

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

MISC. CIVIL APPLIC. NO.6 OF 2019

SERFINA OKELLO OGILE (suing as the Legal Representative of the
estate of **JOSEPH OGILE ULU**).....**PLAINTIFF**

VERSUS

CAREN ALILA OMUTO.....**1ST RESPONDENT**

WALTER ACHANGO OLOO.....**2ND RESPONDENT**

RULING

1. The Notice of Motion dated 1st July 2019, essentially seeks an order of stay of execution of the ruling made by the magistrate's court at Ndhwa on 28th March 2019 pending appeal and for leave to lodge the appeal out of time.

The grounds in support of the application are set out in the body of the notice of motion and fortified by the applicant's averments contained in the supporting affidavit dated 1st July 2019. These are opposed by the first respondent on the basis of the grounds set out in a replying affidavit deponed by her advocate on record and dated 23rd September, 2019.

2. At the hearing of the application, the applicant through learned counsel, **Mr. Mboya**, reiterated the supporting grounds and the contents of the supporting affidavit and prayed for the orders sought herein.

The first respondent through learned counsel, **M/s Nabifo**, holding brief for **Mr. Kimanga**, placed full reliance on the replying affidavit while the second respondent, through learned counsel, **Mr. Odero Nyakwana**, opposed the application on the basis of the grounds relied upon by the first respondent.

3. Having given due consideration to the application on the basis of the supporting grounds and those in opposition thereto and with regard to the first prayer for stay of execution pending appeal, it is the opinion of this court that the applicant has failed to satisfy the conditions set out in **Order 42 Rule 6 (2) Civil Procedure Rules** for this court to exercise discretion in her favour. Her concentration was mainly on the prayer for leave to file appeal out of time. In that regard, the applicant contended that she was not aware of the date of ruling which was against herself. She said that no notice was served upon her nor was she informed of the ruling date. That, she became aware of the ruling only after she made enquiries after which she applied for copies of the proceedings which were then issued to her in June 2019.

4. The lower court file was not availed herein, this court did not therefore have the benefit to peruse the proceedings and indeed the entire record to see what actually transpired at the lower court which led to this application.

In any event, the delay of approximately four (4) months since the date of the delivery of the impugned ruling, was unreasonable such that the reasons given herein for the delay are unsatisfactory and unsustainable for this court to extend time and exercise discretion in favour of the applicant.

In sum, this application is lacking in merit and is hereby dismissed with costs to the first respondent only. Ordered accordingly.

J.R. KARANJAH

JUDGE

18.12.2019

[Delivered and signed this 18th day of **December, 2019**]