



REPUBLIC OF KENYA

High Court of Kisii

Miscellaneous Application 104 of 2011

JOSEPHINE MORAA COSMAS..... APPLICANT

-VERSUS-

JOHN BOSCO MBOGA RESPONDENT

RULING

The applicant seeks an order for stay of execution of the decree in Kisii CMCC No. 553 of 2009. She also seeks leave of this court to appeal out of time. The decision in the lower court was rendered on 30th June 2011. Her application is premised on the grounds that she was dissatisfied with the judgment of the lower court but being illiterate did not appreciate and take advantage of her right of appeal within time. She alleges that the appeal has a high chance of success for reason that the lower court did not take evidence from key witnesses.

In her supporting affidavit, the applicant avers that she did not appreciate the import of the lower court judgment until she was served with a notice of eviction from the suit plot stating that her advocates on record then did not properly advise her.

The application is opposed. In his replying affidavit, the respondent avers that the application is founded on untruths as the applicant was well aware of the outcome of the case having filed an application for stay and review soon after the judgment was delivered. Further he has averred that the applicant had ample opportunity in the lower court to present her evidence and that any lapses thereon attributable to her advocate then cannot form a basis for allowing the present application.

Parties filed and exchanged submission which I have carefully considered.

Section 79G of the *Civil Procedure Act* provides that an appeal shall be filed within 30 days of the date of the decree or order appealed against provided however, that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

The applicant has endeavoured to explain why she failed to appeal within time. Whether the lapses are attributable to herself or her advocate is immaterial. Whereas the lapses are inexcusable I, however take a broader view of substantive justice for the litigant and grant her an opportunity to prosecute her case on merit in the interests of justice. I therefore allow the application in the following terms;

1. The applicant shall file her appeal within 30 days from

the date of this ruling failing which the leave lapses automatically.

2. The execution of the decree in Kisii CMCC No. 553 of 2009 is stayed pending the hearing and

determination of the appeal. The stay order shall lapse automatically at the expiry of one year if the appellant fails to take active steps to prosecute the appeal.

3. The stay order is conditional upon the applicant depositing One Hundred Thousand Shillings (Kshs.100,000/=) into court as security for costs within 30 days from the date of this ruling.

4. The main suit be set down for hearing on priority basis upon compliance with the Rules.

5. Costs of this application will be borne by the applicant.

It is so ordered.

Ruling dated, signed and delivered at Kisii this 23rd day of August, 2012.

R. LAGAT-KORIR

JUDGE

In the presence of :

Edwin Mongare Court clerk

.....Counsel for the plaintiffs/Applicants

.....Counsel for the defendants/respondents

R. LAGAT-KORIR

JUDGE