



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NUMBER 479 OF 2003**

**PHILLIS MBOGO. .... APPLICANT/APPELLANT**

**VERSUS**

**CHARLES MURIITHI. ....1<sup>ST</sup> RESPONDENT**

**OLE KEJUADO COUNTY COUNCIL. .... 1<sup>ST</sup> RESPONDENT**

**RULING**

This is an application seeking a stay of execution of the Judgment of this court dated 2<sup>nd</sup> June, 2011. The application is dated the 13<sup>th</sup> February, 2013 and was accordingly filed about 18<sup>th</sup> Months after the delivery of judgment sought to be appealed against to the Court of Appeal.

The grounds upon which the application is based are that the certified copies of proceedings and judgment applied for by the application on 29<sup>th</sup> July, 2011, have not been supplied by the court whose file, the applicant, asserts has been missing. The applicant also stated that unless the stay is granted, the Decree Holder will execute the decree to the Appellants prejudice and detriment. The Applicant finally avers that his intended appeal has merit and raises triable issues and has high probability of success as it touches on constitutional rights.

The Respondent/Decree Holder opposes the application on the following grounds: -

1. That this application was filed after an inordinate delay.
2. That the Appeal intended to be filed is based on facts in respect of which the Court of Appeal has no jurisdiction.
3. That the facts upon which the appeal is based were decided by the lower court and confirmed by this court and the Court of Appeal will accordingly have no jurisdiction to change them – which means the chances of success of the appeal are minimal.
4. That the Applicant deserves no favourable discretion of this court as he attempted to sell the land the subject matter of the appeal and therefore, came to court with dirty hands.
5. That the applicant will not suffer any substantial loss since he is not in occupation of the land.

I have carefully considered the application after perusing the file records. I find that the High Court record has never gone missing as alleged by the Applicant. I also note that the lower court record which went missing was reconstructed by order of the court. The delay to obtain certified proceedings is not therefore satisfactorily explained by the Applicant.

It is averred by the Respondent and conceded by the Applicant herein that the applicant tried to sell and transfer the plot No. 203 to his nephew after the judgment herein was pronounced. That indicates that the

Applicant does not occupy the subject land and dispossession of it will not directly affect him. He will not accordingly directly and substantially be prejudiced or incur a similar loss.

It is also clear to the court that the applicant is not in a hurry to file the substantive appeal in the Court of Appeal or to bring to an end the litigation any sooner. The possible explanation for such an attitude on the part of the applicant is that he in one way or another, continued to benefit from the status quo and would prefer delay to the intended appeal proceedings.

This court finds that the delay to file this application i.e. 18 months inordinate and inexcusable.

The court also notes that the intended appeal is a second appeal which will be argued only on points of law and not facts. But the Applicants notice of appeal shows that he intends to appeal against this court's whole judgment. This suggests that issues to be placed before the Court of Appeal may not be arguable and the Appeal may not have good chances of success.

In the above circumstances, this application for stay is not based on merit nor is it clear how a party who is not in occupation as the applicant, can offer a reasonable security or undertaking required to come from the applicant in such applications. This application is accordingly dismissed with costs. Orders accordingly.

Date and delivered at Nairobi this 18th day of September, 2014.

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**D A ONYANCHA**

**JUDGE**