



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND CORUT**

**AT MERU**

**MISC. ELC APPLICATION NO. E005 OF 2021**

**GEOFFREY MUTIA .....APPLICANT**

**VERSUS**

**DESDERIO NJEBI M'NKANATHA .....1<sup>ST</sup> RESPONDENT**

**ROBERT MUTWIRI MUGWIKA .....2<sup>ND</sup> RESPONDENT**

**JOHN KINYUA .....3<sup>RD</sup> RESPONDENT**

**DAVID MUTWIRI GIKUNDA .....4<sup>TH</sup> RESPONDENT**

**PHARIS KIMAITA MURIIRA .....5<sup>TH</sup> RESPONDENT**

**REGISTERED TRUSTEES**

**CATHOLIC DIOCESE OF MERU.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. By an application dated 11<sup>th</sup> February 2021, Geoffrey Mutia Kinani hereafter the applicant brought under Sections 3A, 79G and 95 of the Civil Procedure Act, order 42 rule 6, order 50 rule 6, order 51 rule 1, order 9 rule 9 of the civil procedure rules and any other enabling provisions of the law seeking the following prayers;

*(a) A temporary stay of execution of the decree and sought in Meru CMCC No. 386 of 2014.*

*(b) Leave to appeal out of time.*

*(c) Costs of this application.*

2. The application is premised on the grounds; that following delivery of judgment on 27<sup>th</sup> February 2020 the applicant was unable to travel or instruct counsel due to death of his spouse and Covid 19 pandemic travel restrictions; that there is impending threat by execution hence will suffer loss and damage and lastly he is willing to abide by any terms and conditions should he be granted the orders sought.

3. The motion is supported by an affidavit sworn on 11<sup>th</sup> February 2021, a supplementary affidavit sworn on 16<sup>th</sup> February 2021 and a further affidavit sworn on 23.3.2021.

4. The respondents opposed the application through a replying affidavit sworn on 8<sup>th</sup> March 2021.

5. Following directions and through consent parties, agreed the application be disposed of by way of written submissions dated 23<sup>rd</sup> March 2021 and 5<sup>th</sup> Mary 2021 respectively.

6. The court has perused the application, the respective affidavits, annexures, the written submissions and list of authorities by both sides.

7. Section 79 G of the civil procedure act mandates an appeal from a lower court to be filed within thirty days upon delivery of judgment

excluding such period as the lower court may take in preparing and delivering a copy of the decree or order to the appellant .An appeal may be filed out of time for good and sufficient cause why it was not filed in time.

8. In **Nicholas Kiptoo Arap Salat vs IEBC & 7 others 2014 eKLR** the Supreme Court extension of time is not a right but an equitable remedy only available to a deserving party at the discretion of the court and such a party has to lay basis ,explain the delay satisfactorily .Further matters of prejudice to the opposite party have to be considered as well as length of the delay

9. Further the court went on to say matters of prejudice to the opposite party have to be considered as well as length of the delay.

10. In the instant matter there is no dispute that the lower court rendered a judgment on 27<sup>th</sup> February 2020. There is no suggestion by the applicant that he was not aware of the impending judgment. Secondly the reason he did not attend the delivery of the judgment is not given at all.

11. It has not been indicated when the applicant came to learn of the judgment its outcome and if so the action he took. No letter has been displayed to the effect that the applicant soon after recovery from his bereavement took any reasonable steps to establish the fate of his case.

12. It is common knowledge that Covid 19 was declared a pandemic on 11<sup>th</sup> March 2020 and thereafter courts in Kenya scaled down operations which eventually resumed in May 2020 or thereabouts vide practice directions issued on 20<sup>th</sup> March 2020. That notwithstanding courts have all along been operating a hybrid system.

13. The applicant has not explained why even if he could not travel and or attend his lawyers physically, he did not try or attempt to lodge his appeal through the online platform provided by the courts. His lawyers have not explained if they ever sought for the copy of the judgment from the court and perhaps if they made any attempts to get in touch with their client to seek further instructions and were unable to access him.

14. The decree was issued on 19<sup>th</sup> January 2021 subsequent to which this application was filed ostensibly to defeat the execution. Were it not been for the attempt to execute, it is apparent the applicant had slept on his legal rights and only woke up after he was threatened with execution.

