



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

ELC. NO. 27 OF 2018

LILIAN ADHIAMBO OUMA.....APPELLANT

-VERSUS-

FREDRICK JACOB OCHIENG.....RESPONDENT

RULING

1. That vide the Motion dated 23rd November 2018, Lilian Adhiambo Ouma, the Applicant, seeks for extension of time to file the appeal; and stay of execution of the judgment/decreed entered against the Applicant by the lower court on the 11th October, 2018. The application is based on the Seven (7) grounds on its face and supported by the Applicant's affidavits sworn on the 23rd November, 2018 and 7th December, 2018.

2. The application is opposed by Fredrick Jacob Ochieng Obura, the Respondent, through his undated replying affidavit filed on the 3rd December, 2018.

3. The application came up for hearing on the 19th December, 2018 when counsel for the parties agreed to file and exchange written submissions. That subsequently, the learned counsel for the Applicant filed the written submissions dated 4th January, 2019 on the same date, while that of the Respondent filed theirs dated 21st December, 2018 on the 24th January, 2019.

4. The issues for determinations are as follows:

a. Whether the Applicant has made a reasonable case for extension of time to file appeal and for an order of stay of execution.

b. Who pays the Costs.

5. The court has considered the grounds on the motion, affidavit evidence by both parties, written submissions by the parties learned counsel and come to the following conclusions:-

(a) That as properly submitted by both counsel, the court has unfettered discretion in applications for extension of time to file appeal and stay of execution, subject to the Applicant making a satisfactory explanation. [See **Mutiso –Vs- Mwangi Civil Application No. NAI 255 of 1997 (UR)**, **Fakir Mohammed –Vs- Joseph Mugambi & 2 Others Civil Application No. NAI 332 OF 2004 (unreported)**, **Mwangi –Vs- Kenya Airways Ltd [2003] KLR 486** and **Edward Njane Nganga & Another –Vs- Damaris Wanjiku Kamau & Another [2016] eKLR**].

(b) The Applicant has through the grounds and affidavit evidence explained the delay in filing the appeal to be that the trial court judgement was delivered in their absence, and did not know of it until the 8th November, 2018 when counsel perused the record at the registry. That the Applicant and counsel had always attended court until the 13th September, 2018 when the judgment was to be delivered. That the trial court informed the parties that the judgment was not ready and would be delivered on notice. That the Applicant and her counsel did not receive the notice. That though the respondent had deponed that the Applicant was aware of the date of judgment, and willingly opted not to attend, the absence of documentary evidence addressed and served upon counsel for the Applicant makes the court find for the Applicant, that the judgment was most probably delivered without her prior notification or that of her counsel.

(c) That as the Applicant is said to be the one in possession of the suit land, and has through this application shown interest to lodge and pursue an appeal, it is only fair that the parties do maintain the status quo obtaining as at the time of the trial court's judgment.

(d) That the costs of this application will abide the outcome of the intended appeal.

6. That in view of the foregoing, the court finds merit in the Applicant's Motion dated the 23rd November, 2018 and filed on the 26th November, 2018 and orders as follows:-

a. That prayer 2 of the said Motion is granted extending time of filing the appeal to the date the attached memorandum of appeal was filed, and the same is hereby deemed as served.

b. That prayer 4 of the Motion is granted and the parties ordered to maintain the status quo that existed as of the 11th October, 2018 in respect of the suit property, pending the hearing and determination of the appeal.

c. That costs abide the outcome of the appeal.

Order accordingly.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 10TH DAY OF JULY, 2019.

In presence of;

Appellant Absent

Respondent Absent

Counsel M/s Jemtai for Mwamu for Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE