



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**MISC.CIVIL APPLICATION NO. 114 OF 2019**

**ELIZABETH NYARUAI MAINGI.....APPELLANT/APPLICANT**

**VERSUS**

**DAVID NDIRANGU NJOGU.....1<sup>ST</sup> RESPONDENT**

**PROVIDENCE AUCTIONEER.....2<sup>ND</sup> RESPONDENT**

**RULING**

**FACTS**

1. The applicant brought the instant application dated 23<sup>rd</sup> September 2019 under the provisions of Order 42 Rule 6, Order 51(1) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya seeking for the following orders;-

i. Spent

ii. That the Honourable Court be pleased to grant an order of stay of execution of the ex-parte judgment that was delivered and issued on the 22<sup>nd</sup> August, 2017 in **Nyeri CMCC No.228 of 2016** pending the hearing and determination of the application for leave of enlargement of time within which to file an appeal out of time against the order and or ruling delivered in this matter on the 24<sup>th</sup> September, 2019.

iii. This Honourable Court be pleased to grant leave for enlargement of time within which to file the annexed memorandum of appeal dated 6<sup>th</sup> November, 2019 against the ruling September, 2019 and the same be deemed as properly filed upon payment of requisite fees with the leave of the court;

iv. This Honourable Court be pleased to stay the execution of the judgment entered in the **Chief Magistrates Court at Nyeri CMCC No. 228 of 2016** on 22<sup>nd</sup> August, 2017 and all consequence orders arising therefrom pending the hearing and determination of the appeal;

v. The Honourable Court be pleased to exercise its inherent power and issue any other further order in the interest of justice.

vi. That the costs of this application be borne by the respondents.

2. The application was disposed of by way of oral submissions; learned counsel Mr. Gicheru appeared for the applicants and learned counsel Mr Waweru Macharia appeared for the respondent; a summary of each parties' submissions is as follows;

**APPLICANT'S CASE**

3. The application is premised on the grounds on the face of the application and on the supporting affidavit of **Elizabeth Nyaruai Maingi** who stated that the applicant had filed an application in the lower court dated the 23/05/2019 seeking to review, rescind, vary and set aside the ex-parte judgment; the Ruling was delivered on the 24/09/2019 and she had upto the 24/10/2019 to file an appeal against the ruling; but due to her advanced age, being indisposed and lack of funds she was not able to instruct her advocate to file an appeal in a timely manner;

4. She only managed to file an the application for enlargement of time on 6/11/2019; she seeks to appeal against the conditions on the grounds as set out in the draft Memorandum of Appeal; the case law she relied on is the case of **Kenya Power & Co. Ltd vs Abdulhakim**

**Abdulla Mohammed & Anor [2017] eKLR**; where it was held that in setting aside a default judgment it is not proper to require a party to pay a substantial sum of money in a claim that is yet to be proved and in which the court has found that there is an arguable defence; the draft Memorandum of Appeal raises triable issues that the lower court acknowledged in its ruling;

5. Counsel submitted that the onerous conditions given by the lower court was due to the alleged delay injustice; the court did not consider whether the applicant would be able to raise the colossal amount; that depositing of the decretal amount in itself cannot guarantee expeditious disposal of the appeal;

6. The delay from the date the order was made translates to twelve (12) days and is not inordinate and this court has the inherent discretion to enlarge time;

7. Counsel urged the court to give the appellant an opportunity to be heard by allowing the application.

8. Case law relied upon are as follows;-

. Wachira Karani v Bildad Wachira [2016]eKLR

b. Jennifer Njuguna & Another v Robert Kamiti Gichuhi [2017] eKLR

c. Charles Karanja v Charles Githinji Muigwa [2017]eKLR

d. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013]eKLR

e. Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR

f. Kenya Agricultural and Livestock Research Organization v Stephen Ngaruiya Kanyanja Court of Appeal Civil Application No. Nairobi 215 of 2015 (Unreported)

#### **RESPONDENT'S CASE**

9. In response counsel submitted that the applicant had been given an opportunity to comply with the conditions for setting aside the judgment but failed to do so; that no appeal has been preferred and hence stay of execution as envisaged by Order 42 of the Civil Procedure Rules cannot be granted in the absence of an appeal;

10. The orders given by the lower court were given out of discretion of that court and that it would not be right to interfere with such discretion; that the lower court properly exercised its discretion by allowing the application of setting aside the judgment with some set conditions; the applicant seeks to vary the orders of that court by seeking to have the judgment set aside with no conditions;

11. That the 1<sup>st</sup> respondent will suffer prejudice as the judgment was entered on 27/08/2017 and he has not been able to execute it ever since; even when there was no appeal against the judgment;

12. The applicant had not given any good reasons for the delay; and only moved to court upon execution being effected upon the property; that she is not impecunious and could afford the sums already deposited in court;

13. Counsel prayed that the application be dismissed for being bad in law and lacking merit.

#### **REJOINDER**

14. Counsel stated that the orders appealed against were not negative orders; these were positive orders requiring the applicant to fulfil certain conditions within 30 days in default execution to proceed; and the applicant's property would be sold and thus the appeal would be rendered nugatory.

