



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**MISCELLANEOUS CIVIL CASE NO. 41 OF 2018**

**LYDIA WANGARI WAITHAKA.....APPLICANT**

**VERSUS**

**ANDREW GITHINJI MWIHURI.....RESPONDENT**

**RULING**

By a notice of motion dated 3<sup>rd</sup> May, 2018 brought under sections 79G and 95 of the Civil Procedure Act, cap.21 and order 50 rule 6 of the Civil Procedure Rules, 2010, the applicant has sought for extension time within which to file an appeal against the ruling or order of 4<sup>th</sup> of June 2014 and judgment and decree dated 28<sup>th</sup> June, 2017 both made by the Nyeri Chief Magistrates Court in civil case number 509 of 2012.

The motion is supported by the applicant's own affidavit sworn on 3<sup>rd</sup> of May, 2013. In that affidavit, the applicant has sworn that though she was served with the summons to enter appearance and indeed she entered appearance and filed a defence in the suit in the magistrates' court, she was not aware of what transpired thereafter until the 26<sup>th</sup> November, 2017 when she was arrested in church and committed to civil jail.

It is then that her counsel perused the court file and realised that indeed the suit had proceeded ex parte and judgment entered against her on 28<sup>th</sup> of June, 2017. The applicant's attempt to set aside the judgment was rendered futile because her application in that regard was dismissed. Nevertheless, she has already filed an appeal against the dismissal order.

Turning back to her application to file the appeal out of time, the applicant has sworn that if she had been made aware of the judgment against her as soon as it was delivered, she would have filed the appeal timeously. She believes that though she was never heard she still has good grounds of appeal and chances of her appeal succeeding are high.

The respondent opposed the motion and filed a replying affidavit which he swore on 24<sup>th</sup> May, 2018. In particular, he swore that the applicant was aware of the suit against her from the very beginning considering that she has admitted that she was not only served with the summons to enter appearance but also that she even filed her defence. He has also exhibited to his affidavit at least two affidavits of service demonstrating that the applicant was aware of the execution process against her.

If the applicant has filed an appeal against the dismissal order dismissing her application to set aside the ex parte judgment, this may not be the proper forum in which to discuss the merits or lack thereof of her application and whether that particular appeal has chances of success; suffice it to say, for purposes of this application, no material has been placed before this honourable court to show that the applicant was served with the notice for the hearing of the case against her. Assuming that she was not served, it is possible that she might not have been aware of what transpired after she filed her defence. Most importantly for this application, she may not have been aware of when the judgment against her was delivered so as to file the appeal in time.

The applicant's concern, which in my view is valid, is that should it turn out that the judgment against her is either irregular, inappropriate or erroneous for one reason or another, she will obviously suffer some form of prejudice if that sort of judgment is executed without having been probed at the appellate level.

To the contrary, I suppose that the respondent shall not suffer any prejudice if the applicant is allowed to file her appeal out of time. If he merited the judgment obtained against the applicant, he has nothing to lose in the appeal that is bound to be filed by the applicant for, in all probability, the judgment of the subordinate court will certainly be upheld and he would be entitled to the costs of the appeal.

In the absence of any evidence that the applicant was notified of the hearing of her case and the delivery of the judgment, I am prepared to accept the appellant's explanation that she may not have been aware of the date of the judgment. Without being privy to this date, she could not possibly have filed the appeal in time. I will therefore extent time within which she should file her appeal. For this reason, I allow her motion dated 3<sup>rd</sup> May, 2018 but on the following conditions:

1. The memorandum together with the record of appeal should be filed and served within fourteen (14) days of the date this ruling.
2. In the event that the appeal is not filed and served as directed in (1) above, the applicant's motion stands dismissed with costs.

It is so ordered.

**Signed, dated and delivered in open court this 21<sup>st</sup> day of September, 2018**

**Ngaah Jairus**

JUDGE