



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA AT KAJIADO

HIGH COURT CIVIL CASE NO. 36 OF 2018

(FORMERLY ELC NO. 212 OF 2017)

VIVIANNE NAIPANOI.....PLAINTIFF

-VERSUS-

PAUL SITEYA LOORKIPONY.....1ST DEFENDANT/RESPONDENT

NAPOLEON WAKUKHA MURENDE...2ND DEFENDANT/RESPONDENT

MOLYN CREDIT LIMITED.....3RD DEFENDANT/RESPONDENT

ERIC TIMOTHY BALONGO.....4TH DEFENDANT/RESPONDENT

RULING

The Applicant brought the Notice of Motion dated 16th of November, 2018; under section 1A, 1B, 3A, 63(3) and 72 of the Civil Procedure Act, Order 50 rule 6 and order 51 rule 1 of the Civil Procedure rules, 2010, rule 7 of the Appellate Jurisdiction Act and all enabling provisions of the law; seeking the following order:

- 1. THAT, this Honourable Court be pleased to enlarge time for giving notice to Appeal and do grant the Applicant herein leave to file an Appeal out of time against the ruling of the Honorable Court delivered on 20th February, 2018.***
- 2. THAT upon grant of Order (1) above, the notice of Appeal dated 13th November 2018 be deemed as filed on time.***
- 3. THAT this Honorable Court be pleased to issue an order staying proceedings before the High Court pending the hearing and determination of the proposed Appeal.***
- 4. THAT costs be provided for.***

The Applicant's Gravaman

The instant Applicant's case is anchored upon 8 (eight) grounds couched in the face of it as well as in the Supporting Affidavit sworn by Vivianne Naipanoi Kuya on the 19th of November, 2018. It is stated that the Honorable Court delivered its ruling on 20/2/2018, wherein it dismissed the Plaintiffs motion dated 11th April 2017 with costs. The Plaintiff is dissatisfied with the decision of the court and believes it to be flawed on the grounds that the learned judge had failed to consider the Plaintiffs allegation of forgery in making her decision. That the learned judge did not consider the Plaintiffs evidence and affidavit testimony in making her determination. That the learned judge made conclusions that were not supported by any evidence produced by the parties and the decision to dismiss the Plaintiff's was bad in law.

Further grounds are that the Plaintiff having been dissatisfied with the decision of the court instructed a new advocate to take conduct of the matter and filed the instant Appeal, against the court's decision: The said firm failed to file the Appeal as instructed and the period allowed for filling an Appeal lapsed without an Appeal being filed. It was also stated that the delay in filling the Appeal was occasioned by events beyond the Plaintiffs' control; as at the time when the Appeal ought to have been filed. The Plaintiff was estranged from her husband and had been chased away from her matrimonial home and she was therefore unable to keenly follow on the progress made in the case.

It was also deponed that the instant applicant has been filed without delay and if any is reasonably accounted for, the proposed Appeal is arguable and has high chances of success. Hence it would be in the interest of justice that the orders sought herein be granted. Lastly, it was stated that the grant of the orders herein, would not prejudice the Respondents and will assist in the expeditious pursuit of justice.

The Applicant's case as captured in the said supporting affidavit is that Applicant filed the instant suit on 12th February 2017 seeking orders of; an injunction restraining the Defendants from interfering with my family's possession of KJD/KISAJU/10733 (hereinafter "suit property") and a declaration that the Charge created over the suit property is void for lack of spousal consent. Along the plaint, the plaintiff the Applicant also filed an application dated 11th April 2017, which sought an interlocutory injunction restraining the Respondents herein from interfering with possession of the suit property pending the hearing and determination of the suit.

The Applicant's claim against the defendant is that the 1st Defendant to 3rd Defendants fraudulently created a charge over the suit property; wherein they forged her signature and appended the same on the spousal consent and charge. She therefore concluded that the charge being tainted by fraud could not be enforced. It was deponed that a ruling was delivered on her interlocutory application on 20/2/2018 whilst sitting at Ngong Law Courts, which dismissed the said application with costs. She blamed her previous counsel for the Court's outcome and appointed a new firm to take up the matter on Appeal.

She deponed that she had a dispute with her husband which made them to part ways on the 10th March 2018. This made her to abandon her matrimonial home and move back to her parents' home. They finally made amends in late September, 2018 after which she moved back to the matrimonial home (herein the suit property). She asserted that during the time when they were estranged, she was under belief that her previous Advocate had taken conduct of the matter and an Appeal had been filed. She was surprised to receive communication from her previous Advocates that the matter was to be mentioned on 12/10/2018. Upon inquiry, the previous firm did not give her concrete reasons as to why the Appeal had not been filed save to inform her that they were in the process of procuring the proceedings. That is when she instructed her current Advocates to proceed and seek leave to file an Appeal against the ruling of the court delivered on 20th February 2018. She therefore, filed a notice of Appeal dated 13/11/2018 and she believes that her Appeal has high chances of succeeding as it is premised on concrete grounds as indicated in the draft memorandum of appeal.

The applicant also filed submissions in support of her Application. It is the Applicant's contention that this court has jurisdiction to extend time for filing an Appeal as enshrined under section 7 of the Appellate Jurisdiction Act and rule 4 of the Court of Appeal Rules.

The Applicant cited the case of *Edith Gichuki vs Stephen Njagi Ithoithi (2014) eKLR*, to advance the contention that this court has unfettered discretion under rule 4 aforementioned to grant leave to appeal out of time and does not require establishment of "sufficient reasons". In that case it was stated that the discretion ought not be guided by consideration of factors stated in many previous decisions of the court including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted and whether the matter raises issues of public interest among others.

The Applicant also cited the Court of Appeal's decision in *Hon John Michuki & Another vs Kentazuga Hardware Limited (1998) eKLR* where it was held that discretion of the court to extend time in which to lodge an appeal was unfettered and "...was only subject to it being, granted on terms as the court may think just. Within this context, this court has on several occasions granted extension for time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstance inexcusable and his opponent was prejudiced by it".

As regards the period of delay and the reasons for the delay, the Plaintiff admits that she has delayed for a period of 8 months in filing her notice of Appeal from the date the ruling was delivered. In her supporting affidavit, the Plaintiff explains that; she was informed of delivery of the ruling soon after its delivery and being disgruntled sought to Appeal against it. Further that at the time she was dissatisfied with her Advocates and therefore instructed a new firm of Advocates to take over conduct of the matter.

It was therefore submitted that the Applicant has brought the present application without any delay as it was made as soon as she became aware that no Appeal had been filed and her reasons for the delay in filing the notice of Appeal has also been explained. Further submission was made to the effect that the delay occasioned is not inordinate and is excusable and the delay should also be excused in the interest of justice.

As regards the degree of prejudice upon the Respondents if the application is granted, Counsel for Plaintiff contended that part of the Plaintiff's claim against the Respondents is that they colluded to perpetuate a fraud, namely; forging her signature on the charge and spousal consent dated 14th January 2015. Further that the 3rd Defendant purported to sell the property to the 4th Respondent through an auction on 2nd August 2016. However, there was no evidence to indicate such an auction had happened or that any consideration had changed hands. In the Plaintiff's view, by virtue of the taint in the charge and the flawed exercise of statutory power of sale, the 3rd and 4th Defendants could not obtain any legitimate interest on the suit property.

It was also argued that the Honourable Judge in the ruling of 20th February 2018 made the findings that there was no fraud in the charge and further that the 4th Respondent had obtained title over the property which findings. In the Plaintiff's view were made without the production and examination of evidence that is only accorded at trial. It was further argued that the implication of determining the Plaintiff's case without affording her an opportunity to ventilate at trial.

Counsel for the Plaintiff is of the view that if the Plaintiff is not given an opportunity to set aside the findings in the aforementioned ruling by granting the orders sought herein, she stands to suffer irreparable harm in the form of loss of her home. Counsel further takes the view that if the Plaintiff proceeds for hearing under the "Wrong" findings of the court, her claim has absolutely no chance of succeeding.

