

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

Misc 294 of 2007

VIOLET W. GATEIPLAINTIFF

V E R S U S

MOUTAIN VIEW GENERAL HARDWARE LIMITED...1ST DEFENDANT

BONIFACE MUTAHI WAHOME ALIAS BONNIE.....2ND DEFENDANT

R U L I N G

In this application (by notice of motion dated 18th May, 2007) the Applicant seeks two main orders; one, that she be granted leave to lodge appeal out of time against the decree passed on 21st December, 2006 in Milimani CMCC No. 12706 of 2004 and, two, that there be stay of execution of the said decree pending hearing and determination of the intended appeal. The application is brought respectively under section 79G of the Civil Procedure Act, Cap. 21 (the Act), and under section 3A of the Act and Order 41(4) of the Civil Procedure Rules (the Rules). There is an affidavit of the Applicant sworn in support of the application.

The Respondents have opposed the application. For the 1st Respondent there is a replying affidavit sworn by its advocate, JENNIFER MUTIYO NDETO, filed on 12th June 2007. For 2nd Respondent there are grounds of opposition dated 15th June, 2007. The grounds of opposition put forward by both Respondents are, in a nutshell, that the legal requirements for the granting of the orders sought have not been met by the Applicant.

I have considered the submissions of the learned counsels appearing, including the cases cited. With regard to the application for leave to appeal out of time, the Applicant must satisfy the court that she had good and sufficient cause for not filing the appeal in time (see the proviso to section 79G of the Act). Has she done so? I am afraid not. By her own word, the Applicant learnt of the judgment sought to be appealed against on 14th March, 2007. But she did not file the present application until 21st May, 2007, a period 68 days. Whereas the period between delivery of judgment on 21st December, 2006 and when the Applicant learnt of the judgment on 14th March, 2007 may be excused, what about this 68 days? It is not stated at all in the supporting affidavit what prevented the Applicant from applying for leave to appeal during these 68 days. Under the law (the proviso to section 79G of the Act) she was obliged to satisfy the court that she had good and sufficient cause for not seeking leave during these 68 days to lodge the appeal out of time. She has not even attempted to do so. I am therefore not satisfied that the Applicant had good and sufficient cause for not appealing within time. I must refuse the application for leave to appeal out of time.

Having refused leave to appeal out of time, a stay of execution of decree would not serve any lawful purpose. In any event, the Applicant has not shown that she stands to suffer substantial loss if stay is not granted as required by sub-rule (2) of rule 4 of Order 41. The supporting affidavit merely states that the Applicant would suffer heavily without specifying what this loss would be or how it would come about.

In the event, I am in agreement with the position taken by the Respondents that the Applicant has not

met all the legal requirements for the grant of the orders that she seeks. I must therefore refuse the application. It is hereby dismissed with costs to the Respondents. Orders accordingly.

DATED AT NAIROBI THIS 13TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED ON 17th DAY OF AUGUST, 2007