



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 70 OF 2013

BRIGITTE MUKUI KITENGE.....APPLICANT

VERSUS

1. FLORENCE MBITHE MUNYALO

2. J.M. MUINDE ADVOCA.....RESPONDENTS

R U L I N G

1. In the application dated 5/4/2013, the orders sought that remain for determination are that leave be granted to the Applicant herein to file an appeal out of time from the ruling of the Honourable Magistrate in **Kitui SPMCC No. 18 of 2010** delivered on the 6th day of December 2012. Secondly that pending the hearing and determination of the intended appeal, this Honourable Court be pleased to stay execution and the warrants of arrest issued upon the Applicant in **Kitui SPMCC No. 18 of 2010**.
2. The background to the application is a consent judgment entered between the parties for the payment by the Applicant to the Respondent of Kshs.305,000/= plus interest and costs following a failed agreement for the purchase of a plot.
3. According to the affidavit in support of the application sworn by the Applicant, **Bridgette Mukui Kitenge**, she had deposited the sum of Kshs.305,000/= with her advocate **J.M. Muinde** the 2nd Respondent for onward transmission to the 1st Respondent prior to the filing of the suit. That following the entry of the judgment, instead of paying the 1st Respondent, the 2nd Respondent gave a professional undertaking in court to pay the said decretal sum in sixty days. That the Applicant was discharged from making the payment. That the 2nd Respondent failed to honour the undertaking. The Applicant was arrested after one year only to realize that the 2nd Respondent had failed to pay the decretal sum and had withdrawn the professional undertaking. What has aggrieved the Applicant and prompted the application herein is the withdrawal of the said professional undertaking. The intended appeal is against the ruling by the trial court dated 6/12/2012 dismissing the Applicant's application that the order discharging the professional undertaking be reviewed, varied and/or set aside.
4. The application is opposed by both the 1st and 2nd Respondent. The 1st Respondent filed the grounds of opposition dated 23/4/2013 and a replying affidavit. According to the 1st Respondent, the judgment has not been challenged and is not the subject of the intended appeal. The 1st Respondent averred that although the 2nd Respondent gave a professional undertaking, the decretal sum was Kshs.416,705 but the Applicant claimed to have given the Advocate (2nd Respondent) Kshs.300,000/= as a friendly loan. The 1st Respondent's position is that the appeal

on the question of the said professional undertaking does not affect her and therefore she ought to be paid the decretal sum and should not be dragged into issues affecting the Applicant and her advocate.

5. The 2nd Respondent, **Joseph Mutinda Muinde** saw no merits to the application. The 2nd Respondent annexed several documents to vindicate himself which include the pleadings in the lower court file, a complaint to the Honourable the **Chief Justice** and a complaint to the **Law Society of Kenya Disciplinary Committee**.
6. The delay of five months is inordinate. The same has not been sufficiently explained. Although the Applicant stated that she had no money to file an appeal, the Applicant had an advocate in the lower court case and has annexed her bank statement which does not reflect her as a pauper. It is also noteworthy that the transaction that gave rise the case that is the subject of appeal involved a transaction for the sale of land by the Applicant.
7. I have taken into account the authorities cited for example, **Kenya Reinsurance Corporation – vs- V.E Muguku Murius T/A Ms Muguku Muriu Company – Nairobi Court of Appeal No. 48 of 1994**. It is also observed that the decretal sum has almost doubled due to the delay in paying the same and the further delay in filing the appeal. My view however is that the appeal is arguable. I am therefore inclined to allow the Applicant to exercise her right of appeal but upon certain conditions.
8. The beef over the professional undertaking is between the Applicant and her then advocate. I am in agreement with the 1st Respondent that she should not be dragged into that tussle but should enjoy the fruits of her successful litigation.
9. With the foregoing, taking into account the decree is not challenged, I direct that the Applicant do pay 50% of the decretal sum to the 1st Respondent and give security for the due performance of the other 50% of the decretal sum within 60 days from date hereof. In default execution to proceed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 29th day of September 2014.

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JUDGE