



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**MISCELLANEOUS APPLICATION NO. 75 OF 2012**

**ANNA KOEI KATONON.....APPLICANT**

**VERSUS**

**CLEMENTINA JEBET BARNG'ENTUNY.....RESPONDENT**

**RULING**

The application for determination is the Notice of Motion dated 18th September, 2012 in which the Applicant prays for order that a stay of execution of the decree be granted pending the hearing of the appeal, that the Applicant be granted leave to file appeal out of time and for costs.

The same is brought under S. 3A and 63 (e) of the Civil Procedure Act, Order 42, Rule 6 and 50 Rule 6 of the Civil Procedure Rules, the inherent jurisdiction of Court and all enabling provisions of the law.

It is premised on the following grounds:-

- (a) That the judgment was entered und a decree passed in favour of the respondent herein against the applicant dispossessing the applicant of her share of the suit property.**
- (b) That the applicant is aggrieved by the said judgment hence the decree.**
- (c) That the applicant due to failing health was unable to take any action hence the delay in lodging an appeal therefrom and was unable to give the requisite instructions to her counsel on record.**
- (d) That the Applicant now desires to appeal out of time from the said judgment and decree.**
- (e) That the Applicant has a strong appeal with high chances of success hence this application.**
- (f) That the Applicant stands to suffer irreparable loss should the judgment be left to stand since all her beneficiaries stand to lose.**
- (g) That the Applicant is willing to comply with any reasonable condition that may be imposed by this Honourable Court in order to grant this application.**

It is further supported by the affidavit of Anna Koei Katonon, the Applicant herein sworn on 18th September, 2012. The gist of the supporting affidavit is that the Applicant was unable to file an appeal on

time as she was sick and could not communicate with her lawyer to give him instructions to file the same.

The application is opposed vide a Replying Affidavit sworn by the Respondent on 22nd November, 2012. She urged the court to dismiss the application on ground that the application is without merit and is filed as an afterthought. She states that after judgment was delivered in her favour she proceeded to execute the transfer of the subject land in her favour without the objection by the Applicant. She also states that the Applicant has not substantiated the allegation that she has been sick and unable to communicate with her lawyer. That in the end, the Applicant is only intent on preventing the Respondent from enjoying the fruits of her judgment.

Mr. G. O. Obudho, learned Counsel for the Applicant submitted that under the provisions of Order 50 Rule 6 of the Civil Procedure Rules, 2010, the court is empowered to enlarge time for doing any act or taking any proceedings upon terms as the court may deem fit. He stated that the court has unfettered discretion and if any delay should occur prior to the making of an application, it ought to be explained by the party making such application. In this regard, he submitted that the Applicant has given the explanation in her supporting affidavit which is that the delay in filing the appeal out of time was due to unavoidable circumstances.

He further submitted that the Respondent had intercepted the communication between the Applicant and her advocate as both shared the same postal address. That the respondent made deliberate effort to conceal facts with a view to frustrating any efforts the Applicant intended to make.

Mr. Obudho cited the case of **BELINDA MURAI & 9 OTHERS VS AMOS WAINAINA - NAIROBI CIVIL APPLICATION NO. 19 OF 1978** which gave the parameters of exercising courts discretion as regards entertaining an application for extension of time as follows:

1. Delay
2. Public importance of the matter
3. Prospects of success of the intended appeal

Finally, the counsel pointed out that the fact that the Respondent had contributed to the delay of the case in the lower court should also be taken into consideration in deciding whether the Respondent would indeed suffer irreparable damage if the Applicant was allowed to lodge the appeal out of time.

Miss Kipseii, learned counsel for the Respondent on the other hand submitted that the application was made in bad faith, was an afterthought and lacked merit and should therefore be dismissed with costs. While conceding that this court has inherent jurisdiction and consequent discretion in granting the leave to file the appeal out of time, submitted that the court should also consider the interests of the Respondent in arriving at such a decision. She submitted that the Applicant had received her share of land and that she had admitted before the court that the entire family had received their share of land. That therefore, the Applicant had no claim over the land belonging to her late son Stephen Barng'etuny and in any case she was only holding the land in trust for her late son's children, together with the Respondent who was the deceased's wife.

She further submitted that Order 42, Rule 6 of the Civil Procedure Rules presupposes a situation where an appeal already exists and the Applicant ought to first obtain leave to file an appeal and indeed ought to have filed such appeal before seeking an order of stay of execution.

She also submitted that the claims by the Applicant that there was a non-communication with her advocate occasioning the delay to file the appeal are baseless and an attempt to delay justice. She further stated that there was no evidence that the Applicant was too ill to go to see her advocate and give him the instructions to file this application.

Miss Kipseii stated that since there was no indication that the Applicant was not satisfied with the lower

court judgment, the Respondent commenced execution of the decree whose effect was to transfer the land into the name of the Respondent and her two children. That in the event, if the orders sought are granted, the Respondent's family would suffer a lot of anguish.

Before I analyse the merits or demerits of this application it is important to briefly state who the parties to the dispute are. The Applicant Anna Koei Katonon was the Defendant while the Respondent was the Plaintiff in Eldoret Chief Magistrate's Court Civil Suit No. 1352 of 2002. The Respondent is Stephen Katonon's widow who is the Applicant's son. The dispute revolved around two parcels of land namely, Moiben/Kapsumbere Block 2 (Tachasis)/93 and Moiben/Kapsumbere Block 2 (Tachasis)/101. While finding in favour of the Respondent the learned magistrate observed that the Applicant got her share of her late husband's estate and it was selfish of her to require to benefit from her late son's 76 acres of land. In this respect, the magistrate granted the prayers sought which included that the two parcels of land (belonging to the Respondent's late husband) be registered in the joint names of the Respondent and her two children.

I have accordingly considered the entire application, the supporting and replying affidavits as well as the submissions made by the respective counsel.

I concur with counsel for the Respondent that Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:-

***"6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under subrule (1) unless-***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

***(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.***

***(4) For the purpose of this rule an appeal to the Court of Appeal shall be deemed to have filed when under the Rules of that . Court notice of appeal has been given.***

***(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.***

***(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."***

presupposes that an appeal already exists. But again, Section 63 (4) of the Civil Procedure Act gives the court the discretion to make other interlocutory orders as may appear to the court to be just and convenient to prevent the ends of justice to be defeated. Such orders, I believe, include, but not limited

to, an order of stay of execution. The mischief intended to be cured as in the instant case is to avoid the intended appeal being rendered nugatory.

Be that as it may, in considering this application, the court cannot shut its eyes to the narrations given by both parties, in particular whether the Applicant has substantiated the reasons given for the delay in filing the appeal on time. Whereas annexure 'AKK.2' in support of the application shows that the Applicant has been attending treatment for osteoarthritis and peptic ulcers at Dr. L. K. Lelei's clinic, there is no indication that such treatment prevented her from either walking or traveling to see her lawyer to give the requisite instructions to file the appeal.

Again he who alleges must prove. The Applicant alleges that the Respondent hid the correspondence between herself and her advocate which contributed to their communication breakdown. However she did not demonstrate any evidence in this respect. In particular, and surprisingly, even her lawyer did not show any single correspondence he may have written to the Respondent and did not reach her. At the same time, the Respondent never exhibited a single copy of such correspondence she may have written to her lawyer. In this respect, I find such assertions to be without any merit.

Moreso, the Applicant sat on her right to appeal. It was not until the execution of the decree was near completion that she realized she needed to knock on the door of the court. For this reason I find that the delay in filing the appeal is inordinate and inexcusable and that her agitation to file the appeal is aimed at curtailing the Respondent from enjoying the fruits of her judgment.

In the upshot, it is the finding of this court that the Applicant does not deserve the exercise of the discretion of this court in her favour due to her indolence. The application is thus dismissed with costs.

**DATED and DELIVERED at ELDORET this 27th day of February, 2014.**

**G. W. NGENYE - MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Obudho for the Applicant

Mr. Komen holding brief for Ms. Kipseii for the Respondent