



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, JA IN CHAMBERS)

CIVIL APPLICATION NO. NAI 206 OF 2015

BETWEEN

PHILIP KIPYEGON LELEI.....APPLICANT

AND

JONATHAN KIMUTAI MIBEI.....RESPONDENT

(Application for extension of time to file and serve letter requesting for typed proceedings, notice of appeal and record of appeal out of time in an intended appeal from the judgment and decree of the Environment and Land Court - High Court of Kenya at Kericho (Waithaka, J.), dated and delivered on 29th October 2014

in

H.C.C.C. No.64 OF 2009)

RULING

[1] By a notice of motion dated 24th July, 2015 lodged in the court registry on 24th July 2015 **Philip Kipyegon Lelei** who was a defendant in Kericho High Court Civil Case No.64 of 2008 moved this court for orders under Sections 3, 3A and 3B of the Appellate Jurisdiction Act and under Rule 4 of the Court of Appeal Rules Article 159 of the Constitution of Kenya, 2010 for orders *inter alia* that:

(i) (Spent)

(ii) The honourable court be pleased to extend time within which to file and serve letter requesting for the typed proceedings, Notice of appeal, Memorandum of Appeal and record of appeal in the intended appeal from the judgment and decree of Hon. L. N. Waithaka (J), dated and delivered on the 29th day of October 2014, in Kericho HCC No.64 of 2009, between Jonathan Kimutai Mibei vs Philip Kipyegon Lelei.

(iii) This honourable court be pleased to grant an order of status quo pending the hearing and determination of this application.

(iv) Costs of and occasioned by this application be provided for.

[2] The application is anchored on grounds stated in the motion as well as the affidavit sworn by the

applicant on 24th July, 2015. In short, the applicant swears that the judgment delivered on 29th October, 2014 was read in his presence and the learned judge entered judgment in his favour on the counterclaim and issued a declaration that **Jonathan Kimutai Mibei** (the respondent herein), who was the plaintiff in the suit, was holding 13 acres out of the suit property in trust for him.

[3] Following that judgment the respondent lodged a notice of appeal, in response to which the applicant filed a notice of address of service in accordance with the Court of Appeal Rules. Thereafter the applicant visited the court registry several times in an effort to obtain a copy of the judgment but was unsuccessful as the learned judge was said to have gone with the file to Nakuru to have the judgment typed.

[4] The applicant swears that following the judgment delivered on 29th October, 2014, the respondent approached him with a view to excising the 13 acres awarded to the applicant by the court. The respondent also called a surveyor who prepared mutation forms and took the applicant to the Land Control Board which granted consent to sub-divide the suit property. The applicant produced the copy of the mutation form and a Land Control Board consent for the sub-division.

[5] It therefore came as a surprise to the applicant when on 20th May, 2015 he was served with a notice of intended execution in which he was threatened with eviction from the suit property. On visiting the court registry, the applicant was shocked to note in the court file a typed copy of the judgment purported to have been delivered on 29th October, 2014 whose content varied from that of the judgment that was pronounced in his presence on 29th October, 2014.

[6] By a letter dated 5th July, 2009, received in the High Court registry on 25th May, 2015, the applicant's advocate sought clarification from the deputy registrar of the High Court regarding the judgment that was delivered on 29th October, 2014. By a letter dated 3rd July, 2015 received in the advocate's office on 23rd July, 2015, the deputy registrar responded that the learned judge had confirmed that the typed judgment in the file was the one she had delivered on 29th October, 2014.

[7] It is thereafter that the applicant filed his motion seeking extension of time. The applicant explains that he could not have filed an appeal as he believed that the judgment was in his favour. The applicant further maintains that the appeal raises serious and weighty arguable issues.

[8] Both the applicant and the respondent filed written submissions. The applicant reiterated that the circumstances giving rise to this application were unique and peculiar as the judgment delivered by the court in his presence appeared to have been substituted by another one, and the only legitimate way for the applicant to challenge the judgment was through an appeal. The applicant maintains that he has a strong and an arguable appeal as the declaration of trust does not require the consent of the Land Control Board and therefore the judgment against the applicant is based on a misapprehension of the law governing claim for trust. The applicant maintains that the respondent will not suffer any prejudice if the application is granted as he will have an opportunity of being heard during the appeal. On the other hand, the applicant stands to suffer irreparable injury if the application is not granted as he has established his home on the disputed property.

[9] In his submissions that were filed on 25th September, 2015, the respondent contended that judgment was delivered in his favour on 29th October, 2014; that the applicant has no arguable appeal on the grounds that the judgment delivered in court was different from the typed judgment as that was a result of his own misunderstanding of the judgment; that the provisions of Section 3(3) of the Law of Contract Act Cap 23 requires all contracts relating to land to be in writing; and applicant counter-claim was not therefore maintainable; that the applicant's intended appeal is an afterthought; that the intended appeal was neither arguable nor would it be rendered nugatory if the orders sought by the applicant are not granted. The Court was therefore urged to dismiss the application.

[10] The application came up for hearing before me on 13th June, 2016, during which Mr. Otieno counsel for the applicant and Mr. Koech counsel for the respondent, both reiterated their positions in accordance

with their submissions.

[11] In considering this application, I have noted that in prayer 3(3) of the motion, the applicant seeks “***an order of status quo pending the hearing and determination of this application***”. In effect what the applicant is seeking is an order under Rule 5(2)(b) that gives the court powers where a notice of appeal has been lodged to order a stay of execution or stay of any further proceedings. However, under Rule 53(2)(b) of the Court of Appeal Rules, a single judge has no powers to hear an application for stay of execution, injunction or stay of further proceedings. This means that as a single judge, I have no powers to entertain prayer (3) of the applicant’s motion and would therefore for this reason decline to grant it.

[12] As regards the prayers for extension of time in regard to the filing of the notice of appeal, memorandum of appeal and record of appeal, these prayers appropriately fall before me for consideration under Rule 53(1) as read with Rule 4 of the Court of Appeal Rules. Rule 4 states as follows:

“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.”

[13] Thus the power of a single judge Under Rule 4 of the Court of Appeal Rules to extend time, is unfettered, however, being a discretionary power it must be exercised judicially. (***Origo & Another vs Mungala [2005] 1KLR 178; Gitetu vs Kenya Commercial Bank Ltd [2009] KLR 545***). The factors that are relevant in the exercise of the court’s discretion include the length and reason for delay, the prejudice if any likely to be suffered by the respondent, and arguability of the appeal.

[14] In this case, the applicant has given a rather unusual explanation for his delay in filing the appeal. That is, that he could not have filed a notice of appeal against the judgment, as the judgment delivered in his presence on 29th October, 2014 was in his favour. The applicant has supported his explanation by producing documents showing that immediately after the judgment the respondent, on 7th November, 2014, filed a notice of appeal, copy of which has been availed to the Court. In addition, the respondent took action with a view to complying with the judgment delivered in the applicant’s favour and successfully applied for consent for sub-division of the suit property with a view to sub-dividing the 13 acres in favour of the applicant. In my view, these documents lend credence to the applicant’s explanation that he did not file his appeal because he believed the judgment was in his favour. Accordingly, his explanation is reasonable.

[15] In addition, it is apparent from the judgment dated 29th October, 2014, that in his counterclaim, the applicant sought a declaration that the respondent was holding a portion of 13 acres of land in the suit property in trust for him (applicant), and a permanent injunction restraining the respondent from interfering with the said portion. In my view, it is debatable whether the requirements of the application of Section 3(3) of the Law of Contract Act Cap 23 and the requirements of the Land Control Board consent under the Land Control Act Cap 302 applies to a trust and therefore the intended appeal is arguable. Further, the respondent is not likely to suffer any prejudice if time is extended for the filing of the appeal. To the contrary the applicant who has been in occupation of the suit property is likely to suffer greater prejudice.

[16] For these reasons, I find that it is fair and just that I do exercise my discretion in the applicant’s favour. Accordingly, I grant prayer (2) of the applicant’s motion dated 24th July, 2015 and extend time for the applicant to file and serve the notice of appeal, memorandum of appeal and record of appeal within 30 days from the date hereof. Costs of this application shall be costs in the appeal.

Dated and Delivered at Nairobi this 15th day of September, 2016.

H. M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR