



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC APPEAL NO. E005 OF 2020**

**CHARLES NJONJO GITHUKA.....RESPONDENT**

**VERSUS**

**PURITY WAMUYU WAITHERERO.....APPLICANT**

**RULING**

(1) This ruling is on the application dated 3/8/2021 which seeks the following orders;

- (i) The setting aside of the order dated 22/4/2021 which allowed a stay of execution of the Judgment and decree dated 21/10/2020 pending the hearing and determination of the pending appeal.
- (ii) The striking out of the Appellant's Appeal and record of appeal dated 18<sup>th</sup> March, 2021.
- (iii) Costs of the suit.

(2) The grounds for seeking the above orders are that the judgment of 21/10/2021 is in the Applicant's favour, that the respondent filed an application under certificate of urgency dated 29/1/2021 on 9/2/2021, the application was heard ex-parte and the applicant was never heard in reply, that the Memorandum of Appeal was filed outside the 30 day period allowed under **Section 79 G** of the **Civil Procedure Act**, without leave, that the applicant has been denied the fruits of her judgment and that the Respondent will not suffer any prejudice if the application is allowed.

The application is supported by an affidavit sworn by the applicant Purity Wamuyu Waittherero dated 3/8/2021 which has three (3) annexures which include the judgment, the ex parte order of 22/4/2021 and a copy of the Memorandum of Appeal dated 20/11/2020.

(3) The Respondent Charles Njonjo Githuka filed three grounds of opposition dated 17/9/2021 which are as follows;

- (i) The application is fatally defective for failure to comply with **Order 9, Rule 9 Civil Procedure Rules**.
- (ii) That the application is an abuse of the Court process in that the counsel for the Applicant came on record after judgment without seeking leave because in the Lower Court, it was Cherop and Marete Advocates who acted for the Applicant.
- (iii) That the Application ought to be struck out in limine with costs for having been filed by a firm not properly on record and thus are mere busybodies.

(4) The Applicant filed a Supplementary affidavit dated 15/10/2021 but wrongly titled replying affidavit in which she explains that both Mugambi Njau Advocates and E.K. Kimani Advocates were to act for her together and that her application does not offend **Order 9, Rule 9, Civil Procedure Rules**.

(5) Counsel for the parties were to file and serve written submissions by 14/3/2022 but at the time of writing this ruling, none had been filed by either party.

(6) Having carefully considered the application in its entirety including the affidavits, grounds of opposition and the annexures, I make the following findings;

Firstly, I find that it would not be fair or just to strike out the appeal because there may be a good reason why it was filed out of time. The Court having entertained the application dated 29/1/2021 on 10/2/2021, it means that striking out the Appeal would not be unfair.

Under **Section 79 G, of the Civil Procedure Act**, the Court has jurisdiction to admit an appeal out of time and the tendency would be to extend time rather than not to extend it. Striking out pleadings is a draconian move that derogates from the right to a fair hearing guaranteed under **Article 50(1) of the Constitution**.

Secondly, I find that **Order 9 Rule 9 of the Civil Procedure Rules** does not apply in this case because no judgment has been passed in this case. The provision would have applied if the current application was before the Lower Court whose decision has been appealed against.

Thirdly, the Respondent has not addressed the issue at the heart of the application namely, “was the Applicant served with the application dated 29/1/2021?”. The Respondent did not file an affidavit of service to prove service. He did not file a replying affidavit to depose that he served. This makes it more probable than not that there was no service of the said application.

Service of the application was mandatory so that the Applicant was not to be condemned unheard.

For the above reasons, I allow the application dated 3/8/2021 in the following terms;

- (1) The order dated 22/4/2021 is set aside.
- (2) The Appeal will be heard on merit.
- (3) Cost in the cause.

Order accordingly.

**Dated signed and delivered virtually at Kajiado 20<sup>th</sup> day of April, 2022.**

**M.N. GICHERU**

**JUDGE**