



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 74 OF 2016

BETWEEN

EPHANTUS STANLEY NJAGI MOKO.....APPLICANT

AND

MONICA RUGURU NJIRU..... RESPONDENT

(Being an application for extension of time to file a notice of appeal and/or appeal against the judgment of the High Court of Kenya at Embu, (Bwonwonga, J.) dated 19th November, 2014 as well as stay of execution of the decree therein pending the hearing and determination of the application herein and/or the intended appeal

in

E. L. C. No. 26 of 2014)

RULING

EPHANTUS STANLEY NJAGI MOKO, the applicant herein, was the 1st defendant in the suit No. 26 of 2014 in the Environment and Land Court (E&LC) at Embu which was instituted by **MONICA RUGURU NJIRU** (the plaintiff therein and now the respondent herein). One Elijah Nyaga Njeru was named as the 2nd defendant. The suit concerned land and the respondent sought orders for the eviction of the applicant and his co-defendant. She also sought other orders that are not relevant in this ruling.

The suit was heard by **J. M. Bwonwonga, J.** Each party called witnesses. On 19th November 2014, the learned Judge delivered judgment in the presence of Mr. Ndorongo holding brief for Mr. Maina for the respondent/plaintiff and Mr. Eddie Njiru for the “defendant.” It was not shown in the record which of the two defendants was referred to as “defendant”.

The applicant filed in this Court on 21st October 2016, after almost two years since the delivery on 19th November 2014 of the judgment by the Environment and Land Court an application by way of notice of motion dated 19th October 2016 seeking orders that:-

“(1) Spent

(2)“This Honourable Court does extend time for filing a notice of appeal and/or an appeal against the judgment entered on 19th November 2014 in Embu H. C. ELC No. 26 of 2014.”

(3)“There be a stay of execution of the judgment entered on 29th November 2014 in Embu H. C. ELC No. 26 of 2014 pending hearing and determination of this application and/or pending hearing of the intended appeal.”

(4)“The costs be in the cause.”

The applicant swore an affidavit on 19th November 2016 (in support of the application) in which he averred that he was represented in the suit in the Environment & Land Court by Eddie Njiru & Company Advocates; that the latter failed and/or neglected to inform him immediately of the delivery of judgment; that by the time he was informed of the delivery of the judgment, 30 days had elapsed; that he fell ill after he was informed of the judgment; that as a result of the illness, he spent 'a lot of money' towards treatment leaving him completely broke and therefore financially incapable of pursuing legal redress; that failure to file appeal within time was not deliberate but was due to illness and lack of funds as well as failure by his advocates to inform him of the delivery of the judgment in time.

The respondent filed on 19th December 2016 an affidavit in reply to the notice of motion. In it, she opposed the application and contended that as Messrs Lee Maina & Associates, Advocates, who filed the application were never on record in the Environment & Land Court case No. 26 of 2014 as counsel for the applicant, the application is incompetent as it was filed by strangers. The respondent also averred that the decree in Suit No. 26 of 2014 in the Environment and Land Court was executed and consequently the application seeking orders for stay is overtaken by events. As regards the intended appeal, the respondent avers that the applicant is not candid or truthful in giving reasons for the delay in lodging appeal. The respondent further contends that the applicant never copied his letter bespeaking the proceedings to the respondent's advocates and consequently, the applicant is not entitled to take advantage of the proviso to Rule 82 (1) of the Court of Appeal Rules that allows exclusion from the time taken to appeal, the period certified by the Registrar as required for preparation and delivery of the proceedings. In addition, the respondent contends that the intended appeal is a non-starter as no notice of appeal was given as required by Rule 75 of the Rules of this Court and no appeal can be lodged without notice of appeal. It is the respondent's further contention that the application lacks merit.

When the application came up for hearing before me on 8th May 2017, the applicant was represented by learned counsel **Mr. Lee Maina** and the respondent was represented by learned counsel **Ms Nyangati Gichahi**.

It was Mr. Maina's submission that the applicant has an arguable appeal and that extension of time to appeal will not prejudice the respondent. Mr. Maina relied on the affidavit in support of the application and reiterated the contents thereof.

On his part, Ms Nyangati opposed the application and placed reliance on the replying affidavit. She pointed out that Messrs Eddie Njiru & Co Advocates are still on record for the appellant in the Civil suit before the Environment & Land Court (Case No. 26 of 2014) and as such, Messrs Lee Maina & Associates are not competent to make the application now before me on behalf of the applicant. It was counsel's submission that the application is devoid of merit.

I have perused the application and duly considered the submissions of the parties. It is premised on Rule 4 of this Court's Rules. The Rule stipulates:

“4. The Court may, on such terms as it thinks just, 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.”

