



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. APPLICATION NO. 55 OF 2010

JOANINA NDUTA

GATHIGA.....APPLICANT

VERSUS

**STEPHEN MACHARIA MWANGI.....1ST
RESPONDENT**

ISAACK MAINA MWANGI.....2ND RESPONDENT

RULING

The subject matter of this ruling is the Motion dated 5th May 2010 in which **Joanina Nduta Gathinga**, the Applicant herein, is seeking for leave to appeal out of time against the judgment of the Murang'a Senior Principal Magistrate's court. The Motion is supported by the two affidavits of the Applicant. **Stephen Macharia Mwangi** and **Isaac Maina Mwangi**, the 1st and 2nd Respondents herein, filed the replying affidavit of Stephen Macharia Mwangi to oppose the Motion.

The main reason advanced by the Applicant to justify the delay in filing her appeal on time is that she was not supplied with typed proceedings and judgment. She attached to her supporting affidavit a copy of a certificate of delay given by the trial court. The certificate of delay indicates that the typed proceedings and judgment were supplied on 26th April 2010. The Applicant further averred that the intended appeal has high chances of success. The Respondents are of the view that the Motion amounts to an abuse of the court process because the Applicant had previously filed an appeal before this court which she later withdrew. The current application is said to have been filed when that appeal was pending. It is further alleged that the intended appeal has been overtaken by events because the decree has been fully executed. The Applicant admitted that she had filed an appeal which she later withdrew when she realized that the same was filed out of time without leave of court. The Applicant also conceded that the decree in the lower court has been executed.

I have considered the grounds set out on the face of the Motion and the facts deponed in the affidavits filed for and against the Motion. It is not in dispute that on 3rd March 2010, I. K. Orenge, learned Resident Magistrate, delivered his judgment in favour of **Stephen Macharia Gathinga**, the 1st Respondent herein. The Applicant was dissatisfied with that decision hence he filed an appeal vide **Nyeri**

H.C.C.A. No. 54 of 2010. That appeal was admitted to hearing. On 6th July 2010 the Applicant filed a notice withdrawing the appeal. The Motion dated 5th May 2010, the subject matter of this ruling was filed on 11th may 2010. By that time **Nyeri H.C.C.A. No. 54 of 2010** was pending. The Applicant failed to disclose in her application the existence of that appeal. I am convinced the Applicant withdrew the appeal when she realized her folly.

It is alluded that the intended appeal will serve no useful purpose because the judgment sought to be upset has already been executed. The Applicant did not respond to this submission. I have looked at the averments of Stephen Macharia Mwangi made in the replying affidavit he swore on 17th September 2010. Attached to the aforesaid affidavit are three title deeds and a copy of the official search indicating that the parcel of land known as **LOC. 2/KINYONA/281** has been subdivided into four subdivisions namely:

LOC. 2/KANGARI/4274 - GATHERIA MWANGI

LOC. 2/KANGARI/4275 - STEPHEN MACHARIA MWANGI

LOC. 2/KANGARI/4276 - ISAAC MAINA MWANGI

LOC. 2/KANGARI/4274 - JOANINAH NDUTA GATHINGA

The subdivision was done in execution of the judgment of the trial court. It is obvious that the intended appeal has been overtaken by events. Execution of the decree was complete by 29th April 2010. Courts cannot issue orders in vain.

In the end and on the basis of the above reasons, the Motion is dismissed with costs to the Respondents.

Dated and delivered at Nyeri this 15th day of July 2011.

J. K. SERGON

JUDGE

In open court in the absence of the parties with Notice.