Contrary to the 3rd Respondent's claim through the affidavit of Lydia Nyambura that they stand to suffer prejudice in form of delay in the in the matter as she is ready to proceed to hearing and that she has already spent a lot of time and money in the subject suit. The Counsel of the Plaintiff opined that the 3rd Defendant has previously pleaded that she loaned a sum of Kshs.7, 2 million to the 1st and 2nd Defendant. That she has received a sum of Kshs.33 million from the 4th Respondent which money she continues to hold hence the 3rd Respondent does stand to suffer great prejudice by having the Applicant allowed to Appeal against the decision of the court, compared to the Plaintiff who stands to lose her only home. Further that, if at all the 3rd Respondent stands to suffer prejudice can be easily be repaired with damages or security for

costs, but such is not enough to deprive the Plaintiff the right to ventilate her case at Appeal.

On whether the appeal is arguable, Counsel for Plaintiff is of the view that the learned judge misapplied the principles governing the grant of an injunction thereby, arriving at a wrong conclusion. It was argued that the learned judge erred in applying the principles in *Giella v Cassman Brown & Co. Ltd (1973) EA 378* in the sense that the Learned Judge ought not to have relied on conflicting affidavit evidence to make a finding that the Plaintiff's signature had not been forged, despite taking note that the Plaintiff had expressly alleged fraud by the Respondents and had particularized the alleged fraud in her plaint to conclude the forgery. In the Plaintiff's view this was contrary to the principle that where fraud is alleged and particularized, then the court is called upon to safeguard the property pending production of evidence at trial.

Further it was the counsel for the Plaintiff's contention that the Court erred in its finding that the 3rd Respondent had rightfully exercised its statutory power of sale especially noting that it was uncontested that the Plaintiff had not been served with any statutory notice as required under section 96 (3) land act and which automatically rendered any exercise of statutory power of sale void.

The Plaintiff also contended that the Learned Judge erred in failing to find a prima facie case by reaching the conclusion that the auction held on 2nd August 2016 was valid despite the Plaintiff's claim that the said sale was a sham and never took place and no proof of the auction or payment of purchase price was produced before court. Further that the Learned judge erred in her interpretation of the principles in *Giella v Cassman Brown Case*, by failing to find that the Plaintiff was likely to lose her only home and be rendered destitute as irreparable harm and that the precedent on the issue held that the balance of convenience usually shifts in favor of an Applicant in possession of the property.

It was also argued that the Learned Judge disregarded the Plaintiff's claim of forgery. Thus the plaintiff is of the view that her relevant claims which she raised were not considered. This includes that she had not been served with the statutory notices before exercise of the statutory notices before exercise of statutory power of sale, that her signature on the charge and spousal consent had been forged; that there was no legitimate sale of the property and allegations of such a sale were unsubstantiated.

The Plaintiff also contended that only considered a signature purported to be that of the Plaintiff appeared on the charge and the spousal consent, that the court in Milimai HCC No.563 of 2015 had authorized sale of the property and that the 4th Respondent was alleging to have purchased the property. On the premise of consideration, the court proceeded to find that the Plaintiff had not proven a prima facie case and that her case had been overtaken by events. It was therefore the Plaintiff's submission that the appeal is arguable, its grounds are not frivolous and have a high very high of success.

On the second issue of determination of whether or not the court should order a stay of proceedings pending the hearing and determination of the Appeal, the Plaintiff cited the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* where the court stated as follows: -

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

The Plaintiff therefore submitted that the issues being presented for Appeal relate to material issues in the matter before the High Court and unless the matter before the High Court is stayed and the Appeal ends being successful, then there will be waste of judicial time as the Commercial Court will be forced to revisit the suit in light of directions from the Superior court. Further that if an order of stay is not granted and the High court proceeds to make a determination premised on the facts on record, it will effectively render the outcome of the Appeal nugatory and purely academic. It was submitted that the suit will be expeditiously determined as well as judicial time be optimized if the proceedings before the High Court are stayed pending the determination of the Appeal before the Court of Appeal.

