**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC MISC. APPLICATION NO. 3 OF 2021**

**SAMUEL MAINA NDIRANGU ..... APPLICANT**

**-VERSUS-**

**JOHN GIKARA MACHARIA ..... 1ST RESPONDENT**

**PETER NDIRANGU KIMANI.....2ND RESPONDENT**

**RULING**

1. This Ruling is in respect of two applications both filed by Samuel Maina Ndirangu (hereinafter the Applicant). By his First Application dated 25th May, 2021, the Applicant prays for an order:

*2. That this court be pleased to enlarge time for giving a Notice of Appeal and to grant the Applicant leave to file an Appeal out of time against the Judgment of the Othaya SRM'S Court issued on 4th December, 2020 in ELC No. 10 of 2019; John Gikara Macharia –vs- Samuel Maina Ndirangu and Peter Ndirangu.*

2. The First Application is premised on the grounds *inter alia* that:

*(i) The Applicant is grossly dissatisfied with the Judgment issued on the said 4th December, 2020 but the time for filing the intended Appeal has long expired;*

*(ii) The Applicant failed to file the Appeal in time because the Applicant first sought recourse before the lower court through an application dated 14th January, 2021 seeking for enlargement of time but the same was dismissed on 30th April, 2021; and*

*(iii) It is in the interest of justice that the orders sought be granted.*

3. That application is opposed by the 1st Respondent – John Gikara Macharia. In his Replying Affidavit sworn and filed herein on 14th June, 2021, the 1st Respondent avers that the application dated 25th May, 2021 is a non-starter, fatally and incurably defective, grossly incompetent, misconceived, scandalous, frivolous, vexatious and that it may embarrass or delay him from reaping the fruits of his judgment.

4. The 1st Respondent further avers that the application is a total abuse of the court process and that the Applicant has failed to give good and justiciable grounds as to why he failed to lodge his appeal to this court within time.

5. The 1st Respondent asserts that the annexed Memorandum of Appeal does not raise triable substantive issues of fact and law which have a high chance of success to warrant consideration by an appellate court and avers that the Applicant ought to first provide security for costs before he can be allowed to appeal out of time.

6. The 1st Respondent further avers that the Applicant is guilty of undue and unreasonable delay having sought the orders herein some six (6) months after the Judgment was passed. He further avers that the Applicant has not shown that the 1st Respondent is a man of straw who may not repay the costs of the suit upon the success of the intended Appeal and asserts that he is entitled to the fruits of his Judgment.

7. By the second Application dated 12th July, 2021, the Applicant prays for an order:-

*3. That this Honourable Court be pleased to stay execution of the Judgment and decree of the Othaya SRM's Court issued on 4th December, 2020 in Othaya ELC Case No. 10 of 2019; John Gikara Macharia –vs- Samuel Maina Ndirangu and Peter Ndirangu pending the hearing and determination of the* intended Appeal.

8. The Second Application is on its part premised on the grounds *inter alia*:

*(i) That there is a pending application dated 25th May, 2021 herein seeking enlargement of time to file an Appeal out of time;*

*(ii) That the 1st Respondent has however filed an application in the subordinate court dated 15th June, 2021 seeking eviction orders against the Applicant;*

*(iii) The Applicant is therefore apprehensive that if evicted the 1st Respondent will destroy the developments made by himself on the property and render the proposed Appeal nugatory; and*

*(iv) The proposed Appeal is arguable and has high chances of success and the Applicant is willing to furnish security and abide by any conditions that the court may deem appropriate.*

9. The Second Application is equally opposed by the 1st Respondent. In his Replying Affidavit sworn and filed herein on 14th July, 2021, he attacks the suitability of the application and asserts that the Applicant has failed to demonstrate what substantial or irreparable loss he stands to suffer if the orders of stay are not granted.

10. I have carefully perused and considered the two applications as well as the responses thereto by the 1st Respondent. I have similarly perused and considered the written submissions placed before the court by both the Applicant and the 1st Respondent. The 2nd Respondent did not file any response to the two applications.

11. By the two applications filed herein, the Applicant urges the court to enlarge the time within which he can appeal the decision of the Othaya SRM's court issued on 4th December, 2020. He also pleads with the court to stay execution of the orders issued by the said subordinate court pending the hearing and determination of his intended Appeal.

