



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
MISC. CIVIL APPLICATION NO. 473 OF 2009

- | | | |
|----|--------------------------|-----------------|
| 1. | MARINDICH BIWOTT | 1 ST |
| | APPLICANT | |
| 2. | KIPKOSGEI BIWOTT | 2 ND |
| | APPLICANT | |
| | =VERSUS= | |
| 3. | JACOB KIRWA KEMBOI | |
| | RESPONDENT | |

RULING

This Notice of Motion has been brought under section 79 of the Civil Procedure Act and Order XLIX Rule 5 of the Civil Procedure Rules. It is by **Marindich Biwott and Kipkosgei Biwott** (hereinafter “**the applicants**”). They seeks two main orders namely that they be granted leave to appeal out of time from the Judgment in Eldoret CMCC No. 990 of 2005 and that in the meantime, pending hearing of this application, there be a stay of execution in the said case.

The application is based on the grounds that the applicants were not informed of the judgment; that the applicants have an arguable appeal and that it is in the interests of justice that the orders sought be granted.

The applicants further rely upon the 2nd applicant’s affidavit sworn on 17th August, 2009. In it, it is deponed, *inter alia*, that the applicants became aware of the judgment on 1st July, 2009, when Court bailiffs attempted to evict them and when they enquired of the matter from their advocates, they were informed that a judgment had indeed been passed against them. Annexed to the affidavit is a draft of the proposed Memorandum of Appeal.

The application is opposed and there is a replying affidavit sworn by the respondent. He swears that execution has already taken place and the applicants have been evicted from the suit land; that the applicants have been aware of the judgment since it was delivered and should have lodged their appeal in time and that their application is merely intended to delay their enjoyment of the fruits of that judgment.

When the application came up before me for hearing on 5th July, 2011, counsel agreed to file written submissions which were duly filed by 4th October, 2011. The Submissions elaborated the parties’ stand-points taken in their respective affidavits. I have considered the said submissions, the affidavits filed and the application itself. Having done so, I take the following view of the matter. With regard to stay, the respondent has deponed that the same has been overtaken by events since the applicants have already been evicted from the suit land. That averment was not contradicted by a subsequent affidavit of the

applicants. Infact, the applicants sought stay pending hearing of the application and not pending the lodging, hearing and determination of the proposed appeal. In any event, the applicants did not attempt to demonstrate the conditions for granting an order of stay pending appeal under order XLI Rule 4 of the Civil Procedure Rules which was applicable when they filed their application.

With regard to the prayer for extension of time to lodge their appeal, the reason given for delay is that although they were in Court on the date of judgment, they did not know that the judgment was indeed delivered until court bailiffs attempted to evict them. That indeed is the reason advanced in counsel's submissions.

Having perused the material availed to the court, it is clear that the judgment intended to be challenged was passed on 29th January, 2009. This application was lodged on 17th August 2009, which was about 6 ½ months after the said judgment was delivered. That delay is in my view long but is not inordinate, given the explanation proffered by the applicants. Besides, the matter concerns land, always an emotive issue in this country. In the premises, I am inclined to grant the applicant the extension sought as in my view the same will serve the ends of justice. The only prejudice the respondent will suffer is the delay in the finalization of the appeal. That prejudice in my view is not sufficient to deny the applicants their undoubted right of appeal.

In the premises, the applicants' application dated 17th August 2009 and lodged on the same date is allowed in terms of prayer 2 thereof. The time within which the applicants were to file their appeal against the judgment in Eldoret CMCC No. 990 of 2005 is hereby extended by a further fourteen (14) days from the date hereof.

The applicants shall pay the respondent's costs of this application in any event.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS
8TH DAY OF NOVEMBER, 2011**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Omboto for the Respondent.

**F. AZANGALALA
JUDGE**

8/11/2011.