



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 28 OF 2014

MILCAH J. MUTWOL::: APPLICANT

VERSUS

FRACA SERVCOM::: RESPONDENT

RULING

The applicant, **MILCAH J. MUTWOL**, is seeking leave to appeal out of time. She also seeks an order staying the execution of the Decree which she intends to appeal against.

The Judgement of the trial court was delivered on 16th January, 2014. The applicant was absent when the court delivered the said Judgement. She has deponed that she was unwell at the said time.

In support of her illness, the applicant has exhibited 2 "***Sick Leave Certificates***".

Notwithstanding the said certificates, the Respondent submitted that there was no evidence that the applicant was so unwell as to be incapable of instructing her lawyers to institute on appeal on her behalf.

The Respondent also pointed out that the applicant failed to bring forward any evidence to explain what happened to her between 20th January, 2014 and 20th February, 2014.

However, it is clear from the first Sick Leave Certificate, dated 13th January, 2014, that the Chief Medical Officer at the Health Services Department of Moi University had given 7 days sick-off to the applicant.

In that certificate, the Medical Officer indicated that the applicant ought to go back for review on 20th January, 2014.

In effect, the applicant was away from her place of work on 16th January, 2014, when the judgement was delivered.

The second Sick Leave Certificate is dated 20th February, 2014. In it, the Medical Officer gave to the applicant 10 days sick-off. He also directed the applicant to go back for review on 1st March, 2014.

As the first review had been scheduled for 20th January, 2014, whilst the second Sick Leave Certificate was dated 20th February, 2014, the Respondent pointed out that the applicant did not explain what happened to her between those 2 dates.

The Respondent believes that the only reason why the application was made was because execution was levied against the assets of the applicant.

In fact, the Respondent was of the view that there was no way an order for stay of execution could be granted considering that a Court Broker had already proclaimed the applicant's goods on 18th March, 2014.

I think that it is important to emphasise that the proclamation of goods is not, of itself, the complete exercise of execution of a Decree. Execution does not end at the stage of proclamation.

When a Court Broker makes a Proclamation of Attachment, he cites on the proclamation the goods which he is deemed to have Attached. However, the said goods would remain at the place where they were when proclamation was made. The goods cannot, lawfully, be removed by the Court Broker until after a period of seven (7) days.

And when the period of 7 days elapses, the Court Broker will only cart away the attached goods if the Judgement-Debtor had not yet paid off the decretal amount, together with the costs of the execution process.

The point I am making is that even after there has been a proclamation, the court can still grant an order for the stay of execution, in appropriate circumstances.

In this case, was the applicant only seeking stay of execution with the intention of stopping execution which had commenced? That is the Respondent's contention.

It is clear that the application was filed in court on 18th March, 2014. As at that date, the applicant expressed fear that the Respondent was likely to execute the Decree at any time. In other words, the applicant was talking about something which she anticipated could happen. She was not talking about something which had already happened.

So, it cannot be correct to assert, as the Respondent did, that this application was only prompted by the process of execution, which had already commenced.

The court Broker's proclamation is dated 19th March, 2014. That confirms that the process of execution was commenced after the applicant had already come to court, seeking stay of execution, amongst other reliefs. Therefore, the application herein was not prompted by the process of execution.

The applicant deponed that she fell ill in late 2013. According to her, she had been ailing since then. To my mind, that deposition provides an answer to the Respondent's contention, concerning the Applicant's state of health between 20th January, 2014 and 20th February, 2014. The applicant's poor state of health did not take a break. That is what I understand the applicant to have stated in her affidavit.

I find that the applicant has provided a reasonable explanation for the delay in lodging her appeal. I also find that the delay of 30 days was not inordinate.

Therefore, there is merit in the application for leave to appeal out of time.

The only difficulty that the applicant faces is that her application for stay of execution is pegged on her intended appeal. To my mind, if a person is asking the court to make an order for stay of execution pending the hearing and determination of his appeal, the said appeal ought to already be in place.

The danger of granting an order for stay of execution when an appeal had not yet been filed, is that the party in whose favour the stay was granted may chose to never file an appeal.

In this case, execution has already commenced. Therefore, if there be no stay of further execution, at least on an interlocutory basis, there was a real danger that the execution process could be concluded long before the appeal progressed.

In order to safe guard the subject matter of the intended appeal, I find that it is necessary, in this

exceptional situation, to grant an interim relief.

Accordingly, I now order as follows:-

(a) Leave is granted to the applicant to appeal out of time.

(b) The intended appeal shall be filed within the next TEN (10) DAYS from today.

(c) There shall issue forthwith an order of stay of further execution of the Decree in Eldoret CMCC NO. 994 of 2010. This order will remain in force for a period of 30 days only.

(d) If the applicant should be desirous of seeking an order of stay of execution pending the hearing of such appeal as she will have filed, she will need to take appropriate steps within the period when the interim relief was still in force.

(e) The applicant has succeeded in her application. However the need for it cannot be blamed on the Respondent. Accordingly, the Applicant will meet her own costs of the application. Even though the Respondent's opposition to the application was not upheld, I find no reason to burden the respondent with the costs of the application.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF APRIL, 2014

FRED A. OCHIENG

JUDGE