#### **ISSUES FOR DETERMINATION**

15. After hearing the oral submissions made by the respective counsel this court has framed the following issues for determination;

i. Whether the application for enlargement of time was made without unreasonable delay;

ii. Whether the applicant has an arguable appeal; whether substantial loss may result to the applicant unless the orders sought are granted;

#### **ANALYSIS**

16. The applicable law for enlargement of time in which to file an appeal is found under the provisions of section 79G of the Civil Procedure Rules which reads as follows;

**“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.”**

17. The renowned case of **Nicholas Kiptoo Arap Korir Salat vs IEBC and 7 Others [2014] eKLR** lays down the general principles a court should consider in exercising its unfettered discretion to extend the time for filing an appeal; the held as follows;

**“It is clear that the discretion to extend time is indeed unfettered.**

**It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:- exercise of such discretion:**

- 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.”**

18. This court concurs that it has been given wide and unfettered discretion to make such orders as may be necessary for the ends of justice; but this has to be exercised judicially; in the circumstances this court will proceed to consider hereunder whether this is a suitable case to exercise its discretion and whether the application should be allowed;

**Whether the application for enlargement of time was made without unreasonable delay;**

19. This court notes that the impugned Ruling was delivered on the 24/09/2019 and the applicant had upto the 24/10/2019 to file an appeal against the ruling; the reasons given for her failure to file was her advanced age, she was also indisposed and lacked funds so she was not able to instruct her advocate to file an appeal in a timely manner; that she only managed to file this application for enlargement of time on 6/11/2019;

20. Indeed, looking at the court record this court is satisfied that the application was filed after twelve (12) days after the applicant’s time for filing her appeal had lapsed; and finds that the period does not constitute inordinate delay;

21. This court is satisfied that the application for enlargement of time was made without unreasonable delay;

22. Upon perusing the applicant’s National Identity Card annexed to the instant application and marked as ‘ENM.7’ this court notes that her year of birth is stated as being 1925; taking this into consideration this court is satisfied with the reason given that her inability to file the appeal in a timely manner was due to her advanced age and finds it to be a reasonable and satisfactory explanation;

**Whether the applicant has an arguable appeal; whether substantial loss may result to the applicant unless the orders sought are granted;**

23. This court reiterates that it has unfettered discretion to grant the orders sought by the applicant and all the applicant must do at this stage is to satisfy this court that the intended appeal is not frivolous and that she has an arguable appeal;

24. Looking at the draft Memorandum of Appeal the main ground of appeal is that the trial court imposed onerous and unjust conditions in setting aside the default judgment;

25. The record indeed reflects that the order for setting aside was conditional upon the depositing of the thrown away costs, the full decretal sum, the auctioneers costs and the costs of execution; without going into the merits or demerits of the intended appeal this court is satisfied that on this ground alone the applicant has demonstrated that she has an arguable appeal as it raises issues based on the propriety of requiring a party to pay a substantial sum of money in a claim that the trial court set aside as it found that the applicant had an arguable defence;

26. The 1<sup>st</sup> respondent in its response had submitted that since the judgment was rendered in the year 2017 he had been unable to execute the decree and as such he had been denied the fruits of his judgment; this court notes that as at 23/07/2018 the decree reflected that the decretal amount stood at Kshs.1,458,053/-; and opines that the sum together with the other costs amounts to a substantial sum in total; and that it is probable that if applicant fails to raise the full amount this will definitely result in the automatic execution of the decree that could negatively impact the applicant as it entails the sale of her property Title No.Thengenge/Karia/315 by public auction and also involves her ejection therefrom; in the circumstances the applicant would suffer substantial loss;

27. The 1<sup>st</sup> respondent has not demonstrated that he would be able to refund the decretal sum and or compensate the applicant for the loss of her property if the appeal was ultimately successful; and for this reasons this court is satisfied that the applicant has demonstrated that unless the application is granted she is likely to suffer hardship and loss which is not proportionate to the loss the respondent is likely to suffer;

28. From the material placed before it this case is found to be a suitable one in which the court can invoke its discretionary powers to enlarge the time to enable the applicant to file her appeal.

#### **FINDINGS AND DETERMINATION**

29. In the light of the foregoing this court makes the following findings and determinations;

- i. This court finds that the application for enlargement of time was made without unreasonable delay;
- ii. The application is found to have merit and it is hereby allowed; the applicant is hereby granted an order for enlargement of time to institute or file the intended appeal within forty-five (45) days from the date hereof;
- iii. The interim orders of stay of execution are hereby extended for a period of forty-five days on the same conditions; upon filing appeal the applicant is at liberty to file an application for stay of execution pending appeal;
- iv. The applicant to bear the costs of application.

Orders Accordingly.

**Dated, Signed and Delivered at Nyeri this 2<sup>nd</sup> day of July, 2020.**

**HON. A. MSHILA**

**JUDGE**