeal is arguable, and if so, the length of delay and the reason for the delay. Whether the delay has been sufficiently explained, and whether the applicant will suffer any prejudice if the application is granted.

[12] It is evident from the annexures that the ruling subject of the intended appeal was delivered on 12th July, 2016. A copy of the order annexed to the applicant's affidavit shows that both the counsel for the applicant and counsel for the respondent were present when the ruling was delivered. The application by the applicant's current advocate seeking to come on record was filed on 8th August i.e about 26 days after the ruling, and the current application was filed on 14th December, 2016 that is about 5 months after the Judgment was delivered. The applicant has not annexed a copy of the order from the court granting his current advocate leave to represent him. It is therefore not clear how soon the counsel acted after being granted leave. Be that as it may, this Court has an unfiltered discretion under Rule 4 of the Court Rules the primary concern of which should be, to do justice to the parties. **(Githiaka vs Nduriri [2004] KLR 67**. It is evident that the applicant was impeded from filing the appeal within the required period because of his counsel having failed to inform him of the ruling and also the time needed to get leave for his new counsel to come on record. From the ruling there is an arguable issue that can be canvassed on appeal regarding the applicant's *locus standi*. I also note that the respondent did not file any reply to the applicant's motion nor did he attend court for the hearing. I find that he will not suffer any prejudice if the order sought is granted.

[13] I therefore find it just and appropriate to allow the application and grant the applicant leave to file the notice of appeal and the record of appeal within 14 days from the date hereof.

It is so ordered.

DATED and delivered at Eldoret this 1st day of March, 2018.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.