



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CIVIL APPEAL NO. 8 OF 2018**

**(Formerly Machakos ELC Appeal No. 98 of 2014)**

**MARY NJERI NJOROGE.....APPELLANT**

**VERSUS**

**BENJAMIN SIRONKA METOYU.....1<sup>ST</sup> RESPONDENT**

**DAVID LESHOO METOYU.....2<sup>ND</sup> RESPONDENT**

**RULING**

What is before Court for determination is the Appellant/ Applicant's Notice of Motion application dated the 12<sup>th</sup> March, 2019 brought pursuant to Order 12 rule 7 of the Civil Procedure Rules; Sections 1A, 1B, 3A and 63 ( a) of the Civil Procedure Rules. The Applicant seeks a stay of execution of the lower court orders and setting aside of the dismissal orders issued on 14<sup>th</sup> November, 2018 as well as reinstatement of the ELC Appeal No. 8 of 2018 for hearing and final determination.

The application is premised on the summarized grounds that a notice to show cause came up on the 24<sup>th</sup> October, 2018 and consequently the Appeal was dismissed for want of prosecution. Neither the applicants nor the advocates on record were served with the notice to show cause dated the 28<sup>th</sup> August, 2018. The applicant has a credible Appeal with high chances of success and the same ought to be put on record. The applicant is apprehensive that unless the suit is reinstated and orders of stay of execution granted, the Respondent is likely to sell, transfer, demolish and or otherwise dispose off the suit land.

The application is supported by the affidavit of MARY NJERI NJOROGE the Appellant herein where she deposes that the Respondents instituted proceedings against her by way of a Plaint dated the 22<sup>nd</sup> December, 2011 with the dispute premised on the ownership of land parcel number Loitoktok/ Ngama / 2054. She avers that the matter was heard and determined with the Magistrate granting judgment in favour of the Plaintiff. She claims being dissatisfied with the said Judgement, she lodged an Appeal at the Environment and Land Court. Further, that she gave her advocates instructions to prosecute the Appeal. She contends that she had no reason or doubt that her advocate would abscond court hearings either by default/ and or design since she had given proper as well as complete instructions to him. She later learnt that the matter was dismissed vide an order dated the 14<sup>th</sup> November, 2018 when she was served with the said order. She insists her advocate on record at that time was not served with the Notice to Show Cause and after perusal of court file, there is no affidavit of service. She is apprehensive that if this suit is not reinstated and stay of execution granted, she will suffer irreparable loss as the Respondents will seek to enforce orders issued by the Magistrate's court.

The application is opposed by the Respondents who filed a replying affidavit sworn by the 1<sup>st</sup> Respondent BENJAMIN SIRONKA METOYU where he confirmed that they filed a suit against the Applicant by way of Plaint dated the 22<sup>nd</sup> December 2011 and judgment was delivered in their favour. He is aware of the Appeal lodged by the Appellant. He contends that the Appellant has failed to produce any evidence to prove her allegations that the advocate absconded court despite giving him proper instructions. He insists that the Applicant has not shown or demonstrated that she was following up on her case. He avers that the previous advocate on record on behalf of the Applicant has not sworn any affidavit that he was never served with the Notice to Show Cause. He states that the Applicant will not suffer any irreparable loss as she has never lived on the suit land but resides in a separate property. He reiterates that the application is incompetent; bad in law; brought in bad faith; frivolous, vexatious and amounts to an abuse of the court process. Further that the application is not supported by any proper evidence.

Both the Applicant and the Respondents filed their submissions that I have considered.

**Analysis and Determination**

Upon perusal of the materials filed in respect of the Notice of Motion dated the 12<sup>th</sup> March, 2019, the following are the issues for determination:

- Whether the Orders issued on 14<sup>th</sup> November, 2018 should be set aside and the ELC Appeal No. 8 of 2018 reinstated for hearing and final determination.
- Whether the Court should grant a stay of execution of the lower court orders

As to whether the Orders issued on 14<sup>th</sup> November, 2018 should be set aside and the ELC Appeal No. 8 of 2018 reinstated for hearing and final determination.

From the Court record, it is evident that the judgement in Kajiado PMCC No. 234 of 2011 was delivered on 23<sup>rd</sup> May, 2014. The Appellant lodged the instant Appeal and filed an application dated the 20<sup>th</sup> June, 2014 seeking stay of execution pending Appeal but it is not clear whether the said application was determined or not. From the records, the Court first issued a Notice to Show Cause why Suit should not be dismissed for want of prosecution on 13<sup>th</sup> April, 2018 but the file was transferred to Kajiado ELC. The Court further issued a Notice to show why suit should not be dismissed for want of prosecution on 24<sup>th</sup> October, 2018. On 24<sup>th</sup> October, 2018, there was an Appearance for the Respondents but none for the Appellant and the Court proceeded to dismiss the Appeal for want of prosecution. From the Applicants averments in the affidavit it is not clear on what action her lawyer had undertaken from 2014 upto 2018 to prosecute her Appeal. She contends that there is no affidavit of service in the court file to prove her previous advocate was served. I note the Applicant has not furnished court with an affidavit sworn by her previous advocate to confirm her allegations that her advocate was not served. Applicant submits that she should not be condemned unheard. The Respondents on the other hand insist the Applicant has failed to demonstrate she was following up on her case and relied on the case of **Bilha Ngony Isaack Vs Kembu Farm Limited & Another Civil Appeal No. 145 of 2014 and W. Muchanga & E Alunga T/A Womi Associates Vs the Hon. A. G Civil Suit No. 9 of 2012** to support their arguments.

Order 12 rule 7 of the Civil Procedure Act provides that: ***‘Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.’***

From the Court file, I am unable to get a copy of an affidavit of service confirming the previous counsel on record for the Appellant was indeed served by the Notice to Show Cause why suit should not be dismissed for want of prosecution. In the case of **MWK Vs AMW (2016) eKLR**, Justice Ngugi observed as follows:’ .....***dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits...***’

Further in the case of **Bilha Ngony Isaack Vs Kembu Farm Limited & Another Civil Appeal No. 145 of 2014**, Justice Mulwa held that:’ ***A court’s discretion to set aside its ruling is not restricted but should not be so exercised not to cause injustice to the opposing party. It is incumbent upon the Court’s favour to adduce sufficient and plausible reasons that are demonstrable and persuasive to court.***

In so far as the Appellant never furnished court with an affidavit from her previous counsel but I am unable to ignore the fact that there is no copy of the affidavit of service to prove service upon the Appellant’s counsel. It is trite law that mistake to counsel should not be visited upon the Appellant. In being persuaded with the two decisions cited above, I will exercise my discretion and in the interests of justice proceed to set aside the order dated the 14<sup>th</sup> November, 2018. I will proceed to reinstate the Appeal for hearing and determination on its merits.

As for the prayer for stay of execution pending appeal, I note the Applicant is seeking for an order of stay almost 5 years later. Order 42 Rule 6 (2) of the Civil Procedure Rules provides that: ***‘ No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’***

Based on the materials before me and in relying on these legal provisions I find that the Applicant has brought this application after unreasonable delay. In the circumstances, I will decline to grant the same.

It is against the foregoing that I allow prayer no. 3 only of the Notice of Motion dated the 12<sup>th</sup> March, 2019. Applicant is directed to set the Appeal down for directions within 30 days from the date herein, failure of which the Appeal stands dismissed for want of prosecution.

Costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 11<sup>th</sup> day of July, 2019**

**CHRISTINE OCHIENG**

**JUDGE**