The 3rd Respondent's Gravaman

This Application is opposed by the 3rd Respondent who's Director Lydia Nyambura Anyangu Swore a replying affidavit on the 5th of December 2018 where she deposed that the Application is bad in law and the grounds disclosed and laws invoked in the Application and the supporting are absolutely misconceived and cannot justify this court to grant the orders sought. It was pointed out that the Applicant's allegation that she instructed another firm of Advocates to take over the conduct of the matter was not proved with any evidence showing any such instructions being given and the allegations therein are unsubstantiated and therefore this is an attempt to lay blame of failing to appeal in time on a firm of Advocates that has never appeared in this matter.

It was also asserted that despite the Applicant alleging that she blamed her Advocates on record for the dismissal of her Application and didn't wish for them to continue having conduct of the matter, the said Advocates are still on record and in the 3rd Respondent's view. This just shows that the reasons advanced are just a sham. On the Applicant's contention that the marital woes which the Applicant alleged to have happened, the 3rd Respondent is of the view that they have no bearing to filing of any appeal as she could have followed up on the matter under the circumstances and no reasons have been advanced as to why she didn't.

She reiterated that this application is an abuse of Court process and an attempt by the Applicant to use this Honorable Court to obtain orders without advancing justifiable reasons and this Application has not been made in good faith. It was further deposed that the period of nine months from the date of the ruling of this Honourable court to the date of this Application is inordinately long and inexcusable. Further there are no sufficient reasons for delay, the orders sought cannot issue.

The 3rd Respondent also stated that it will be adversely prejudiced if the orders sought are granted as it has already complied with the pre-trial directions of this court and is only awaiting hearing and is desirous of having this matter concluded as soon as possible having spent a lot of money and time and money on the matter noting that there is a similar suit in Milimani HCCC No. 563 of 2015 regarding the same subject matter and which matter the 1st and 2nd Respondent are the Plaintiffs.

Further that the issues being raised by the Applicant will be heard during the hearing and the matter will be expeditiously heard and determined to conclusion before this Honorable Court as opposed to saying to staying this proceeding. The 3rd Respondent's view of this Application is that it is merely set out as a collateral action intended to frustrate the 3rd Respondent and ultimately an abuse of the court process. She therefore took the view that it is just, equitable and expedient in the circumstances that this Court dismisses this Application with costs.

On whether the Plaintiff should be granted leave to appeal out time, the 3rd Respondent resorted to section 79G of the Civil Procedure Act which provides that:-

“79G. 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 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.”

It was argued therefore that it is incumbent upon the Applicant to prove to the satisfaction of the court she has a good and sufficient cause for the delay to file the appeal. Reliance was placed on the case of ***Edward Kamau & another V Hannah Mukui Gichuki & another (2015) eKLR*** in which supports the abovementioned provision of law. The Court in the above-mentioned decision also cited with approval the case of ***Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others, SC Appl 16/2014*** which lays down the underlying principles that a court should consider in the exercise of its discretion to extend time to appeal.

The Counsel for 3rd Respondent opined that the grounds raised by the Plaintiff are not only insufficient, but raises more questions than answers. It was stated the Plaintiff's claim that she instructed another firm to take over the matter and file an appeal was not proved as no evidence was adduced to that effect. As regards the claim that Plaintiff faced matrimonial problems which made it impossible for her to follow up on the matter, the 3rd Respondent believes that ground is not sufficient to warrant the granting of the orders sought unless if there were some other factors which hindered her.

Therefore, the 3rd Respondent is of the view that the Plaintiff has not come before the Honorable Court with clean hands as the reasons she advanced are not only not convincing, but also very suspect. Counsel for the Respondent cited the case of ***Keystone Driller Vs. General Excavators & Osgood Co. 290 (54 S.Ct. 146, 78 L. Ed. 293) Justice Butler*** which explains the meaning and proper application of the maxim that the he who seeks equity must do so with clean hands. It was therefore submitted that the Plaintiff failed to give sufficient reasons to warrant being granted leave to appeal out of time.