12. In regard to the question of enlargement of time, **Section 79G of the Civil Procedure Act** provides as follows:

**"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."**

13. Considering the principles which the court ought to take into account in deciding whether or not to enlarge time, the Court of Appeal observed as follows in **Thuita Mwangi –vs- Kenya Airways (2003) eKLR:**

**"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay, secondly, the reason for the delay, thirdly (possibly) the chances of appeal succeeding if the application is granted and fourthly, the degree of prejudice to the Respondent if the application is granted."**

14. In the matter before me, the decision sought to be appealed was rendered on 4th December, 2020 by the Honourable M. N. Munyendo, SRM, Othaya. Subsequently by an application dated 14th January, 2020 filed before the same court, the Applicant sought inter alia, leave to file an intended Appeal out of time on the ground that the time for filing such an appeal had lapsed.

15. That application was certainly premised on the provisions of **Section 79G of the Civil Procedure Act** which as we have seen grants parties 30 days to lodge an appeal from the subordinate court to this court. That was however a wrong premise in my humble consideration.

16. A perusal of the Civil Procedure Act and Rules reveals to me that as at 14th January, 2021 when the Applicant sought the enlargement of time before the subordinate court, he was still very much within time to lodge his appeal herein. I say so because in terms of computing time in relation to this Court, regard ought to be had for the court's Christmas vacation. In this respect, **Order 50 Rule 4 of the Civil Procedure Rules** provides as follows:

**"Except where otherwise directed by a Judge for reasons to be recorded in counting, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the Court) for the amending, delivering or filing of any pleadings or the doing of any other act:**

**Provided that this rule shall not apply to any application in respect of a temporary injunction."**

17. That being the case, it would appear to me that both the parties and the court proceeded on an erroneous presumption that the Applicant was as at 14th January, 2021 precluded from filing an Appeal to this court in regard to a decision which had been rendered some 17 days earlier excluding the period described under **Oder 50 Rule 4 of the Civil Procedure Rules**.

18. As it turned out, the matter would remain pending a determination on the said application until 30th April, 2021 when the court made a Ruling dismissing the same.

19. Arising from the foregoing, I was not persuaded by the 1st Respondent's argument that the Applicant had sought to Appeal some six (6) months later, a period which the 1st Respondent considered to be inordinate.

20. In respect to the Second Application seeking an order of stay, **Order 42 Rule 6 of the Civil Procedure Rules** stipulates at **Sub-rule 2** thereof as follows:

**"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."**

21. As was stated in **Kenya Commercial Bank Limited –vs- Sun City Properties Limited & 5 Others (2012) eKLR**:

"**In an application for stay, there are always two competing interest that must be considered. These are that the successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interest should always be balanced."**

22. I have perused the judgment of the Learned Trial Magistrate dated 4th December, 2020 and it is apparent that the Applicant herein has had the use and occupation of the suit land since the year 2002. He claims to have developed the same. One of the orders granted by the Trial Court was an order of eviction and the 1st Respondent herein was urged by the court to grant the Applicant access to the suit property to remove any crops or structures he may have thereon before the eviction is effected.

23. Arising from the circumstances, I am persuaded that the Applicant stands to suffer substantial loss unless the intended eviction is stayed. The Applicant has proposed to provide security for costs. That to me is a mark of good faith that goes a long way to show that the application for stay is not meant just to deny the 1st Respondent the fruits of his judgment.

24. As was stated in **Butt -vs- Rent Restriction Tribunal (1982) KLR 417**:

**"…The general principle in granting or refusing a stay, is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judges' discretion … A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings."**

25. In the result, I am persuaded that there is merit in both applications before me. Accordingly I make the following orders:

*(a) The Applicant has 14 days from today within which to lodge his Memorandum of Appeal to this court.*

*(b) There is hereby granted a stay of Execution of the Judgment and decree of the Othaya SRM's court issued on 4th December, 2020 in Othaya ELC case No. 10 of 2019; John Gikara Macharia -vs- Samuel Maina Ndirangu and Another.*

*(c) The Applicant shall deposit in court a sum of Kshs.100,000/- being security for costs for the Appeal within 30 days from today.*

*(d) In default of the timelines given under Order 'a' and 'c' the two applications shall stand dismissed with costs.*

*(e) The costs of the two Applications are otherwise in the circumstances of this case awarded to the 1st Respondent.*

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 20TH DAY OF JANUARY, 2022.**

In the presence of:

Mrs Mugaa for the Respondents

Ms Wahito holding brief for Nderitu for the Applicant

Court assistant - Wario

**.....**

**J. O. Olola**

**JUDGE**