



No. 307

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 104 OF 2011

JOSEPHINE MORAA COSMAS APPLICANT

VERSUS

JOHN BOSCO MBOGA RESPONDENT

RULING

1. The applicant, Josephine Moraa Cosmas brought the application herein by way of Notice of Motion dated 12th February 2013 under Order 45 Rules 4 and 63 (e) of the Civil Procedure Act and Section 2(2) and Order 50 rule 6 of the Civil Procedure Rules seeking the following orders;
 - a. **Spent**
 - b. **Spent**
 - c. **That the period for preferring an appeal from the judgment and decree in Kisii CMCC No. 553 of 2009 be extended for such time as the court may deem just and expedient.**
 - d. **That the orders made on the deposition of security in court be reviewed and varied.**
 - e. **That pending the hearing of the intended appeal there be stay of execution of the decree in Kisii CMCC No. 553 of 2009.**
 - f. **That the costs of this application do abide the outcome of the intended appeal.**

The application was supported by the applicant's affidavit sworn on 12th February, 2013 in which the applicant averred that;the applicant had filed an application herein on 7th September 2011 for leave to appeal out of time from judgment and decree issued in Kisii CMCC No. 553 of 2009 and for a stay of execution of the said decree pending the hearing and determination of the intended appeal. The said application was heard by R. Lagat-Korir J. who reserved her ruling on the same. While the said ruling was pending the advocates practicing in Kisii started a strike against High Court judges who were stationed at the Kisii High Court. The said strike paralyzed the normal activities at the High Court because the advocates failed to attend court sessions.

2. Due to the strike, the judge did not deliver the ruling on the said application for a long period of time and the applicant's then advocate on record could not inquire on the same due to bad blood that existed between the advocates and the High Court Judges at the station. While still waiting for the said ruling to be delivered the applicant lost her grandson sometimes in September 2012 and got deeply involved in his burial arrangements. The applicant also became sick at the same time. On 9th February 2013, the respondent came to the parcel of land which was in dispute in the lower court and on which she had put up structures and gave her notice to move out or risk eviction. In view of this turn of events, the applicant went to see her advocates on 11th February 2013 who

upon perusal of the court file informed her that the ruling that was pending on her application for extension of time and stay of execution was delivered by R. Lagat-Korir J. on 20th September 2012 in their absence. The said ruling which had timelines within which the appeal was to be filed and prosecuted and, for the depositing of security was delivered without notice to the applicant's said advocates. By the time the said ruling came to the notice of the applicant, those timelines had lapsed. It is on account of the foregoing that the applicant has sought extension of the timelines that were set out in the said ruling by R. Lagat-Korir J. that was delivered on 20th September, 2012.

3. In addition to the extension of time, the applicant has also sought the review of the security amount of Ksh.100,000.00 that she was ordered to deposit in court as a condition for stay of execution. The applicant has contended that she is old and ailing and has no source of income. She is therefore unable to raise the said sum of Ksh.100,000.00. The applicant urged the court to reduce the said amount to modest sum that she can pay.
4. The respondent did not file a replying affidavit and/or grounds of opposition to the applicant's application. When the matter came for hearing before me on 3rd February 2014, the respondent's advocate did not appear. Upon satisfying myself that the hearing date was taken by consent, I allowed the hearing of the application to proceed. Mr. Minda advocate for the applicant submitted in support of the application that the ruling that was delivered by R. Lagat-Korir J. on 20th September, 2011 was delivered without notice to the parties and that the applicant became aware of the said ruling after the timelines set out therein had lapsed.
5. Mr. Minda submitted further that the applicant is old and unemployed and as such not capable of depositing the sum of kshs. 100,000.00 that was ordered by the court as security. Mr. Minda submitted that the said order of security will hinder the applicant's access to justice if left to stand. As an alternative to the security that was ordered by the court, Mr. Minda submitted that an order can be made to inhibit any dealings with the applicant's parcel of land namely, Plot No. 25B pending the hearing and determination of the intended appeal.
6. I have considered the applicant's application together with the affidavit filed in support thereof. The application was not opposed by the respondent. In her ruling delivered on 20th September 2012, R. Lagat-Korir J. made the following orders:-
 - a. **The applicant shall file her appeal within 30 days from the date of this ruling failing which the leave lapse automatically.**
 - b. **The execution of the decree in Kisii CMCC No. 553 of 2009 is stayed pending the hearing and determination of appeal. The stay order shall lapse automatically at the expiry of one year if the appellant fails to take active steps to prosecute the appeal.**
 - c. **The stay order is conditional upon the applicant depositing One Hundred Thousand Shillings (kshs. 100,000/=) into court as security for costs within 30 days from the date of this ruling.**
 - d. **The main suit be set down for hearing on priority basis upon compliance with the rules.**
 - e. **Costs of this application will be borne by the applicant**
7. The application before me seeks the extension of the timelines set out above and a review of the order on security. Under Order 50 rule 6 of the Civil Procedure Rules, 2010, the court has power to enlarge time that has been fixed by the court for doing any act or taking any proceedings. The power is exercised at the discretion of the court as the justice of the case may require. The applicant has given various reasons why she was not able to meet the timelines sought to be enlarged. The reasons given by the applicant have not been challenged by the respondent. The applicant has contended that the ruling of the court which fixed timelines within which the appeal was to be filed and security deposited was delivered without notice to the parties and that she became aware of the said ruling after the expiry of the said timelines. This contention has not been controverted by the respondent. I am satisfied that the applicant has given good reasons for enlarging the time that was set herein on 20th September, 2012 for filing the intended appeal and depositing of security. As I have stated above, the applicant has also sought an order for the review of the amount of security that she was required to deposit as a condition for an order for stay of execution pending appeal. Review is provided for under Order 45 of the Civil Procedure

