



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Case 948 of 2007

MISS NJUHI KINIU

MRS. MICHAEL RUGU.....APPLICANTS

VERSUS

GEORGE MUNYUA MBIRARESPONDENT

R U L I N G

The Applicants seek by notice of motion dated 11th December, 2007 leave to appeal out of time against the decree of the lower court passed on 30th May, 2006. By that decree, the Applicants, who were the defendants, were required to vacate land parcel **L.R. No. Ndeiya/Ndeiya/615**. They were also permanently restrained from occupying the said land. The Applicants also seek stay of execution of the decree pending disposal of their intended appeal.

The Respondent, who was the plaintiff in the lower court, has opposed the application.

I have read the supporting and opposing affidavits. I have also perused the plaint and typed proceedings of the lower court. Finally, I have given due consideration to the submissions of the learned counsels appearing. No authorities were cited.

The plaintiff obtained interlocutory judgement in default of appearance and defence. Given the nature of the reliefs sought in the plaint, no interlocutory judgement was available under any of **rules 3, 4, 5 or 6 of Order IXA of the Civil Procedure Rules** (the Rules). The interlocutory judgement was thus irregularly entered.

The defendants entered appearance and filed defence on 18th August, 2005. This was after entry of interlocutory judgement but before final judgement. They were entitled to enter appearance at any time before final judgement. See **Order IX, rule 1** of the Rules. Defence could be filed only before interlocutory judgement. Bearing in mind that interlocutory judgement was irregularly entered, and that therefore the same was null and void, the defence filed on 18th August, 2005 was properly on record.

I note that the defendants applied to the lower court for an order to set aside the interlocutory judgement. The application was dismissed and the defendants did not appeal. The plaintiff thereafter proceeded **ex parte** to formally prove his case. This was irregular. The defendants had duly appeared and were entitled to participate in the "formal proof". There is no indication that they had been duly served with hearing notice, the hearing date having been taken *ex parte* by the plaintiff. Furthermore, as already seen, the interlocutory judgement having been irregularly entered, there was a defence properly

on record. The suit should thus have proceeded to full hearing in the normal course.

The Applicants appear to have become aware of the final judgement on 31st August, 2007. They then engaged in resisting the execution of decree proceedings that were facing them. After that they brought the present application. I consider, in the circumstances of this case, that there was no undue delay in bringing the application.

Under the **proviso to section 79G of the Civil Procedure Act, Cap. 21** (the Act), the court has power to admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. In the present case, I am satisfied that the Applicants had a good and sufficient cause. That cause was that they became aware of the decree long after it had been issued. After becoming aware of it they had first to resist the execution of decree then facing them before they could turn their attention to seeking to appeal against the decree. I will therefore grant leave to the Applicants to file appeal out of time. They may lodge their appeal within 14 days of delivery of this ruling.

Regarding stay of execution, none can be granted under **Order 41, rule 4** of the Rules as there is no appeal yet. But the same can be granted under the inherent powers of the court which have been invoked in this application. Having granted the Applicants leave to appeal, it is only just that execution of decree of the lower court be stayed pending disposal of the appeal. Otherwise the appeal may be rendered nugatory. I will therefore grant stay as sought. The stay is granted subject to the condition that the Applicants file their appeal within 14 days of delivery of this ruling as already ordered.

Costs of the application shall be in the intended appeal. If no appeal is ultimately filed, those costs shall go to the Respondent. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF JULY 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 11TH DAY OF JULY 2008.