On whether or not these proceedings should be stayed, the counsel for the Respondent argued that the Plaintiff did not give any ground in support of the said prayer. The 3rd Respondent prayed that this court be guided by the decision in ***Kenya Power & Lighting Company Limited v Esther Wanjiku Wokabi (2014) eKLR*** which lays down the principles which must be taken into consideration when exercising whether or not to grant stay of proceedings which include whether the applicant has established that he has a prima facie arguable case, whether the application was filed expeditiously and whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

Analysis and Determination

I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law of the subject of amendments, I take the following view of the matter. The main issues for determination are:-

- a) ***Whether or not the Plaintiff should be granted leave to appeal out time?***
- b) ***Whether or not the proceedings should be stayed pending hearing and determination of the intended appeal.***

On whether this court should grant extension of time for filing an appeal, the applicable law is Section 79G of the Civil Procedure Act which provides as follows:

“79G. 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 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.”

The foregoing, prescribes the period for filing of appeals from decrees or orders of the lower court to the High Court to 30 days from date of the decision or order. However, the proviso to the said Section 79G permits the admission of an appeal out of the statutory period of 30 days where there is sufficient or good cause shown as to why there was delay in such filing. It is therefore, incumbent upon the Applicant to

prove to the satisfaction of the court she has a good and sufficient cause for the delay to file the appeal. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others, SC Appeal 16/2014* laid down the following as the underlying principles that a court should consider in the exercise of discretion to extend time: -

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**
- 3. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
- 5. Whether there will be any prejudice to be suffered by the respondents if the extension is granted.**
- 6. The application should have been brought without undue delay; and**
- 7. In certain cases, like election petitions, public interest should be a consideration for extending time.**

In the foregoing, applying the above principles, the question to ponder is whether the Applicant has shown good and sufficient cause for not filing the appeal out of time. The Plaintiff admits having delayed filing the appeal for a period of about 8 (eight) months from the day the ruling was delivered. The Ruling by Hon. Ochieng was delivered on the 20th of February 2018 and the notice of Appeal is dated 13th November 2018.

In her supporting affidavit dated 16th of November 2018, she explains that she was informed of the delivery of the ruling and having been dissatisfied by it, she sought to appeal against it. She was also dissatisfied by her advocates who were in charge of the case and she fired them and hired a new firm to take over the matter.

She further told the court that she encountered matrimonial problems which resulted in her being estranged from her husband from the month of February, 2018 to September, 2018 when she reconciled with her husband. She alleges that the separation disturbed her as much as following up the status of the appeal which she believed to have been filed is concerned. Further that when she followed up after the said reconciliation with her husband and that is when she learnt that the appeal had not been filed. The Plaintiff therefore contended that the Applicant has brought the present Application without delay upon learning that the same has not been filed.

According to the Counsel for the 3rd Respondent, the grounds raised by the Plaintiff are not only insufficient, but raises more questions than answers. It was pointed out that the claim by the Plaintiff that she instructed a new firm to take over the matter was not proved as no piece of evidence was adduced to that effect. The Counsel for the 3rd Respondent is of the view that the Plaintiff's claim regarding matrimonial problems which she alleges to have made it impossible for her to follow upon the matter, is not sufficient ground to warrant the granting of the orders sought unless if there were some other factors which hindered her but the same is not available before court. According to the 3rd Respondent, the Applicant came to the court of equity with dirty hands.

In the foregoing, I'm inclined to concur with the Counsel for the 3rd Respondent in the sense that all the reasons forwarded by the Plaintiff to explain the delay in filing the appeal were not proved to the standard of proof required by the law. For instance, the best the Plaintiff could prove was the allegation that she hired a new law firm after having been dissatisfied with her Advocates. This alleged fact was not proved. Having perused the evidence on record, I have taken notice of the fact that the firm (Gichuki Kimere & Company Advocates) that represented the Plaintiff in the previous proceedings that she is seeking to appeal against, are still her Advocates on record in this matter. The Plaintiff's assertion is therefore a blatant lie.

Secondly, the Plaintiff's claim that the Matrimonial woes made it impossible to follow up on the status of the appeal cannot hold water. It is clear from the Plaintiff's testimony that she was not only aware of need to file the said appeal within 30 days, but also aware of her rights and therefore the intended appeal is an afterthought. In the Court's view, the period of nine months from the date of the ruling of the Honourable court to the date of this Application is inordinately long and inexcusable and without sufficient reasons for delay, the orders sought cannot issue.

