



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GHITHINJI, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 7 OF 2017

BETWEEN

THOMAS AGURE ARAP NDONEE APPLICANT

VERSUS

KIPSEREM ARAP KEMBOI1ST RESPONDENT

PETER SAWE BIAMAH 2ND RESPONDENT

MOSES KIPNGETICH

(All sued as Trustees of Kapsengere Dispensary 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

(An application for extension of time within which to file and serve a Notice of Appeal and Record of Appeal out of time arising from the decision of the Hon. A. Ombwayo given at Eldoret

in

ENVIRONMENT AND LAND CASE NO. 447 OF 2012)

RULING

[1] This is an application under Rule 4 and 5 (2) (b) of the Court of Appeal Rules for the following orders:

1. Time limited for the applicant to file and serve the respondents with the notice of appeal be enlarged or extended to allow the filing and serving of the same with such time as the court shall deem fit.
2. That conservatory orders be issued preserving suit property and/or a stay of execution pending the hearing and determination of this application and/or until the intended appeal has been determined.

[2] The applicant states in the supporting affidavit inter alia, that judgment in the Environment and Land case No. 447 of 2012 was delivered on 12th July, 2016 dismissing his suit; that he filed and served a Notice of Appeal dated 24th July, 2016; that he applied for copies of proceedings and Judgment by a letter dated 2nd July, 2016 and that the copies of the judgment and proceedings are yet to be supplied.

[3] The application first came for hearing on 26th April, 2017. The respondents' advocates were absent. The applicant's advocates informed the Court that service of the application was effected on the respondents' advocates on 24th April, 2017 which fact the Court confirmed. However, the Court adjourned the application on the ground, inter alia, that the respondent's advocates had not been served in good time. The application was listed for hearing on 2nd October, 2017. The respondents' advocates had not yet filed a replying affidavit and the 1st, 2nd and 3rd respondents advocates applied for adjournment which application was declined.

[4] At the hearing of the application, Mr Kagunza, learned counsel for the applicant quite properly abandoned the second prayer. An application for stay of execution can only be heard by a full Court and not by a single Judge. This is expressly provided in Rule 53(1) as read with 53(2) of the Court of Appeal Rules.

[5] I have considered the application in respect of the prayer for extension of time. The applicant seeks extension of time to file and serve a Notice of Appeal. By Rule 75(2), A Notice of Appeal is required to be lodged within 14 days of the date of decision and to be served within 7 days after lodging the Notice of Appeal (Rule 77 (1)). The applicants' affidavit, the notice of Appeal and the affidavit of service show that the Notice of Appeal was lodged at the court registry on 22nd July, 2016 and served on the same day.

It is crystal clear that the Notice of Appeal was lodged and served within the time stipulated by the Rules. Thus, the application is superfluous and to that extent incompetent.

[6] If the object of the application was to get an extension of time for filing a record of appeal, which it is not then the application, would be premature. Rule 82(1) stipulates that an appeal should be filed within 60 days of the date when the Notice of Appeal was lodged. The proviso to Rule 82(1) excludes from computation of time, the time which may be certified by the Registrar as required for the preparation and delivery to the appellant of a copy of proceedings if the conditions stipulated herein are satisfied.

[7] The applicant applied for copies of proceedings and judgment by a letter dated 22nd July, 2017 which was within the stipulated 30 days of the date of delivery of the judgment. He also paid a deposit of tying charges on the same day. He stated that he has not yet received the proceedings. Until such time when the proceedings are delivered and the Registrar has certified the time required for the preparation and delivery of the proceedings by a certificate of delay, it cannot be ascertained whether or not the time for lodging a record of appeal has already expired. It may well be that after the certificate of delay is issued by the Registrar, time for filing an appeal will be found not to have expired if it eventually turns out that the time for the preparation and delivery of the proceedings should not be excluded from the computation of time, then time for making an application for extension of time to file a record for appeal will have ripened.

[8] In the premises, the application for extension of time within which to file and serve a Notice of Appeal, is struck out as incompetent. As the 1st, 2nd and 3rd respondent did not file a replying affidavit and indeed applied for adjournment of the application which was declined and as the 4th respondent is the Attorney General, I make no orders as to costs.

I make no orders as to costs.

Dated and delivered at Eldoret this 5th day of October, 2017

E. M. GITHINJI

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR