



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Appeal 168 of 2011

EVERLYNE VIGEDI.....APPLICANT

VERSUS

JOSHUA SAUSI AGABA.....RESPONDENT

RULING:

The application is a Notice of Motion dated the 20th December, 2011 brought under Section 3A and 79(a) of the Civil Procedure Act and Orders 42 Rule 6 and Order 51 Rule (1) of the Civil Procedure Rules and all other enabling provisions of the law.

The application is supported by the Affidavit sworn by Everlyne Vigedi dated the 20th September, 2011.

The Applicant seeks enlargement of time to enable the filing of an appeal from a ruling delivered on the 3rd June, 2011 by Honourable A. Ong'ingo SPM Eldoret in CMCC NO. 405 OF 2009. The ruling was for the dismissal of an application to set aside ex-parte proceedings and the subsequent judgment. The last day of filing of the appeal was the 3rd July, 2011. The days lapsed and she was not able to give her advocates instructions because of a breakdown in communication between herself and the said advocates. The Applicant was also seeking for a stay of execution of the decree in Eldoret CMCC NO. 405 OF 2009 pending the hearing and determination of the intended appeal.

Counsel for the Applicant argued that the appeal raised triable issues and had high chances of succeeding.

Counsel further submitted that the delay in filing the appeal was a mistake attributed to the Applicant's previous Counsel. That the mistake of Counsel should not be visited on the Applicant. That the Applicant should not be made to suffer for the mistake attributable to her previous Counsel.

The Applicants prayer was that the application be allowed in the interest of justice and fairness.

The application was opposed by Counsel for the Respondent and in support of his submissions and arguments Counsel relied on the Replying Affidavit of Joshua Sausi Agaba.

Counsel argued that the ruling was delivered on the 3rd June, 2011 and the current application was filed on the 20th December 2011 which was a six (6) month delay which was tantamount to an inordinate delay.

Counsel submitted that it was trite law that it was the burden of the person aggrieved to place before the

court all the material and explanations to enable the court exercise its discretion. That civil inaction could not be equated to a mistake and it was incumbent upon the Applicant to check the progress of her case with her advocates.

Counsel further submitted that the advocates had not put in any affidavit in support nor had they offered any explanation as to the delay.

The Applicant had not shown the substantial loss she would suffer if the application was not granted.

The Respondent urged the court to dismiss the application as there had been an inordinate and inexcusable delay in filing the same.

In further reply Counsel for the Applicant stated that the Applicant stood to suffer irreparable loss as she stood to be evicted from the suit land and urged the court to grant the application.

After reading the Supporting Affidavits and hearing both Counsels arguments the court finds the following issues for determination;

- a) Inordinate delay
- b) Discretion
- c) Costs

It appears that the Applicant neglected to visit her advocates to check on the progress of her case.

There is no affidavit from her said Counsel indicating or in support of the fact that they had informed her of the progress of her case nor have they given any explanation relating to the delay.

I find that there has been an inordinate delay from the date the Ruling was delivered that is on the 3rd June, 2011 to the date of filing of the application herein, that is the 20th December, 2011.

I concur with Counsel for the Respondents submissions that there is no satisfactory explanation given by the Applicant or her former Advocates to explain the delay.

The Applicant should have consulted her advocates regularly and should have advised them or given instructions on the steps to take or the way forward.

The court has discretion to set aside orders but this discretion has to be exercised in a judicial manner and not whimsically or arbitrarily.

The courts discretion is exercisable to avoid instances of injustice and hardship. It is not exercisable to assist inadvertence, inaction or excusable mistake.

The application herein has no merit and is dismissed with costs to the Respondent.

Dated and delivered at Eldoret this 8th day of June 2012.

**A.MSHILA
JUDGE**

Coram: Before A.Mshila J
CC: Andrew

Counsel for the Applicant Karuga holding brief for Andambi

Counsel for the Respondent: No appearance.

A.MSHILA
JUDGE