



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISC. CIVIL APPLICATION NO. 411 OF 2010

GITU MUNIU AND

ANOTHER.....1ST APPLICANT

**EQUATOR NURSING HOMES LTD T/A
NAIROBI EQUATOR**

HOSPITAL.....2ND APPLICANT

VERSUS

**DANIEL KIMOITAMUTAKHA (suing as the
Personal representative of the estate of
FREDERICK LISUTSA**

MUTAKHA.....RESPONDENT

R U L I N G

1. The application that is before this Honourable Court for determination is the Notice of Motion dated 30/08/2010 seeking the following orders in terms of prayers 2, 4, and 6:-

(2).*Leave to file appeal out of time.*

(4).*Stay of execution of the orders issued on 24/6/2010 and the mandatory orders issued on 22/10/2010 and 15/05/2010 respectively until hearing and final determination of the appeal herein (sic).*

(6).*Stay of proceedings in CMCC No. 7541 of 2008 until the hearing and determination of this appeal.*

2. The application is supported by the grounds on the face of the application, namely that:-

a. *The applicants have an arguable appeal with a high probability of success.*

b. *The intended appeal will be rendered nugatory if the orders sought herein are not granted,*

c. *The applicants stand to suffer injustice unless time to appeal is extended.*

d. *Unless this application is granted the applicants stand the risk of having their properties attached and/or being detained in prison.*

e. *Substantial loss will result to the applicants unless the orders sought are granted.*

f. *This application ought to be granted in the interest of equity and justice as the delay was occasioned through no fault of the applicants and due to reasons beyond their control.*

3. The application is also supported by the affidavit of E.M. Muthemba sworn on 30/08/2010. The deponent avers that the statutory period within which to prefer an appeal lapsed due to circumstances beyond the control of the applicants. The deponent also avers that the Lower Court ruling delivered on

24/06/2010 was without notice of the applicants and that because of that omission, the time for filing appeal lapsed without any fault on the applicants' part. The deponent has urged this Honourable court to exercise its discretion in the applicants favour and to grant the orders sought.

4. Interim orders were granted by Hon. Mr. Justice F. A. Ochieng on 07/09/2010, granting stay of execution of the orders issued on 24/06/2010 and the mandatory orders issued on 22/04/2010 and 15/05/2010 pending hearing and determination of the application herein. Mr. Justice Ochieng also granted a temporary stay of the proceedings in Milimani CMCC No. 7541 of 2008 pending the hearing and final determination of this application.

5. This application is opposed vide the Replying Affidavit of David Kimoita Mutakha sworn on 04/10/2010. The deponent who is the Respondent in the application avers that the applicants are not deserving of the orders sought because they are in breach of the injunctive orders that were issued by the Lower Court in favour of the Respondent. The deponent also says that the applicants' application is mischievous in that a purported third party who is said to owe the applicants money is not a party in these proceedings. The deponent further says that there is a clear admission by the applicants that the estate of the late Fredrick Lisutsa Mutakha does not owe the applicants any money. The deponent prays that the applicants' application be dismissed with costs to the Respondent.

6. The parties appeared before me on the 05/10/2010 and made their oral submissions. The applicants were represented by Mr. A. N. Rashid. Mr. Mbogo for the applicants submitted that following the issuance of two mandatory injunctions by the Lower Court on the 22/04/2009 and 15/05/2009, the Motor Vehicle Reg No. KAG 867T which had been given as security by the patient of the 2nd applicant was sold by the 1st applicant to recover the hospital debts.

7. Mr. Mbogo further submitted that by an application dated 18/06/2009, the applicants applied to have the orders issued on 22/04/2009 and 15/05/2009 set aside at or reviewed but that though the application was heard interpartes, the applicants were not advised of the date of the ruling which had been slated to be delivered on notice. Mr. Mbogo submitted that by 24/06/2010, when the ruling on the application to set aside was given, the 30 day notice within which to file appeal had lapsed, hence this application.

8. Mr. Mbogo also submitted that this application was brought without undue delay and that the intended appeal has high chances of success and that in any event no prejudice will accrue to the Respondent if this application is allowed.

