

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
MISC. CIVIL APPLICATION NO. 204 OF 2004

MBURURE MUHOTI.....1ST APPLICANT

JOSEPH KIMOTHO.....2ND APPLICANT

VERSUS

JANE KIPSANG CHEBOR.....RESPONDENT

RULING

By a Notice of Motion made under **Section 79G and Section 3A of the Civil Procedure Act, and Order XLI Rule 3 of the Civil Procedure Rules** the Applicants have moved this Court seeking for the orders that they be granted leave to lodge their appeal out of time. The Applicants have further sought to stay the execution of the decree issued by the lower Court in Nakuru CMCCC No. 1573 of 1998 pending the hearing and determination of the Intended Appeal proposed to be filed by the Applicants. The Application is supported by the annexed affidavit of Joseph Kimotho and on the grounds stated on the face of the application. The said grounds are that the Applicants had filed their Appeal on time, namely Civil Appeal No. 12 of 2002, on time but the clerk of their then Advocate failed to pay the Court fees in time; that the Applicants had a good and arguable appeal with a high chance of success; that the Applicants would suffer substantial loss if the application for extension of time is not granted; that the 2nd Applicant's motor vehicle had been attached and was likely to be sold if stay of execution was not granted.

The Application is opposed. The Respondent has filed a lengthy replying affidavit giving a detailed chronological account of the events that have taken place prior to the Applicants filing this Application before this Court. The summary of the said replying affidavit is that the Respondent is contending that the Applicants should not be granted the orders sought as they have frustrated the Respondent from enjoying the fruits of her judgment. The Respondent further contend that the Applicants have acted in bad faith and further that the application herein was filed in furtherance of an abuse of the due process of the Court. The Respondent has further deponed that the Applicants have been indolent in the pursuit of their case and only came to Court when the Respondent had already executed against them. The Respondent deponed that the Application should be disallowed. Mrs Ndeda, learned Counsel for the Applicants submitted that the Applicants had filed the original Appeal in time but unfortunately their then Counsel on record did not pay Court fees and therefore the Appeal was consequently struck out. Learned Counsel submitted that the mistake of Counsel should not be visited upon a litigant. The Applicants submitted that they only learned of the fact that their Appeal had been struck out when their motor vehicle was attached. The Applicants prayed that the Application be allowed so as to enable them pursue their Appeal and have the same determined on merits. The Applicants urged this Court to allow the application with or without conditions.

Mr Olonyi, Learned Counsel for the Respondent opposed the Application. Learned Counsel submitted that the averments made in the affidavit in support of the Application were not true. The Respondent submitted that it was convenient for the Applicants to blame their former Advocates on record. The Respondent submitted that it was inconceivable that the Applicants were not aware that the previous Appeal had been struck out yet the matters in issue had been determined a long time ago. The Respondent submitted that the Applicants were being vexatious. Learned Counsel for the Respondent further submitted that the Applicant's application was meant to deny the Respondent the fruits of the judgment entered in her favour. The Respondent submitted that the Applicants had not been vigilant and therefore the Application should be dismissed.

I have considered the rival submissions made by Counsel for the Applicants and Respondent. I have

also read the pleadings filed in Court by the opposing parties in this application. It has not been disputed that judgment was entered in favour of the Respondent and against the Applicants for the sum of Kshs 297,600/= on the 25th of June 2001 in Nakuru *CMCCC No. 1573 of 1998*. It has further not been disputed that the Applicants application for stay of execution pending the hearing of the Appeal was dismissed by the lower Court on the 30th of January 2002. It has further not been disputed that the Applicants did not take any step to protect their interests until the 3rd of May 2002 when the Application for the execution of the decree by the Respondent was made. It is further not disputed that the Applicants purported to file an Appeal on the 16th of May 2002 which Appeal was filed out of time without the leave of the Court for the obvious reason that the Applicants sought to obtain stay orders in the High Court to frustrate the Respondent from executing against him. It is further not disputed that the Appeal filed out of time by the Appellant was struck out by this Court more than one year ago. It is further not disputed that since the striking out of the said irregularly filed Appeal, the Applicants made no efforts to protect their interest until the Respondent executed against them and further that is the time that the Applicants filed the present application.

It is clear from the above chronological explanation of the events that took place in the history of the litigation between the Applicants and the Respondent that the Applicants herein have been indolent. In fact, the Applicants were not averse to abusing the due process of the Court when it suited their purpose. For instance, the Applicants purportedly filed an Appeal by having the date on the Appeal backdated so as to appear that the Applicants had filed their Appeal on time. The Applicants, fortunately were caught out. Their shenanigans was discovered and the said improperly filed Appeal was duly struck out. The said non-existent Appeal was struck out after the Applicants had obtained stay of execution orders of this Court for a period of over six months. After the Applicants were discovered, they went to sleep only to be awoken from their slumber when the Respondent executed against them.

I have evaluated the arguments made by the opposing parties in this application. I am persuaded that the Applicants have blamed their former Advocates on record specifically to win the sympathy of this Court. The Applicants conduct in the entire proceedings in the dispute between themselves and the Respondent is not impeccable. In fact in some instances the Applicants conduct has been outrightly dishonest. The Applicants have used all the tricks in the book and also out of the book to frustrate the Respondent from enjoying the fruits of her judgment. I agree with the Respondent that the current application is yet another attempt by the Applicants to postpone the day of reckoning. I will however have to disappoint them. Like a man walking along Kanu Street, Nakuru would say "Gari Tosha!" . I find no merit in the Applicant's application for extension of time to file an Appeal out of time. The Applicants conduct precludes this Court for exercising its discretion in favour of the Applicants. The Application is consequently dismissed with costs to the Respondent.

DATED at NAKURU this 22nd day of October, 2004.

L. KIMARU

AG. JUDGE