



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**MISC. ELC APPLICATION NO. E006 OF 2020**

**FESTUS GUANTAI M'IKIRIMA.....APPLICANT**

**VERSUS**

**RAEL KABITI MUNYUGI .....RESPONDENT**

**JUDGMENT**

1. This miscellaneous suit was filed by way of an application dated 9.10.2020 and is brought under the provisions of Section 79G, 3,3A, 3B, 95 of the Civil Procedure Act, Order 50 rule 6, Order 42 rule 6 of the Civil Procedure Rules as well as Article 159 2(d) of the Constitution of Kenya 2010. The applicant is seeking leave to file an appeal out of time and that there be a stay of the judgment dated 4.5.2020 in Githongo ELC No. 5 of 2019.

2. The applicant contends that neither him nor his advocate was aware of the date of delivery of the judgment, that the proceedings and certificate of delay were only supplied on 18.9.2020 and that the the prayers sought shall not prejudice the respondent.

3. In opposition to the said application, the respondent contends that she is the decree holder in the Githongo case, that the applicant was well aware of the date of judgment, that the sins of the applicant and his advocate in not getting the proceedings in time should not be visited upon her and that the application is an afterthought meant to impede her enjoyment of the fruits of the judgment. She also avers that the matter has been overtaken by events as costs have been taxed and executed.

4. The applicant has availed the certificate of delay which shows that the request for proceedings and judgment was made on 21.5.2020 but the same were availed on 18.9.2020. Thus the applicant has laid a reasonable basis for the delay. The prayer to file the appeal out of time is therefore merited.

5. On the issue of stay of the judgment, reference is made to the provisions of order 42 rule (6) of the Civil Procedure Rules where it is provided as follows:

**“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”.**

6. The court has already found that the applicant has satisfactorily explained the delay. However, the applicant has not demonstrated the element of substantial loss that he stands to suffer if a stay is not granted. He has also not offered any security.

7. A perusal of the judgment reveals that the respondent is the one who was utilizing the land by cultivating arrow roots even though she was not living on that land.

8. In order to balance the interests of both parties, this court will give a conditional stay of execution in the following terms:

**1. Leave is hereby granted for the applicant to file and serve the memorandum of appeal within 14 days.**

**2. An order of stay of execution of prayer (b) in the plaint (prayer for sub division on the land and the registration of a share thereof to respondent) is hereby issued for a period of ONE YEAR.**

**3. The respondent is to continue utilizing the land.**

**4. The applicant is to deposit a sum of Shs. 100,000 as security in this court within 30 days.**

**5. The applicant is to meet the costs of the application.**

**6. In the event of none compliance on the part of the applicant the orders given herein shall lapse.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgement was given to the advocates for the parties through a virtual session via Microsoft teams on 4.11.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**