9. Counsel for the applicants relied on the case of **Zachariah Mbugua Kariuki –vs- Catherine Wambui Kariuki in Misc Application No. 293 of 2005 at Nakuru.**

10. In response to the applicants' submissions Mr. Rashid for the Respondent contended that the applicants herein have come to the court too late in the day and in particular that they have not explained where they were between 28/03/2010 and 24/08/2010 which is a period of about 5 months. Secondly, Mr. Rashid argued that the notice for the ruling was posted at the court room door as is the practice in the lower courts and that therefore the applicants' contention that no notice of the ruling was given has no basis. Counsel for the Respondent asked this Honourable Court to look carefully at the Lower Court ruling and to find that the applicants' application is devoid of any merit and to dismiss the same with costs to the Respondent.

11. I have looked at the lower court record. I have seen the order of injunction issued by Hon. Mr. S. A. Okato Principal Magistrate on 22/04/2009 whereby the 2nd applicant herein was restrained from attaching, auctioning, interfering, vandalizing, disposing and/or in any other manner dealing with motor vehicle known as Mazda 323 Saloon registration number KAG 867T pending hearing and determination of the case in the Lower Court namely CMCC No. 7541 of 2008. The 2nd applicant was also ordered by way of mandatory injunction to release the Motor Vehicle known as Mazda 323 Saloon Registration Number KAG 867T (the subject motor vehicle) to the estate of the late Fredrick Lisutsa Mutakha.

12. I have also seen the orders made on the 15/05/2010 against the applicants herein requiring them to release the subject Motor Vehicle to the estate of the late Fredrick Lisutsa Mutakha and further restraining the said applicants from attacking, auctioning, interfering, vandalizing, disposing and/or in any other manner dealing with the subject Motor Vehicle pending the hearing and determination of the suit in the Lower Court.

13. This is an application brought under sections 79G and 95 of the Civil Procedure Act, Order 49 Rule 5, Order 41 Rule 4 and Order 50 Rule 1 of the Civil Procedure Rules and also under Section 3A of the Civil Procedure Act and all other enabling provisions of the law. Orders 49 and 41 of the Civil Procedure Rules each require the applicants to satisfy the court as to certain minimum parameters for the application to succeed. Under Order 49 Rule 5, this court has unfettered discretion to enlarge the time for the doing of any act but such discretion must be exercised judiciously and not capriciously. The applicants must under the said order adequately explain the delay in not filing the appeal in time.

14. In the instant case, there is a whole 5 months that have not been adequately explained by the applicants herein. For a party who alleges that it is seriously aggrieved by an action taken by the court I think that the 5 months delay is inordinate delay and that the delay has not been adequately explained. For this reason the prayer for leave to appeal out of time must fail. The applicants were indolent.

15. Under Order 41 Rule 4(2) of the Civil Procedure Rules, the applicants must demonstrate to this Honourable Court that substantial loss will accrue if the order sought is not granted. The applicants must also show that the application for stay of execution has been brought without undue delay and that the applicants have offered such security for the due performance of the decree/order as may be ordered by the court. The applicants must comply with all the three conditions before an order for stay of execution can be granted in their favour.

16. I have read the affidavit in support of the application as sworn by E. M. Muthemba on 30/08/2010 and nowhere throughout the 19 paragraphs does the deponent make any offer as to security for the stay order sought. Since the applicants must satisfy not just one or two but all three conditions for the granting of the order for stay of execution of the orders made on 24/06/2009 and 15/05/2009 must fail consequent upon my findings on the prayer for leave to appeal out of time and the prayer for stay of execution of the orders of 22/04/2009 and 15/05/2009, the applicants' prayer for stay of proceedings in CMCC No. 7541 of 2008 must also fail.

17. Before I conclude this ruling there is one point I must make to the applicants. The present application is too loaded with prayers coming as it does under several and different provisions of the law. Such a procedure makes the application untidy and liable to being struck out.

18. In the premises and for the reasons above given, the applicants' application dated 30/08/2010 and filed in court on the same day be and is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nairobi this 28th day of October, 2010.

**R. N. SITATI
JUDGE**

In the presence of:-

Mr. Mbogo (present) For the Applicants

Mr. Rashid (present) For the Respondent

Jane Omasaba - court clerk