



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**MISC. CIVIL APPLICATION NO. 173 OF 2017**

**MARY NJOKI WACHIRA.....APPLICANT**

**VERSUS**

**JOHN MBUREMU MURIU.....RESPONDENT**

**RULING**

1. The applicant prays for *extension of time* to lodge an appeal.
2. The *notice of motion* is dated 21<sup>st</sup> November 2017. The intended appeal is against the *ex parte* judgment entered on 5<sup>th</sup> September 2016; and, consequential orders of the lower court in Murang'a Chief Magistrates Civil Suit 155 of 2016.
3. There are two other prayers for *injunction* pending the hearing of the *appeal*. As *no* appeal exists at the moment, prayers (c) and (d) of the motion have no legs to stand on. They are *dismissed*.
4. The pith of the motion is that unless *leave* is granted, the appeal will be lost. In the annexed *draft memorandum of appeal* the applicant pleads that she was condemned *unheard*; that she was irregularly committed to *civil jail* from 26<sup>th</sup> October 2016 to 24<sup>th</sup> March 2017; and, that the subsequent *prohibition order* and *attachment* of her landed properties was *unlawful*.
5. Those matters are set out at length in *two* depositions of the applicant sworn on 21<sup>st</sup> November 2017 and 30<sup>th</sup> July 2018.
6. The motion is contested by the respondent. There is a *replying affidavit* sworn on 19<sup>th</sup> April 2018 and *grounds of opposition* of even date.
7. On 21<sup>st</sup> February 2019, I heard brief submissions from the learned counsel for both parties.
8. The legal parameters in a matter of this nature are well settled. This court has wide and unfettered discretion to *extend time*. The discretion must however be exercised *judiciously*. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See ***Leo Sila Mutiso v Rose Mwangi***, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), ***Nicholas Salat v IEBC & 7 others***, Supreme Court, Application 16 of 2014 [2014] eKLR.
9. The *amended plaint* in the subordinate court is for a *liquidated sum* of Kshs 1,475,000. But it is also plain that the *original claim* was for a *refund* of the sum of Kshs 2,950,000 for a failed conveyance of *land*.
10. The respondent opted to enforce the decree by arrest of the judgment debtor. The applicant was committed to *civil jail* between 26<sup>th</sup> October 2016 and 24<sup>th</sup> March 2017.
11. For reasons that will become evident, it would be *prejudicial* to comment at length on the depositions by the parties; or, the merits of the intended appeal.
12. I am satisfied that the application has been brought after substantial *delay*. The applicant claims to have been *disoriented* by her incarceration. The application was only lodged on 23<sup>rd</sup> November 2017. She was released from custody months earlier on 24<sup>th</sup> March 2017. She had legal counsel. The delay is *not* well explained.
13. But in a matter of this nature, the court must pay heed to the *overriding objective* to do justice to the parties. There are questions of *personal liberty* of the subject; and, the emotive issue of *land*. I am well guided by **Article 159** of the **Constitution** and sections 1A and 1B of the **Civil Procedure Act**. See also ***Harit Sheth v Shamas Charania***, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.

14. On the face of it there is an *arguable appeal*. Unless time is extended, three matters will be swept under the carpet: First, was the applicant condemned unheard? Secondly, were proper procedures followed before the orders of committal to civil jail or the attachment of the properties? Thirdly, was the *ex parte* judgment valid? In a synopsis, was *due process* followed in execution of the decree?

15. Justice is a two way street. The respondent will be prejudiced from enjoying the fruits of the decree. Certainly, there will be delayed closure of the litigation. But I am alive that it can be abated by an award of *costs*. That is the justice of the case.

16. Granted those circumstances, I will exercise my *discretion* under section 79G of the **Civil Procedure Act** in favour of the applicant.

17. Prayer (b) in the applicant's notice of motion dated 21<sup>st</sup> November 2017 is *conditionally* allowed: The intended appeal *shall* be filed and served within the next *fourteen days* of today's date. All the other prayers in the motion are *dismissed*.

18. I grant the *respondent* costs in any event. If the applicant fails to lodge the appeal within the set time, the leave to appeal out of time shall automatically *lapse*.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A** this 14<sup>th</sup> day of March 2019.

**KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of:***

Ms. Maina for the applicant instructed by Rhoda N. Maina & Advocate.

Mr. Mwangi for the respondent instructed by Kirubi Mwangi Ben & Company Advocates.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.