Rules.

8. Order 45 rule 1 (1) of the Civil Procedure Rules, 2010 provides as follows;

“(1) Any person considering himself aggrieved;

- a. **By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
- b. **By a decree or order from which no appeal is hereby allowed,**

And who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

9. In **Francis Origo & Another –vs- Jacob Kumali Munagela [2005] eKLR**, the Court of Appeal stated that;-

“From the foregoing it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there was some mistake or error apparent on the face of the record or that there was any other sufficient reason Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. (Emphasis added). Once the appellants took the option of review than appeal they were proceeding in the wrong direction.”

It is clear from the foregoing that an order or decree may be reviewed on the grounds of; discovery of new and important matter of evidence or mistake or error apparent on the face of record or for any other sufficient reason. Order 42 rule 6(2) of the Civil Procedure Rules 2010 provides that the court shall not grant a stay of execution unless the applicant has among other things given security for the due performance of the decree sought to be stayed. It follows therefore that while the court was considering the applicant’s application for extension of time to file an appeal against the lower court judgment and decree and for stay of execution of the said decree pending the hearing and determination of the said appeal, one of the factors that the court considered was whether the applicant had provided or proposed to deposit any security. The court after considering the decree sought to be stayed and the position of the parties in relation thereto ordered the applicant to deposit a sum of Ksh. 100,000.00 as a security as a condition for the order of stay of execution that she had sought.

10. The applicant has not pointed out any apparent error or mistake on the record of the ruling and order that provided for the depositing of this sum of Ksh.100,000.00 as a security neither has the applicant demonstrated that she has come across any new and important evidence that she could not place before the court when the said order was made. I believe that the fact that the applicant is aged, sickly and has no source of income was a fact within the knowledge of the applicant when the applicant’s application for stay of execution was made. I am also of the opinion that the applicant’s, sickness, age and lack of source of income is not a sufficient reason to warrant the review of the order for security made herein on 20th September, 2012. These are issues which should have been raised during the hearing of the applicant’s application for stay of execution. As I have stated above, these are not new facts which have come to the knowledge of the applicant after the date of the order sought to be reviewed.

11. Due to the foregoing, I am not satisfied that the applicant has made out a case for the review of the order on security made herein on 20th September, 2012. In conclusion, the applicant’s Notice of Motion application dated 12th February, 2013 is allowed in part on the following terms;

- a. **The time within which the applicant was to file appeal pursuant to the order made herein on**

- 20th September, 2012 is extended by thirty (30) days from the date hereof.
- b. The order of stay of execution of the judgment and decree issued in Kisii CMCC No.553 of 2009 granted herein on 20th September, 2012 shall lapse automatically at the expiry of one (1) year from the date hereof if no steps are taken by the applicant to prosecute the appeal within that period.
 - c. The time within which the applicant was to deposit in court a sum of Ksh.100,000.00 as a security pursuant to the order issued herein on 20th September, 2012 is extended by forty five (45) days from the date hereof.
 - d. The respondent shall have the costs of this application.

Delivered, signed and dated at KISII this 7th day of August, 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the applicant

Mr. Ombachi h/b for Masese for the respondent

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE