



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**MISCELLANEOUS APPLICATION NO. 13 OF 2021**

**IN THE MATTER OF AN INTENDED APPEAL**

**EVANS MONARI (Suing as the legal representative of the estate of the late**

**GEORGE HUDSON MONARI OGETO).....PLAINTIFF**

**KENNEDY MONARI, GEOFFREY OSIAGO MONARI AND DENNIS ONKOBA**

**MONARI (Suing as the legal representatives of the estate of the late GEORGE HUDSON**

**MONARI OGETO).....INTENDED SUBSTITUTES/APPLICANTS**

**VERSUS**

**MORAA MOSOTI.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. This Ruling pertains to the Notice of Motion dated 8<sup>th</sup> November, 2021 in which the Applicants seek three orders. Firstly, they seek to be substituted in place of the deceased Applicant. Secondly, they seek to be granted leave to file their appeal out of time against the ruling and orders of Honourable Nathan Shiundu Lutta, Chief Magistrate delivered on 28<sup>th</sup> July 2021 in CMELC Case No. 281 of 2018. Thirdly, they seek that there be a stay of proceedings in CMELC Case No. 281 of 2018 pending the hearing of the intended appeal.

2. The application is anchored on the grounds indicated on the face of the Notice of Motion and on the Supporting Affidavit of Kennedy Monari sworn on the 8<sup>th</sup> day of November 2021 and the Supplementary Affidavit of George Mutuli Advocate, sworn on 19<sup>th</sup> November, 2021. It was opposed by the Respondent through her Replying Affidavit sworn on 24<sup>th</sup> November, 2021 in which she deposes that there is no appeal pending and that the intended appeal has no chances of success.

3. From the material placed before the court, the background of this case is that the Applicants are the legal representatives of the estate of the late George Hudson Monari Ogeto-deceased, who was the registered owner of land parcel number CENTRAL KITUTU/DARAJA MBILI/926. The deceased filed a case of trespass against the Respondent. The case proceeded ex-parte and on 29<sup>th</sup> January 2020, the lower court delivered a judgment in favour of the deceased in which the Respondent was ordered to deliver vacant possession of land parcel number CENTRAL KITUTU/DARAJA MBILI/926.

4. The deceased subsequently applied for an eviction order and an order that the OCS Nyanchwa Police Base to provide security during the eviction process. The court delivered a ruling dated 31<sup>st</sup> May, 2021 in which it allowed the application but stated that it would take effect if the Respondent's application to set aside the ex-parte judgment was unsuccessful. In the meantime, the Respondent had by an application dated 18<sup>th</sup> December, 2020 applied to set aside the ex-parte judgment. In its ruling dated 28<sup>th</sup> July, 2021 the court allowed the Respondent's application by setting aside the ex-parte judgment. It is against this ruling that the Applicants intend to appeal.

5. The application was argued orally. Learned counsel for the Applicant relied on the Applicant's Supporting and the Supplementary Affidavit. He submitted that the Applicants have an arguable appeal. It was his submission that the delay in filing the appeal was occasioned by the delay in obtaining a certified copy of the proceedings and ruling as evidenced by the Certificate of delay which was annexed to the Supplementary Affidavit. He further submitted that the Respondent would not be prejudiced if the appeal was granted. With regard to stay of proceedings, he relied on the case of **Global Tours and Travels Limited Nairobi Winding Up Cause No. 43 of 2000** where Justice

Ringera (as he then was) stated that:

**“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”**

6. In opposing the application, learned counsel for the Respondent relied on the Respondent’s Replying Affidavit. He submitted that the Applicants were opposed to a hearing of the suit on merits which goes against the purpose of litigation. He contended that section 79G of the Civil Procedure Act envisages the existence of an appeal, yet the Applicants had not yet filed their appeal. He further submitted that the Applicants had not furnished sufficient reasons for the delay in filing the appeal.

7. Having considered the Notice of Motion, the Supporting and Replying affidavits as well as the rival submissions, the issues for determination are twofold:

- i. Whether the Applicants should be granted leave to appeal out of time
- ii. Whether there should be a stay of proceedings pending appeal.

Section 79G of the *Civil Procedure Act* provides that:

**Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.**

8. In the case of **Nicholas Kiptoo Arap Korir Salat V IEBC (2014) eKLR** the court set out the following principles that a Court should consider in the exercise of its discretion to grant an application for extension of time:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

9. In the instant case, the main reason advanced by the Applicants is that they did not obtain a certified copy of the proceedings and ruling in good time. A certificate of delay is annexed to the Supplementary affidavit which clearly shows that the proceedings were not ready until the 26<sup>th</sup> October 2021. Before then the original Applicant, Evans Monari passed away on 4<sup>th</sup> October 2021 and the application was filed on 11<sup>th</sup> November, 2021. Considering the period from the time the proceedings were ready upto the time the application was filed, I do not find the delay to be inordinate. Furthermore, the Respondent has not demonstrated what prejudice she stands to suffer if the application is granted. As to the merits of the appeal, that will be considered once the appeal is filed.

10. Taking all factors into consideration, I am persuaded that the application is merited and I grant it and make the following orders:

- a. The Applicant is granted leave to file an appeal out of time. The said appeal shall be filed within 14 days from the date of this ruling.
- b. The proceeding in CMELC Case No. 281 of 2018 are hereby stayed pending the hearing and determination of the appeal.
- c. The costs of the application shall be borne by the Applicant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 8<sup>TH</sup> DAY OF MARCH, 2022**

**J.M ONYANGO**

**JUDGE**