



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELCA NO. E003 OF 2021**

**ABIGAE BARMAO.....APPLICANT**

**VERSUS**

**GRACE WAMBOI MACHARIA.....RESPONDENT**

**RULING**

1. This is a ruling in respect of a Notice of motion dated 28<sup>th</sup> May, 2021 in which the Applicant seeks stay of proceedings in Eldoret CMC Land case No. 108 of 2019 pending the hearing and determination of an appeal filed by the Applicant to this Court.
2. The Applicant contends that she filed a preliminary objection in the lower Court on grounds that the Respondent's suit was statute barred. The preliminary objection was canvassed by way of written submission but it was dismissed.
3. The Applicant argues that the suit in the lower Court has been set down for hearing and that unless the proceedings are stayed, the hearing will proceed to full hearing which will render the appeal nugatory.
4. The Applicant's application is opposed by the Respondent through a replying affidavit sworn on 21<sup>st</sup> of July, 2021. The Respondent contends that the Applicant's appeal was filed out of time without leave of the Court and that the application for stay of proceedings is intended to delay the finalization of the case which is before the lower Court.
5. The Respondent further argues that the Applicant has not disclosed that she filed a similar application before the lower Court which application was dismissed and further that the Applicant has not annexed the ruling of the lower Court which dismissed the preliminary objection for this Court to appreciate the reasoning of the trial magistrate.
6. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the oral submissions by Counsel for the parties during the hearing of this application. The only issue for determination is whether the Applicant has made out a case for stay of proceedings.
7. There was a contention that the memorandum of appeal was filed out of time. Under section 79G of the Civil Procedure Act, an appeal from a subordinate Court is supposed to be filed within 30 days. The ruling which is the subject of this appeal was delivered on 17<sup>th</sup> December, 2020. The memorandum of appeal was filed on 8<sup>th</sup> February, 2021. Under order 50 Rule 4 of the Civil Procedure Rules, the period between 21<sup>st</sup> December and 13<sup>th</sup> January of the following year is omitted from computation of time. If this period is taken out, it follows that the Applicant filed her memorandum of appeal on the 29<sup>th</sup> day which is within the 30 days required.
8. In considering whether to stay proceedings, the Court has to consider the merits of the appeal; whether there will be any prejudice suffered by the Respondent and whether the appeal will be rendered nugatory. In the instant case, the Applicant contends that her preliminary objection was dismissed on the ground that the issue of limitation ought to be addressed during the main hearing. If this be the case, then the Applicant's appeal is arguable and an arguable appeal is not one which will necessarily succeed.
9. There will also be no prejudice suffered by the Respondent if proceedings are stayed. If proceedings were to go on, the Applicant's appeal will be rendered and academic exercise. I therefore find that the Applicant's application has merits. I allow the same in terms of prayers (3) and (4).

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF MARCH, 2022.**

**E. OBAGA**

**JUDGE**

**IN THE VIRTUAL PRESENCE OF;**

**MS. KOSGEY FOR MR. OMBOTO FOR RESPONDENT.**

**MS. LUGWE FOR APPLICANT.**

**COURT ASSISTANT –ALBERT**

**E. OBAGA**

**JUDGE**

**3RD MARCH, 2022**