



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 1 OF 2018 (UR NO. 1/2018)

BETWEEN

MURIELMA SHIRANDULA SANYA.....APPELLANT

AND

VINCENT OSUNDWA MAKOKHA.....RESPONDENT

(Application for extension of time to file an appeal from an order of the High Court of Kenya at Bungoma (Mukunya, J.) dated 4th October, 2017 and stay of proceedings respectively of Bungoma High Court ELC Case No. 140 of 2016 formerly Kakamega HCCC No. 229 of 2012

RULING

[1] By a notice of motion dated 24th January, 2018, **Murielma Shirandula Sanya** (Applicant), seeks to have time extended to enable him file an appeal against the ruling and order made on 4th October, 2017, by the Land and Environment Court sitting at Bungoma in Land Case No. 140 of 2016 (formerly Kakamega HCC NO. 229 of 2012). The applicant also seeks leave to file the proposed appeal and an order for stay of the proceedings in the Land and Environment Case No. 140 of 2016.

[2] The applicant is the plaintiff in Land Case No. 140 of 2016. Judgment was entered in his favour on 19th May, 2014 by an application brought under section 3A 63(e) of the Civil Procedure Act and Order 10 rule 11 of Civil Procedure Rules the defendant in the land case sought to have the judgment that was entered against him and in favour of the applicant on 19th May, 2014 set aside and his defence filed out of time admitted to hearing.

[3] In the ruling delivered on 4th October, 2017, the learned judge (Mukunya, J.) allowed the defendant's motion and set aside the judgment of 19th May, 2014 together with all consequential orders and further directed the defence to be deemed as duly filed and the suit proceed to hearing. This is the ruling that the applicant intends to appeal against. In his supporting affidavit, the applicant contends that the court's ruling was delivered in his absence and without any notice of delivery having been given to him. He therefore, urges the court to extend time to enable him file an appeal against the decision and further urges the Court to stay the proceedings in the Land and Environment Court so as not to render his appeal nugatory.

[4] It is evident that the ruling was delivered on 4th October, 2014 and that the applicant's motion was filed on 24th January, 2018. Under **Rule 75(2)** of this **Court's Rules**, a party intending to appeal from a decision of a superior court to this Court must file a notice of appeal within fourteen (14) days and under **Rule 82**, shall lodge the appeal within sixty (60) days from the date of the notice.

[5] In this case, by the time the applicant was making his application, on 24th January, 2018, which was about 120 days after the orders sought to be appealed against neither the notice nor the appeal had been lodged. The applicant has maintained that he could not have filed the documents as he was not aware that the judgment had been delivered.

[6] Although the respondent did not attend court for the hearing of the applicant's motion, he had filed a replying affidavit in which he opposed the applicant's motion. The respondent maintains that the applicant has no reasonable or arguable appeal, and that the motion is only intended to delay the hearing and finalization of the applicant's suit, to the detriment of the respondent.

[7] We have considered the applicant's motion under Rule 4 of this Court's Rules, the Court has jurisdiction to extend time limited by the rules or by any decision by the Court in such terms as it may deem just. This is a discretionary power that this Court must exercise judicially taking into account the circumstances of each case.

[8] As stated in **Leo Sila Mutiso vs Rose Hellen Wangare Mwangi**, Civil Application No. Nai 255 of 1997 (UR) referred to in **Mwangi vs Kenya Airways Limited [2003]** KLR 486, some of the factors that may be taken into account in exercising the Court's discretion include the length of the delay; the reason for the delay, the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the respondent if the application is granted.

[9] The applicant's explanation is that he was not served with a notice of the date for delivery of the ruling and because of this he could not have known of the ruling so as to be able to take action within the appropriate time. This contention of the applicant has not been challenged. Therefore, the applicant seems to be having a reasonable explanation for failing to file the appeal within the required time. Nonetheless, the intended appeal is in regard to an order allowing an application for setting aside an ex parte judgment entered against the respondent in default of entering appearance and filing a defence. Although the applicant contends that he has an arguable appeal, he has not demonstrated that this appeal has good chances of success. The learned judge having found that the respondent was not served with summons to enter appearance and the plaint, it would be in the interest of justice that the respondent is given an opportunity to file a defence, and that the suit is heard on merit. In my view, allowing the applicant's motion would be prejudicial to the respondent. It would also have the effect of delaying the finalization of the dispute between the parties and therefore, contrary to the overriding objective of facilitating expeditious disposal of suits in the administration of justice. In effect the order of the learned judge allowing the respondent to file a defence has not prejudiced the applicant in any way as he still has the opportunity of proving his case on merit. Indeed, the subject of the suit being one involving the emotive issue of land, it is desirable that the Court has the benefit of all facts in order to enable it arrive at a just conclusion.

[10] Accordingly, I find it fair and just not to exercise my discretion in the applicant's favour. The applicant's notice of motion dated 24th January, 2018, is accordingly dismissed. In light of the circumstances of this matter and taking into account that there was no appearance for the respondent during the hearing of the application, I make no orders as to costs.

Dated and delivered at Kisumu this 24th day of May, 2018.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.