On whether or not the proceedings should be stayed pending hearing and determination of the intended appeal, I'm inclined to cite the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* as rightly put forward by the Plaintiff. In that case the court stated as follows: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

The case of *Kenya Power & Lighting Company Limited v Esther Wanjiku Wokabi (2014) eKLR* which lays down the principles which must be taken into consideration when exercising whether or not to grant stay of proceedings. The Court addressed itself as follows: -

“To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

a) Whether the applicant has established that he/she has a prima facie arguable case.

b) Whether the application was filed expeditiously and

c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

Looking at the instant application in light of the above laid down principles, I wish to assert that the issue as to whether the application was filed expeditiously is one of the hotly contested issues in the instant application which this court has already determined. Manifestly, the evidence on record suggest that the filing of the application was inordinately delayed given that the Memorandum of Appeal was lodged eight months after the ruling had been delivered.

As to whether or not the applicant has an arguable appeal and whether it would be in the interest of justice to order stay of proceedings pending the hearing and determination of the appeal filed by the applicant is in contention herein. According to the Plaintiff, the issues being raised in the aforementioned memorandum of appeal relate to the material issues in the matter before the High Court and unless the matter before the High Court is stayed and the Appeal ends being successful then there will be waste of judicial time as the Commercial Court will be forced to revisit the suit in light of directions from the superior court. It was further stated that if an order of stay is not granted and the High Court proceeds to make a determination premised on the facts on record, it will effectively render the outcome of the Appeal nugatory and purely academic.

Further, the Plaintiff believes that the appeal is arguable, its grounds are not frivolous and have a high chance of success. It is claimed that the learned judge disregarded the Plaintiff’s claim of forgery; that she had not been served with statutory notices before the exercise of statutory power of sale, that her signature on the charge and spousal consent had been forged; that there was no legitimate sale of the property and allegations of such a sale were unsubstantiated.

The foregoing arguments remained uncontroverted. This appeal that the Applicant is seeking to prosecute involves land. Thus land issues especially in Kenya are not to be taken for granted hence I’m inclined to agree with the decision cited by the plaintiff, that is the case of ***Paula Waheti Muchina V Henry Wanjohi Muchina CA 178/2003 (UR)*** where the court was faced with a delay of ten (10) years, its stated that:-

“Each case stands on its own facts but they all have to be considered on the underlying principle of justice”.

Further that:-

“The matter involves land which is very dear to hearts of Kenyans. Should the applicants be deprived of the right of being heard by the highest Court in the land? This factor has weighed on my mind and taking all matters into consideration I am inclined to give one last chance to the applicants.

They will have no redress against their own advocates as generally no amount of damages (if the advocates are any good for payment of such damages) can compensate Kenyans for lost land.”

In the premises, I concur with the above court decision. It must be noted that the object of the court is uphold substantive justice pursuant to article 159 2(D) of the constitution. It is my view that substantive justice will be done by ensuring that the Applicant has her day in court to ventilate all the issues surrounding the suit property. I hereby make the following orders:-

- 1) That the appeal herein as filed is hereby admitted out of time and deemed to be duly filed and served within the stipulated statutory period.***
- 2) That the proceedings before the trial court are hereby stayed pending the hearing and determination of the Appeal.***
- 3) That the appellant shall within 30 days from to date compile, file and serve upon the respondent a complete record of appeal.***
- 4) The Deputy Registrar is directed to call for the submission of the lower court record for admission of this appeal to hearing expeditiously.***
- 5) Costs of this application shall be to the Respondents, assessed at Kshs. 20,000/- to be paid before the appeal is heard and in default execution to issue for recovery of the same.***

Orders accordingly.

Dated, signed and delivered in open court at Kajiado this 26th of February 2019.

.....

R. NYAKUNDI

JUDGE

Representation

Ms. Koech holding brief for Mr. Chege for the 3rd Respondent - Present

Mr. Gichuki Kimere for the Plaintiff - Present