15. On that ground alone, it is my finding that the explanation for the delay is not convincing and is hereby rejected.

16. Secondly the delay of over twelve months is inordinately long and has also not been explained at all, more so considering that on the week towards the delivery of judgment the applicant signed the mutation forms on 12<sup>th</sup> February 2020 and 14<sup>th</sup> February 2020 respectively. Later on 26<sup>th</sup> February 2020 he caused the suit land register to be closed for subdivisions.

17. Strangely a day after the judgment on 27<sup>th</sup> February 2020 the applicant lodged the said mutation forms with the district land surveyor for registration in favour of new numbers.

18. This cannot be a coincidence. It is apparent the applicant may have been aware of the judgment and was racing against time to defeat the impending execution process by hastily subdividing his land.

19. Assuming the applicant was acting in good faith and while aware the respondents have been in occupation, one would have expected by new subdivisions at the very least to leave room and or make provisions for the disputed portion of land.

20. In the further affidavit sworn on 23<sup>rd</sup> March 2021, the applicant admits there was a caution at the instance of the respondent which he unilaterally removed during the pendency of this suit and without bringing it to the attention of both the court and the respondents.

21. The applicant also went ahead to transact in the suit land while fully aware there was a pending dispute. His current lawyers were also the same ones who triggered the removal of the caution and so cannot feign ignorance of the procedure and the law. He who comes to equity must do equity and approach it with clean hands. There are no proceedings over the removal of the caution as envisaged under Section 23 of the Land Registration Act and the rules made thereunder.

22. Under section 79G of the Civil Procedure Act there is no certification of delay from the lower court in support of the application to show exact time the applicant took to obtain the judgment, order or the decree.

23. It is also unbelievable that the applicant and his advocates on record had time to visit the district land surveyor and registrar during Covid 19 period to lodge documents in person yet could not find time to visit the court premises in the same locality or town to establish the fate of the case and or lodge an appeal on time or at the very least make an application for leave without unreasonable delay.

24. It may very well be that there were Covid 19 ministry of health guidelines over the aged against travel and stay at home.

25. However that explanation is vitiated by the fact that the applicant not once or twice at the same period lodged or caused to be lodged valid documents relating to the subject land with the ministry of lands far away from his home place. It has not been suggested by the applicant how else he would have taken such steps without his physical presence and or initiative.

26. Again it has been submitted his spouse passed on a month before the decision was delivered, depleted his resources and hence could not raise fees to instruct counsel. It is common knowledge that the process of subdivision requires funds yet the applicant was able to afford

such process and not court fees.

27. Regarding the reason that the applicant incurred huge medical bills no supporting documents have been attached in support of those assertions.

28. The applicant has fallen short of meeting the guiding principles as held out **Nicholas Kiptoo Arap Koriri Salat** for he has not acted equitably. The explanation given is not satisfactory and lacks basis. The reasons for the inordinate delay are wanting in form and substance.

29. On the other hand the respondents have demonstrated how he shall be prejudiced and will continue to suffer prejudice should the application be allowed particularly given the bad faith on the part of the applicants unbecoming character actions and moves to interfere with the suit land during pendency of this case and after the decision was made so as to defeat any cause of justice in favour of the respondent.

30. On the issue of stay of execution, there is already an admission on the part of the applicant that he sold a portion of the suitland measuring an acre to a third party by agreement dated 21<sup>st</sup> September 2012, removed the caution lodged by the respondent and has closed the register for parcel no. 19 to register new numbers namely 3027, 3028, 3029 and 3030.

31. The decree was to the effect that ½ half of the suit land be excised in favour of the respondents from Ngusishi Settlement Scheme/19 which is now no more due to the actions of the applicant.

32. The applicant has not offered sufficient explanation over contents of paragraphs 19 of the replying affidavit that his conduct was irregular, in bad faith and unlawful.

33. There are subsequent transfers underway in favour of third parties. The applicant therefore stands to suffer no loss at all, unlike the respondents.

34. Given that the respondents have moved to the trial court as averred in paragraph 23 of the replying affidavit I say no more over that issue.

35. In the premises I find the application dated 11<sup>th</sup> February 2021 lacking merits. The same is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2021 IN PRESENCE OF:**

C/A: Kananu

No appearance

**HON. C.K. NZILI**

**ELC JUDGE**