



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 147 OF 2014

JOSEPH KIPREPEL LOTUKEI.....PLAINTIFF

VERSUS

STEPHEN TOROITICH KORKOU.....DEFENDANT

RULING

1. The applicant brought an application dated **28/10/2020** seeking the following orders:-

(1) ...spent

(2) That honourable court be pleased to grant leave to the applicant to file an appeal out of time and that the notice of appeal annexed hereto be deemed as duly filed upon payment of requisite court fees.

(3) ...spent

(4) That costs of this application be provided for.

2. The application is brought under **Sections 1, 1A, 1B, 3 and 3A** of the **Civil Procedure Act Cap 21** and **Order 17 and 50** of the **Civil Procedure Rules 2010**. It is also premised on the grounds set out at the foot of the notice of motion as follows:-

(a) That (the) court delivered judgment and dismissed plaintiff's suit.

(b) That the time which to file appeal has since lapsed and applicant prays that the time be extended.

(c) That failure to file and serve notice of appeal within time prescribed was occasioned by lack of knowledge when the matter was set down for delivery of judgment because of Covid 19 pandemic.

(d) That the delay of filing the appeal was purely unintended and excusable.

(e) That the delay is inordinate. (sic)

(f) That the intended appeal has merit and has high chance of success.

(g) That the application has been made in good faith.

(h) That the appeal be rendered nugatory unless leave to appeal out of time and stay of execution sort there be granted.

3. The application is supported by the affidavit of the applicant sworn by the applicant on **28/10/2020**.

4. The respondent filed a replying affidavit sworn on **5th November, 2020** and opposed the application dated **28/10/2020** claiming that it is incompetent, misplaced, lacks legal basis and ought to be struck out; that the honourable court rendered a well-reasoned judgment hence he should not be deprived of the fruits of a successful litigation without a just cause; that the application has already been overtaken by events since immediately after delivery of judgment on **26/5/2020**, the applicant demolished his properties and left; that the respondent took possession and started utilizing the suit land after the applicant vacated; that the applicant was aware of the judgment since he had an advocate on record who was present during delivery of judgment.

5. The court gave directions for the application to be canvassed by way of written submissions. The respondent filed his submissions dated **27/11/2020** on **2/12/2020**. The applicant never filed any submissions.

Determination

6. I have considered the application, the response and the submissions on record and I find that the main issue for determination is whether the applicant has met the conditions for grant of the orders sought.

7. On the issue of execution stay, **Order 42 rule 6(2) of Civil Procedure Rules** provides :-

“(2) No order for stay of execution shall be made under sub rule 1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

8. In the case of *Daniel Wambua Ndabi -vs- Peter Luka Ndutu [2008] eKLR* the court stated as follows:-

“The issue for determination by this court is whether the defendant established a case to enable this court grant stay of execution pending the hearing of the appeal. The principles to be considered by this court in determining whether or not to grant stay of execution pending the hearing of an appeal are well settled. In *Butt vs. Rent Restriction Tribunal [1982] KLR 417* at page 419 Madan JA held that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson vs. Church (No.2) 12 Ch. D [1879] 454* at page 459. In the same case Cotton LJ said at page 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory”.

9. From the foregoing, in an application of this nature the court has to consider whether the application has been brought timeously and if the applicant would suffer irreparable loss if the orders sought were not granted.

10. The applicant has argued that the application has been brought after a duration of more than five months and the delay has been explained to have been occasioned by the current Covid 19 pandemic. I find that this is unreasonable delay.

11. The next condition for consideration is the issue of whether the applicant would suffer substantial loss. The applicant alleges that

he has made extensive developments on the suit land. The respondent on the other hand has countered this testimony and instead argued that the applicant demolished his property and gave vacant possession of the suit land to the respondent and sold the remaining portion to third parties. Photographic evidence to that effect was tendered by the respondent as annexed in the replying affidavit. The applicant on the other hand did not challenge or deny that to be the position. I therefore find that no evidence of substantial loss has been adduced by the applicant to warrant the orders of stay.

12. Regarding the issue of security I find that the applicant has not offered any security; I do note **Order 42 Rule 6** gives this court the mandate even where no security has been offered by an applicant, to order such security for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

13. The other main issue for determination in the instant application is whether the order sought for leave to file an appeal out of time is merited.

14. **Section 7** of the Appellate Jurisdiction Act states as follows:

7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

15. In summary, this Section allows the High Court to extend time for the filing of a Notice of Appeal when the time provided for the filing of such a notice has expired. This court being of equal status is necessarily covered by the provision.

16. **Rule 75** of the **Court of Appeal Rules** provides for the Notice of Appeal as follows:-

75. Notice of appeal.

(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

(4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

(5) where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.

(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.

Rule 4 of the **Court of Appeal Rules** states as follows:

4. Extension of time

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.

17. In the case of **Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Co. Ltd 2015 eKLR** which cited **Edward Njane Nganga and another -vs- Damaris Wanjiku Kamau and Another 2016 eKLR**, the court stated as follows:

“The principles guiding the court on an application for extension of time premised upon *Rule 4 of the Rules* are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.”

18. In the case of **Mwangi v Kenya Airways Ltd [2003] KLR**, the Court of Appeal gave guidelines to be followed by courts when dealing with applications of a similar nature to include;

- (a) **The period of delay;**
- (b) **The reason for the delay;**
- (c) **The arguability of the appeal;**
- (d) **The degree of prejudice which could be suffered by the Respondent if the extension is granted;**
- (e) **The importance of compliance with time limits to the particular litigation or issue.**

19. Juxtaposing the above authorities against the instant case, I am persuaded that the applicant has not satisfied this court in his favour to enable the grant of the orders sought and the orders sought cannot be granted in the circumstances.

20. For the foregoing reasons I find that the application dated **28th October 2020** has no merit and the same is dismissed with costs to the respondent.

Dated, signed and delivered at Kitale via electronic mail on this 17th day of December, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.



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