



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELCA. CASE NO. E083 OF 2021

**ANNAH ANYANGO ODHIAMBO (Suing as the Legal Representative
of the Estate of Flora Anudo Ogembo (Deceased).....APPELLANT**

VERSUS

ZAKARIA OGARE ODERO.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF KISUMU.....2ND RESPONDENT

(Being an appeal from the judgment of the Honorable F. Rashid, Principal Magistrate, Winam delivered on 3rd August, 2021 in the original Winam CMCELC NO. 108 OF 2018)

RULING

Annah Anyango Odhiambo suing as a Legal Representative of the Estate of Flora Anudo Ogembo (hereinafter referred to as the Appellant) has come to this court against Zakaria Ogare Odero and the County Government of Kisumu for orders that this Honorable Court be pleased to grant leave to the Applicant to file appeal out of time in Winam CMCELC NO. 108 OF 2018 and that upon leave being granted, the Honorable court be pleased to grant orders of stay of execution of the judgment and decree in Winam CMCELC NO. 108 OF 2018 pending the hearing and determination of the appeal herein. That the costs of this application be in the cause.

The application is based on grounds that the time allowed by law for filing the appeal has elapsed and judgment in Winam CMCELC NO. 108 OF 2018 was delivered on 3rd August 2021 in favour of the Respondent.

That stay of execution for 30 days in the said suit was issued and the same lapsed on the 3rd day of September 2021 the same time period within which the Appellant was to appeal against the judgment of the court.

The Plaintiff in the lower court Flora Anudo passed on and by the time the applicant obtained Letters of Administration and gave instructions to their Advocate to Appeal against the Judgment, time within which to Appeal had lapsed.

The reason for the delay was occasioned in obtaining a copy of the judgment, transmitting it to the Plaintiff who had passed on by time the Judgment was read and therefore passing the same to the Estate of Flora Anudo Ogembo and explaining to the estate the contents of the Judgment and the last day to appeal within the 30 days which was 3rd September 2021.

By the time instructions to Appeal were given to the Advocate on record, time had lapsed and the Appeal can only be canvassed with the leave of court to file the Appeal out of time. The delay was occasioned by taking instructions from the estate of Flora Anudo Ogembo (deceased) who had to take out letter of Administration and also sit as family and give instructions to Counsel to Appeal against the judgment that was delivered on the 3rd August 2021.

The Applicant being aggrieved by the whole of the judgment delivered in Winam CMCELC NO. 108 OF 2018 on 3rd August 2021 is desirous of preferring an appeal against the said judgment and has filed the appeal herein though out of time and seeks the indulgence of this honorable court to grant him leave to admit the appeal herein out of time.

The Appeal has overwhelming chance of success should it proceed to full hearing and it would be unfair to deny the Applicant a Legal Representative of the estate of Flora Anudo Ogembo (Deceased) her legitimate statutory right to appeal.

The applicant contends that the application is brought in the interest of justice and no prejudice will be occasioned to the Respondent in the event that the orders sought herein are granted. This application has been made without any unreasonable delay.

The application is supported by the affidavit of Annah Anyango Odhiambo wherein the grounds are reiterated. The application is opposed by the 1st Respondent vide affidavit of Georgine J. Imbaya.

I have considered the application and the replying affidavit and do find that the application is dated 25/11/2021 and filed on 9/12/2021. Judgment was delivered on 3/8/2021 and the application for leave to file the appeal out of time was made more than 3 months after Judgment.

The reasons for delay are that the Plaintiff before the trial court passed on 20/5/2021, even before Judgment. The applicant obtained letters of Administration on 16/8/2021. The applicant took time to instruct the Advocate who was on record.

I do find that the explanation for delay between 3/8/2021 to the date of filing the application has been made thus that the plaintiff died even before judgment. The family of the deceased definitely required time to re-organize themselves for succession whereby they obtained a limited grant of letters of administration ad litem. I do allow the application in terms of prayer 2 of the Notice of Motion. On the issue of stay pending appeal, I do find that Judgment was negative hence there is no order to stay. Costs in cause.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24th DAY OF FEBRUARY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.