This Court has unfettered discretionary power under Rule 4 to extend time limited by the Rules or by orders of the Court. The discretionary power is required to be exercised judicially so as to serve the interest of justice. The existence of the Rule is an acknowledgement of human fallibility and the fact that mistakes can and will be made, hence the need to redress the same. The policy of the Court is to sustain an appeal. Where sufficient reason is given for the lateness showing that the delay was not unreasonable or culpable the Court will excuse it. In deciding whether to extend time or not, some of the factors the Court will consider will include the length of delay; the reasons for the delay; the arguability of the intended appeal; the degree of prejudice to the other party if time is extended; the public interest in the matter, if any; and generally the requirements of the interest of justice including the need to facilitate access to justice under **Article 48** of The Constitution and the need to ensure under Section 3A (1) of the **Appellate Jurisdiction Act: (Cap 9)** that *“the overriding objective of the said Act and the rules made thereunder to facilitate the just, expeditious, proportionate, and affordable resolution of appeals governed by the Act is ascertained. For the purpose of furthering the overriding objective, the Court is enjoined to handle all matters for the purpose of attaining the aims set out in Section 3B (1) of the said Act which include the just determination of the proceedings.”*

An appellant seeking extension of time under Rule 4 must be candid. A litigant who deliberately misleads the Court as regards the facts appertaining to the delay in filing appeal may disentitle himself of the Court's exercise of discretion to extend time.

In this application, the judgment sought to be appealed was delivered on 19th November 2014. The record presented to me shows that the learned Judge delivered the judgment in open court in the presence of Mr. Ndorongo holding brief for Mr. Maina for the plaintiff, now the respondent, and Mr. Eddie Njiru for the applicant. Although the record was not explicit whether advocate Eddie Njiru was counsel for the 1st or the 2nd defendant, or both, the applicant has averred in paragraph 5 of his supporting affidavit that Eddie Njiru & Company were his advocates on record and that they informed him of the delivery of the judgment, albeit after 30 days. If remedial steps had been taken immediately after the applicant was informed of the delivery of the judgment, the applicant would have eschewed inordinate delay. Has the delay been reasonably explained? The applicant proffers as his reasons for the delay conflicting statements. On the one hand, he pleads illness and lack of resources to pursue the appeal and on the other hand he blames his advocates for not informing him in time about the delivery of the judgment. But what sticks out most is the fact that he has kept to himself the particulars regarding the extent of his illness and impecuniosity.

The particular period when the applicant was ill does not come out from the application. It is ostensible that he was not continuously ill from the month the judgment was delivered in November 2014 to the month he filed the instant application in October 2016. Failure to state the missing facts does not reflect complete candour. The applicant has been economical with the truth. He fails to give precise or estimated dates. He does not show dates when his advocates informed him of the delivery of the judgment; or when he fell ill; or when he recovered from his illness; or when he run out of funds; or when he obtained funds so as to engage new advocates, Lee Maina & Associates in place of Eddie Njiru & Company; or when he made up his mind to file the application; or why he had not made the application earlier; in short, the applicant has not shown sufficient candour and has not placed all the material facts before me to give a clear picture to the Court as to what happened so as to facilitate a fair determination of the application. The onus to do so reposed on him.

Although he asserts that he has an arguable appeal, the applicant has not shown that the appeal is not a non-starter. Counsel for the applicant did not comment on the fact that the decree extracted from the judgment sought to be appealed from has been executed and the land reconveyed back to the respondent (who resides on it) in accordance with the decree. It was not enough for the applicant to state that he had an arguable appeal or that the extension of time to appeal would not prejudice the respondent. An applicant must plead or state facts that will demonstrate the arguability of the appeal and the facts that show that no prejudice would be caused to the respondent that cannot be compensated by an award of costs. In this case, the stay order that the applicant seeks would include stay of eviction of the applicant. Stay of an order of eviction is not something costs can redress easily. Moreover, the applicant has kept away from the Court documents that would otherwise reflect the status of registration of the land ordered

by the E & L Court to be reconveyed and the issue of occupation of the land in question. A court of law cannot issue court orders blindly. It must have facts before it so as to be sure that the orders it issues are in consonance with the law and serve the interest of justice.

On the material before me, the applicant admits that his advocates were Eddie Njiru & Company. He concedes that the latter informed him that judgment was delivered. He does not disclose when he was notified. The said advocates were in court. The explanations by the applicant regarding the reasons for the delay appear spurious or calculated to conceal facts that would be prejudicial to the application. The applicant has not made out a case to warrant me to exercise my discretion to extend time.

In the circumstances, I dismiss the application on the ground that it has no merit whatsoever. I order that the applicant shall pay to the respondent the costs of the application.

Dated and delivered at Nyeri this 7th day of June, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR