



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. GITHINJI, ONYANGO OTIENO & AZANGALALA, JJ. A)

CIVIL APPEAL NO. 1 OF 2010

BETWEEN

NABIL HASSANAPPELLANT

AND

DANIEL ODINDO WAGARESPONDENT

(Appeal from a Ruling of the High Court of Kenya at

Kisumu (Lady Justice Mugo, J) dated 13th December, 2007

in

KISUMU HCMISC No. 120 OF 2007

JUDGEMENT OF THE COURT

By a Notice of Motion dated 10th August, 2007 the appellant, Nabil Hassan sought, among other orders, extension of time within which to lodge an appeal to the High Court from the decision of the subordinate Court in Kisumu Chief Magistrate's Court Civil Case No. 738 of 1998 dated 8th December, 2006. By that decision the subordinate court (W.B. Mokaya SM) dismissed the appellant's application to set aside the sale of title number Kisumu Municipality / Block 6/103 (hereinafter the said property). The sale was pursuant to a decree in the said subordinate court case.

The learned Senior Resident Magistrate dismissed the appellant's application on the primary ground that he had failed to intimate to the court his intention to proceed with his objection to attachment in time, with the result that the attachment and sale of the said property had occurred. That is the decision against which the applicant sought to challenge on appeal.

It is significant that when the appellant lodged his application before the subordinate court, he knew that the said property had been sold. Indeed it is that sale which he sought to set aside. Yet the purchaser of the property was not joined in the proceedings before the subordinate court.

The Learned Judge of the High Court (Mugo J) refused to grant the appellant extension of time to lodge an appeal against the said decision of the subordinate court for reasons she expressed as follows:-

“Among other reasons tendered for the delay in filing the appeal and which are related to the above are that the applicant was so involved in securing medical treatment for his father that he had no time to pursue the appeal process and that his father who the applicant says had been ill since 2002, eventually died in January, 2007 thereby necessitating the filing of a petition for letters of administration intestate in which a limited grant of letters of administration ad litem was obtained by the applicant on 3rd August 2007. The applicant also blames the court for not supplying him with copies of proceedings and Ruling of 8th December, 2006 expeditiously.

None of the above reasons are supported by documentary evidence save for the death of the applicant's father and that he did in fact obtain a limited Grant ad litem on 3rd August, 2007. The applicant having instructed his former advocate, Mr. Onsongo to prefer an appeal against the lower courts Ruling and it being clear from the annexed proceedings “NH-7” that Mr. Onsongo did apply and obtain leave to appeal immediately the ruling was delivered, can the applicant be said to have had any other reason not to file the appeal, save, perhaps for the obvious reason that he doubted his chances of maintaining a successful appeal or application for stay of execution having neither a legal nor a beneficial interest in the suit property and worse still not being the judgment debtor?

It being clear as earlier stated herein that leave was not required and that even if it was the same was granted to the applicant on 8th December, 2006 but he chose not to move the court I find that the delay in not filing the appeal is in excusable and that the reasons given for not filing an appeal within the time prescribed are an afterthought. Prayer 2 of the application is therefore refused.”

The appellant has premised his appeal on nine (9) grounds which in the main challenge the exercise of discretion by the High Court Judge and then delve into the merits of his intended appeal had time to lodge the appeal been extended. In his written submissions, which were filed with the leave of the Court, **Mr. Ocharo**, learned counsel for the appellant, reiterated the appellant's contention that the learned Judge of the High Court in exercising her discretion, failed to take into account relevant matters she ought to have taken account of and that on the material availed to the learned Judge her decision was clearly wrong.

Counsel further submitted that the learned Judge failed to appreciate that the manner in which the auction sale and subsequent transfer of the said property were irregular and contrary to the law and further that it was incorrect to find, as the learned Judge did, that the appellant had no capacity to litigate over the said property yet the appellant was the beneficial owner of the same.

M/s Otieno Yogo & Company Advocates filed written submissions in response to those filed on behalf of the appellant. Relying on various authorities, they contented that the learned Judge of the High Court exercised her discretion properly and in accordance with settled principles. They further submitted that the decree of the subordinate court has been executed and the said property sold to a third party who has not been joined. In their view, a reversal of the execution would grossly prejudice the respondent and the third party who has obtained good title to the said property.

When the appeal came up for hearing before us, **Mr. Ocharo**, learned counsel for the appellant, was represented by **Mr. Nyamweya** who relied wholly on Mr. Ocharo's written submissions. Learned counsel **Malimu** represented Mr. J. Otieno, the learned counsel for the respondent, and in highlighting the written submissions filed by M/s Otieno Yogo & Company Advocates stated that the appellant did not explain the delay in lodging his appeal which delay was, according to her, inordinate. Counsel further emphasized that the decree of the subordinate court was executed in 2003 and as third party is now the owner of the said property, she reiterated that to reverse the sale would greatly prejudice the respondent and the third party who is a bonafide purchaser for value without notice.

In declining to grant enlargement of time to lodge his appeal, the learned Judge of the High Court exercised her discretion. There is no dispute about the principles applicable in considering an appeal from

such exercise of discretion. In **Mbogo & Anor =v= Shah [1986] EA 93** it was stated by Sir Clement De Lestang, V. P as follows

“ I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

In the same case, Sir Charles Newbold P, said:-

“For myself I like to put it in the words that Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

In the case before us the Learned Judge of the High Court found that the explanation for the delay of two years in lodging the appeal was inexcusable and that the reasons thereof were an after thought. The learned judge also found that the appellant had not been candid in his affidavit in support of the application before the subordinate court. We have reproduced part of her decision above and we cannot say that the learned Judge exercised her discretion whimsically or capriciously. She assigned reasons for her conclusion that the delay had not been satisfactorily explained. She also referred to parts of the appellant's affidavit which she found untruthful. We think, with due respect to counsel for the appellant, that the complaint that irrelevant matters were considered and relevant ones left out is without basis. We have also not found any misapprehension of the law as contended by the appellant. We cannot also say that on the material availed to the learned Judge, her decision is plainly wrong and has resulted in misjustice.

In the premises we have no reason to interfere with the exercise of that discretion otherwise we would be simply substituting our discretion for that of the High Court Judge which would be improper.

There is a further and equally important reason why this appeal cannot succeed. It is common ground that the sale of title No. Kisumu Municipality Block 6/103 by public auction was completed way back in 2003. A third party is now the owner of the said title. The third party, as we have already stated, was not joined in the proceedings before the subordinate court. There is no evidence before us that any attempt was made to join the third party in the proceedings before the High Court. He is also not a party to this appeal. That being the position, any order we may make in this appeal cannot bind the third party who now owns the said property. Yet it is the sale of the property to the third party which the appellant sought to challenge. In our view, the failure to join the purchaser of the said property alone would seal the fate of this appeal, as a Court of law cannot act in vain. We have however also found that we should not interfere with the exercise of discretion by learned Judge of the High Court.

In the result the appeal is for dismissal in its entirety and we so order. Costs of the appeal shall be borne by the appellant.

Dated and Delivered at Kisumu this 14th day of February , 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR