

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL CASE NO. 95 OF 2013

OWINO CAROLINE PLAINTIFF

VERSUS

CASTRO OTIENDE..... DEFENDANT

RULING

1. Before me are two applications, both filed under certificate of urgency by the appellant. The first was filed on 21st June, 2013 seeking leave to file an appeal out of time and stay of execution of decree (now spent).
2. The application is expressed to be brought under Section 79G and 95 of the Civil Procedure Act, primarily. The main ground is that the applicant is dissatisfied with the ruling delivered in her counsel's absence on 24th April, 2013 which fact only came to her knowledge on 11th June, 2013 after the lapse of the appeal window of 30 days. That she intends to appeal.
3. This court did certify the matter urgent and granted stay of execution subject to deposit of the decretal sum in court within ten days. The applicant did not comply. Instead, one month later on 24th July, 2013, she filed a second application principally under Order 45 rule 1 and 2 of the Civil Procedure Rules seeking review of the order of security through enlargement of time and deposit of a log book for motor vehicle KBS 053S, in lieu of cash as earlier ordered. The chief ground is that the applicant had been unable to deposit the decretal sum as security but she could offer a log book in lieu. She was directed by the court on 24th July, 2013 to serve the second application for hearing alongside the first application, which had been set for 29th July, 2013.
4. On 29th July, 2013 counsel for the respondent sought adjournment on the basis that he had been served for the first time with both applications on 25th July, 2013. Counsel holding brief for the applicant was not aware of this issue. The court thereafter ordered that the applicant takes a date in the registry as she had not demonstrated any urgency by her conduct. On 6th August, 2013 the applicant filed a certificate of urgency stating that the proposed security had been attached. She was directed to take dates in the registry. Eventually on 31st October, 2013 the parties agreed to file written submissions in respect of the two pending applications. Unfortunately, the resident judge was away on official duties on 15th March, 2014, which was the ruling date.
5. I have considered the material placed before me in respect of the two applications. I take the following view of this matter. The initial application was brought under Section 79G Civil Procedure Act which states in the proviso that:

“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 appeal on time.”

6. In grounds opposing the first application, the respondent accuses the appellant of laches. From the appellant's affidavits it is not clear why she and her counsel were absent during the delivery of the impugned Lower Court ruling. The respondents are shown to have been present (annexture OC3). Further, no explanation is given for the two month hiatus between the delivery of the ruling and the lodging of the first application.

7. Even if the court were to consider the delay of two months excusable, the applicant's conduct subsequent to the order herein of 21st June, 2013 inexplicable. She did not serve the conditional stay order on the respondent, or comply with the order for deposit of the decretal sum in ten days. Instead, she came to court over one month later to offer an alternative security and enlargement of time. Apart from the bald deposition in her affidavit that she had been unable to raise the deposit, she did not attach any evidence of her financial position. Having failed to serve the two applications on the respondent on time, the hearing was adjourned on 29th July, 2013. The applicant subsequently failed to persuade this court on 6th August, 2013 to grant an ex parte order. She went back before the Lower Court in the primary suit and filed an application for stay and successfully obtained ex parte orders of stay of execution on 8th August, 2013 (see annexure CO1 to replying affidavit of the respondent, Castro Otiende). That application was due for inter partes hearing on 22nd August, 2013 before the Lower Court. The orders of the Lower Court were procured during the pendency of the two applications herein. The applicant did not obviously disclose this fact to the Lower Court.
8. Therefore, while the 2nd applicant may have been entitled to some sympathy and her application for review considered under the limb of "any other sufficient cause" under Order 45 rule 1 of the Civil Procedure Rules, her delay in bringing the second application and the material non-disclosure before the Lower Court on 8th August, 2013 militate against this. Indeed her entire conduct in these matters leaves a lot to be desired. The applicant is guilty of laches.
9. In the circumstances, and solely for purposes of doing justice, I would only grant the prayer No. 2 in the Notice of Motion filed on 21st June, 2013 which is also replicated in prayer (b) of the Notice of Motion filed on 24th July, 2013, allowing leave to the appellant to file an appeal within fourteen days of today's date.
10. Prayer 3 of the Notice of Motion filed on 21st June, 2013 is spent and was the basis of prayer 3 of the Notice of Motion filed on 24th July, 2013. Nothing would have been achieved by these prayers even if the applications had merit, which is not the case.
11. Apart from the order grant of leave to file an appeal out of time within fourteen days of today's date the two applications have failed and are dismissed accordingly with costs to the respondent.

Delivered and signed at Malindi this **28th** day of **March, 2014** in the absence of the parties.

C. W. Meoli

JUDGE