

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 245 OF 2014

MONICA ANNE NYAMBURA KARIUKIPROPOSED APPELLANT

-VERSUS-

ALBERT ONSINSI.....PROPOSED RESPONDENT

RULING

1. The application before this Court is a Notice of Motion dated 3.3.14 brought under Orders 22 Rule 22 & 34, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1, Sections 1A and 1B, 3 and 3A, 43, 79G and 95 of the Civil Procedure Act, Cap 21, The Constitution of Kenya. The applicant seeks stay of execution and proceedings of decree in CMCC 2040 of 2011 pending the hearing and determination of the supplication and suit and leave for the appellant to file an appeal out of time.
2. The applicant argues that she was not made aware of the decision of the lower Court which in essence struck out the defence and entered judgment as prayed in the plaint. Counsel argued that the same was made prematurely without evidence. The applicant was dissatisfied with the same and sought to appeal against it; that the advocate representing the defendant was not licensed to practice in 2012, 2013 and 2014 and the defendant did not inform the defendant that the defence had been struck out and she was arrested and committed to civil jail; that there is no inordinate delay and any delay is excusable; that the appeal raises serious grounds one being that the matter dint go to formal proof on the issue of interest; that the applicant argues that if leave is not granted and execution is not granted she will suffer irreparable loss and damage as the respondent has not indicated he is in a position to refund the money; that the applicant has already deposited security of costs as a condition to grant of stay. Counsel urged the Court to exercise its discretion and allow the applicant's application.
3. The respondent opposed the application and filed a replying affidavit dated 10th March 2014. He deponed that he entered into an agreement for sale of a parcel of land from the applicant at an agreed price of Kshs. 800,000; that he subsequently paid Kshs. 600,000 on 28th March 2011. Issues on ownership arose and the applicant in a signed agreement agreed to refund him the Kshs. 600,000 he had paid which she failed to do culminating to the current suit. The matter was heard and an ex-parte judgment entered was entered against the applicant as prayed in the plaint. A decree was subsequently drawn as per the law and the respondent instructed M/s Clear Real trader to execute by way of attachment. The auctioneer proclaimed the applicant's properties on 23.04.2012. This prompted the applicant to move to Court seeking to stay the execution and setting aside the attachment which application was heard and dismissed by the honorable Court. The applicant has frustrated the applicant's efforts to recover his money. She had filed an application staying execution upon being served with a Notice to show cause why execution should not proceed claiming that she was not aware of the entry of judgment. Counsel argued that the applicant did not comply with the requisites conditions necessary before the Court to extend time for the applicant to file an appeal out of time. As the applicant is guilty of unreasonable delay, has failed to comply with section 79G of the Civil Procedure Act , that the appeal is frivolous and vexatious as the decree was properly passed and had come to Court with unclean hands as she seeks to defeat justice by avoiding to settle a contractual obligation and that the application was incompetent and an abuse of the court process; that the applicant has made numerous and frivolous applications meant to delay and subvert justice and stands to suffer

prejudice if the application is allowed.

4. The applicant in her further supporting affidavit refutes having signed the purported repayment agreement and deponed that the respondent's advocate had impressed on him to take the plot but he refused and opted to move to Court. She denied having been served with the Notice to Show Cause and further added that the application had been made without undue delay as she was not aware that her defence had been struck out and judgment entered against her. She further added that it was the respondent who breached the sale agreement when he defaulted and failed to adhere to the provisions of the Sale agreement and his interest on purchasing the plot. She urged the Court to allow her application failure to which she would suffer immense financial loss.
5. The respondent in his written submissions reiterated the contents of his replying affidavit and stated that the applicant's affidavit is full of falsehood; that the application for summary judgment was heard inter-partes culminating to the judgment in his favor and subsequently the execution proceedings began.
6. I have considered the parties affidavit and submissions and find as follows; The applicant's reasons for not filing the appeal on time was that she was not aware that her defence had been struck out and blames her former counsel for not informing her of the same. Courts have held that the mistakes of counsel should not be visited on the client however a party also ought to be diligent in pursuing any matter they are a party to in Court. I therefore give the applicant the benefit of doubt. The applicant is granted leave to file her appeal out of time against the orders of Hon. A. K. Ndungu on suit no. 2040 of 2011, she shall file and serve her Notice of appeal and memorandum of Appeal within 15 days from the date of this ruling.
7. On the orders sought for stay, the applicant has explained the delay for which I have given her the benefit of doubt. In the affidavits filed the parties have explained the proceedings which culminated to the current suit. It is interesting that the applicant denies the application dated 14th May 2012 file in the lower Court and claims that her signature was forged. In her affidavit she claims that she will suffer substantial loss but has not given a reasonable explanation. I fail to see the financial loss she alleges she will suffer though she claims she is unwell and that her health is deteriorating. Am not persuaded that I should grant her a stay of execution of the proceedings and execution that had been issued in respect of the orders of CMCC no. 2040 of 2011. I decline to grant the stay order. Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this **19th** day of **September** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Applicant

.....For the Respondent

.....Court Clerk