



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**MISC. CIVIL APPLICATION NO. 96 OF 2009**

**PERIS MICERE NJAGI.....APPLICANT**

**VERSUS**

**1. HARISSON MUCHIRA.....1<sup>ST</sup> RESPONDENT**  
**2. ELIUD NJAGI MITHAMO.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. **Peris Micere Njagi** hereinafter referred to as the Applicant has moved this court under **Sections 3A, 75 and 95 of the Civil Procedure Act Cap 21**. The orders sought by the Applicant are as follows:-
  - *That this application be certified as urgent and be heard in the first instance.*
  - *That the Honourable Court be pleased to order prohibitory orders to be placed on land parcels INOI/KIMANDI/993 and INOI/KIMANDI/994 the resultant sub-divisions of INOI/KIMANDI/792 pending the hearing and determination of this application.*
  - *That the Honourable Court be pleased to grant leave to the applicant to file an appeal against the order of Honourable P.T. NKITIKA SRM Kerugoya dated 23<sup>rd</sup> January 2009 failing to set aside an order for sale by Public Auction of L.R. INOI/KIMANDI/792.*
  - *That Honourable Court be pleased to grant leave to the applicant to file appeal out time.*
  - *That costs of this application be borne by the respondent*
2. From the affidavit sworn in support of the application and the annexure thereto, the Applicant and her husband Eliud Njagi Mithamo were the joint registered owners of INOI/KIMANDI/792 (hereinafter referred to as the original land) as tenants in common. The applicant's husband was a judgment debtor in Kerugoya Civil suit NO. 57 of 2006 wherein the court entered judgment against him for KShs.540,000/=. After efforts to execute the decree against the applicant's husband through his arrest and committal to civil jail failed, the Decree Holder was granted an order by the court for execution to be done by way of attachment and sell of the original land by public auction.
3. The applicant filed an objection to the attachment and sale of the land in the lower court claiming a legal and equitable interest. The objection was however dismissed on 23/01/2009 by the trial court on the grounds that the applicant and her husband were conspiring to defeat the cause of justice. It is this order which the applicant wishes to appeal against.

4. The applicant attributes the delay in filing her appeal to the time taken by the court in providing her with certified copies of the proceedings and judgment. She explains that she applied for the same on 29/01/2009 but the proceedings and judgment were only availed to her on 17/09/2009. In the meantime the subject land was sub-divided into two parcels and both sold by public auction. The applicant maintains that she has a good appeal and therefore prays for leave to file the appeal out of time. She further seeks a prohibitory order to preserve the subject land.
5. Harrison Muchira the Decree holder objects to the application. He maintains that the public auction was done pursuant to a court order and the actual auction carried out regularly. The Decree Holder further contends that the applicants appeal has no chance of success, because the original land has now been transferred to Catherine Muthoni Thiaka who is not party to the proceedings before the court.
6. I have given due consideration to this application and the submissions made before me. It is evident that the ruling subject of the intended appeal was delivered on 23<sup>rd</sup> January 2009. A certificate of delay has been availed showing that proceedings and judgment were not availed to the applicant until several months later i.e. on 17<sup>th</sup> September 2009. Under Section 79G of the Civil Procedure Act, the period certified by the lower court as being necessary for preparations and delivery to the appellant of a copy of the decree or order, is excluded in computing the time for filing an appeal.
7. In this case the applicant did not apply for a copy of the decree or order, but applied for a copy of the proceedings and judgment. However, neither proceedings nor judgment is covered under Section 79G of the Civil Procedure Act. Moreover a copy of the order produced as annexure PMN-2 shows that the order was issued on 27<sup>th</sup> January 2009 which means that it was available for collection then. Further although the applicant explains that the proceedings were needed to enable the applicant prepare grounds of appeal, that explanation is not reasonable. The ruling which was brief and concise was delivered in the presence of counsel. There was nothing to prevent the applicant from filing a memorandum of appeal and if need be, apply to amend the memorandum upon obtaining the typed copies of proceedings and judgment.
8. It is evident that the delay has been inordinate such that the intended appeal has been overtaken by events. The status quo has changed as the public auction which was the subject of the applicant's objection has already taken place. The property is now in the hands of a 3<sup>rd</sup> party who is not party to these proceedings. In the absence of an application under **Order XXI Rules 78 and 79 of the Civil Procedure Rules**, the sale to the 3<sup>rd</sup> Party must be deemed absolute under **Order XXI Rule 80 of the Civil Procedure Rules**. An order of prohibition would therefore not be appropriate.
9. For the above reasons I find that there is no justification or sufficient reason to grant the applicant leave to file appeal out of time or to grant the prohibitory orders sought. Accordingly the notice of motion dated 8<sup>th</sup> October 2009 is dismissed.

**H. M. OKWENGU**

**JUDGE**

Dated, signed and delivered at Embu this 18<sup>th</sup> day of January 2011

**In presence of:-**