



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT**

**AT MAKUENI**

**ELC MISCELLANEOUS APPLICATION NO E3 OF 2020**

**NZEI MAWEU.....PLAINTIFF/APPLICANT**

**VERSUS**

**CHRISTINE KATOTO MASILA.....DEFENDANT/RESPONDENT**

**RULING**

1. Before this court is an application dated 12<sup>th</sup> November, 2020 where the Applicant is seeking for the following orders: -

***a) Spent.***

***b) That pending inter-parties hearing of this application, this Honourable court does issue an order staying the judgment, any resultant orders, decree or any further proceedings in MELC NO. 141 of 2010 at Makindu Law Courts.***

***c) That pending the determination of this application, this court does issue an order staying the Judgment, any resultant orders, decree or any further proceedings in MELC 141 Of 2020 at Makindu Law Courts.***

***d) That the Applicant be granted leave to appeal out of time against the Judgment and orders given on the 17<sup>th</sup> May 2019 by Hon Zachariah Joseph Nyakundi (Senior Principal Magistrate).***

***e) That this Honourable court be pleased to issue any order as it deems just in the circumstances.***

***f) That cost of and incidental to this application be costs in the intended Appeal.***

2. The Application is premised on the grounds set out therein and the supporting affidavit of the Applicant Christine Katoto Masila sworn on the 12<sup>th</sup> of November 2020 and the further affidavit sworn on the 24<sup>th</sup> of September 2021.

3. The Application was opposed vide the Respondent's Replying Affidavit sworn by Nzeli Maweu the Respondent herein.

**APPLICANT'S CASE**

4. A summary of the grounds and the averments is that judgment was delivered on the 17<sup>th</sup> of May 2019.

5. That being dissatisfied with the judgment, the Applicant instructed her Advocate on record to appeal against the judgment. She attached a receipt of payment for legal fees towards the Appeal dated 29<sup>th</sup> May 2019 marked as CKM-1.

6. That thereafter she was informed that her Counsel had applied for the proceedings and a copy of judgment to prepare the memorandum of appeal. That she applied for a copy of the judgment and proceedings vide a letter dated marked CKM-2. That she made a follow up and only managed to get an uncertified copy of the judgment in February 2020.

7. That after the Covid pandemic struck she lost track of the matter. That later in July 2020 she got wind from her neighbours that the Respondent was looking for her to have her arrested.

8. That upon contacting her Advocate, she found that he was suffering from a partial stroke and that he had not filed the appeal. She further avers that despite several demands to her previous Advocate to release her file, the same was handed over to her on the 22<sup>nd</sup> of November

2020. That thereafter, she instructed the firm of Wasolo and Company Advocates to take up the matter on her behalf. That on 27<sup>th</sup> of October 2020 she was arrested and presented before the Makindu law courts where she was to be prosecuted to pay costs.

9. The Applicant avers that she should not be punished for the mistake of her counsel. It is the applicant's position that her Intended Appeal raises arguable issues and that the fact that she has made payment does not relinquish her right of appeal.

#### **RESPONDENTS CASE**

10. In his replying affidavit sworn on the 16<sup>th</sup> of December 2020 the Respondent opposed the application where he stated that the application was fatally defective, an abuse of the court process and a delaying tactic.

11. The Respondent avers that the Applicant had already complied with the orders issued by the court and annexed the notice to show cause and payment receipts annexures NM1.

12. It is the Respondent position that the Court granted the Applicant time to pay Kshs. 30,000/= on 20/11/2020 and the remaining balance to be paid in monthly instalments. He contends that the Applicant had not sought for stay and therefore the purported appeal could not operate as a stay.

13. The parties were directed to canvass the application by way of written submissions. The Respondent filed his written submissions on the 28<sup>th</sup> of September 2021. The Applicant opted to rely on her supporting sworn on the 12<sup>th</sup> of November 2020 and her further affidavit sworn on the 24<sup>th</sup> September 2021.

#### **ANALYSIS AND DETERMINATION**

14. Having considered the application, grounds, affidavits, annexures and the written submissions, I find that the main issue for determination is whether the Applicant has met the required principles for the grant of;

**a) Leave to Appeal out of time;**

**b) Stay of Judgment in Makindu ELC NO 140 of 2020.**

#### **LEAVE TO APPEAL OUT OF TIME**

15. The statutory provisions that deal with the requisite period for filing of appeals from the Subordinate Courts to the High Court is Section 79G of the Civil Procedure Act which 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 the lower court may certify as having been requisite for the preparation and delivery to the Appellant 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.*

16. In **First American Bank of Kenya Ltd Vs Gulab P Shah & 2 Others, Nairobi (Milimani) HCCC No 2255 of 2000 (2002) I EA 65** the court set out the factors to be considered in deciding whether or not to grant such an application and these are;

**(i) The explanation if any for the delay;**

**(ii) The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which would only result in the delay of the course of justice;**

**(iii) Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.**

17. The court has wide unfettered discretion in granting leave to file appeal out of time. However, in exercising its discretion to grant extension of time, the court must consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted.

18. In considering whether the Applicant has met the requirements for the grant leave, the Applicant avers that the delay was occasioned by the fact that her previous Counsel was struck by a mild stroke and the onset of the Covid pandemic.

19. Judgment in the trial court was pronounced on the 17<sup>th</sup> of May 2019. Any Appeal in respect to the said judgment ought to have been filed on or before the 18<sup>th</sup> of June 2019. The Applicant filed the present application on the 16<sup>th</sup> of November 2020 after she got wind that she was going to be arrested.

20. I have looked at annexure CKM2 which is a letter dated 11/11/2019 from the firm of Kasyoka and Associates to the Executive Officer Makindu Law Courts received on the same day requesting for proceedings and I find that the same were applied for five months after the judgment.

21. The Applicant annexed a receipt of payment towards the Appeal dated the 29/05/2020. The Applicant had an express intention of appealing against the Judgement. Her Advocate did not request for the proceedings immediately after payment of legal fees. The draft memorandum of appeal was filed on the 16/11/2020. It was a mistake of Counsel that the Appeal was not filed on time and the same cannot be visited upon the Applicant.

22. I have considered the circumstances of this case and I find that even though the delay is inordinate, the applicant has given reasonable and plausible reasons for the same.

### **STAY OF EXECUTION**

23. Order 42 Rule 6 (1) and (2) of the Civil Procedure rules outlines the guiding principles to be met for the grant of stay and provides that;

*6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*6(2) No order for stay of execution shall be made under sub-rule (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 of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.*

24. In considering an application for stay of execution, I am guided by the case of **Butt Vs Rent Restriction Tribunal (1982) KLR 417** where the court of Appeal gave the following guidelines;

*“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

25. The Applicant in an application for stay must satisfy the court that he/she stands to suffer substantial loss if stay is not granted.

26. In **Tropical Commodities Suppliers Ltd and Others Vs International Credit Bank Ltd (in Liquidation)** the court defined substantial loss as follows;

*“substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”*

27. On the issue of substantial loss, the Applicant should not only state that she is likely to suffer substantial loss, she must prove that she will suffer substantial loss if stay orders are not granted. The Applicant avers that the decree was partly monetary in nature involved a colossal amount and that unless stay of execution was granted it would cause undue hardship. The Applicant did not attach a copy of the decree nor disclose what the decretal amount was.

28. The Respondent in his affidavit averred that the applicant had complied with the decree and that outstanding amount was to be paid in monthly instalments. The outstanding decretal amount was equally not disclosed. The court is at a loss as to what is being executed. The court does not have sufficient material to enable it to make an informed decision regarding the issue of stay of execution.

29. In the instant application the Applicant save for mentioning that she will suffer hardship did not demonstrate the nature of loss she is likely to suffer should an order for stay be declined. In light of the foregoing reasons I find that the prayer for stay of execution is not merited.

30. I therefore allow the application in the following terms;

*a) Leave is hereby granted for the applicant to file and serve her appeal within 14 days from the date of delivery of this ruling.*

*b) Orders for stay of execution is hereby declined.*

*c) The applicant is to meet the cost of the application.*

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2021.

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**HON. T. MURIGI**

**JUDGE**

**IN THE PRESENCE OF: -**

Court assistant – Kwemboi

Wasolo for Plaintiff/Applicant