



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT ELDORET**

**CIVIL APPLICATION NO. 72 OF 2018**

**TRUPHENA TONGOI KORIR.....PLAINTIFF**

**VERSUS**

**MARTIN KIPTOLO LEL.....RESPONDENT**

**RULING**

Before this court is a Notice of Motion application, brought under a certificate of urgency, dated 11<sup>th</sup> July 2018 in which the applicant, *Truphena Tongoi Korir*, prayed that this court do issue a temporary stay of execution of the judgement issued on 22<sup>nd</sup> August 2017 from Kapsabet Senior Principal Magistrate's Court Civil Case No. 75 of 2012 pending the hearing and determination of the intended appeal.

The applicant further prays that this court allows her to file a memorandum of appeal out of time.

The applicant claims that she was condemned unheard in the trial court as she was not aware of the court proceedings against her.

Further, the applicant claims that the interest for 12 years slapped on her is a contravention to *Section 33* of the *Banking Act*.

The applicant claims that she has been starved of the opportunity to be heard in court.

The applicant claimed that the 21% interest rate slapped on her is in contravention of *Section 33B* of the *Banking Act*. The said section states that, a bank or a financial institution shall set the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the Central Bank rate set and published by the Central Bank of Kenya. The applicant therefore can't claim that the interest rate set is in contravention of the said section as the owed amount is not a credit facility advanced to her, neither is the court a bank and nor is it a credit facility.

The applicant, in Paragraph 7 of her affidavit in support of the substantive Notice of Motion application, dated 26<sup>th</sup> June 2018 claims that her counsel failed to update her on proceedings of the aforementioned trial court proceedings. Veracious as that may be, this court holds the view that the applicant can't armour herself with ignorance as it is no defence in law.

The matter was hers and she had a duty to follow it up with her advocate or the court.

Furthermore, the respondent, *Martin Kiptolo Lel*, through his advocate claims that he effected service on the defendant/applicant vide an affidavit of service dated 19<sup>th</sup> July 2012. He produced an affidavit of service marked as MK3 as proof of the same. This hasn't been challenged by the applicant.

The applicant further claimed that the Sale Agreement in question was subject to the approval by The Land Control Board. Even with this knowledge and the knowledge of the likelihood of disapproval by the Land Control Board, the applicant went ahead and received money from the respondent. He who comes to equity must do so with clean hands. On this front, the applicant has approached this court with unclean hands. Furthermore, the applicant in Paragraph 8 of her affidavit in support of the Notice of Motion application dated 10<sup>th</sup> July 2018 stated that she is willing to pay the Kshs. 800,000/= principal amount owed by her to the respondent. This amounts to admissibility of the debt owed by her to the respondent.

The applicant also prays that she be allowed to file a memorandum of appeal out of time. On this, I will be guided by *Section 79G* of the *Civil Procedure Act* which 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.

Judicial precedents have developed a number of factors which need be weighed in exercising the discretion on whether to extend time to file an appeal out of time or not. Some of these factors were suggested by the Court of Appeal in Mwangi v Kenya Airways Ltd [2003] KLR. They include the following:

- 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; and
- f. The effect if any on the administration of justice or public interest if any is involved.

The time prescribed for lodging an appeal expired on the 5<sup>th</sup> August 2017. The present motion was lodged on 11<sup>th</sup> July 2018. There was a delay of around 11 months. The applicant has not shown to the satisfaction of this court that she had good reasons for the delay in lodging the appeal.

As to the arguability of the intended appeal, I am not satisfied that the applicant has raised arguable points in challenge of the holding of the trial court. The applicant claims that the said sale agreement was rendered null and void by the enactment of the Land Control Act. Even so, this wont and shouldn't absolve her of her contractual obligation in the contract entered between her and the respondent.

The application lacks merit and is dismissed in entirety with costs to the applicant.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 25<sup>th</sup> day of June, 2019.**

In the presence of:-

Mr. Wanjala for Plaintiff/Respondent

Mr. Murgor for defendant/Applicant

Ms Sarah - Court clerk