



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO. 32 OF 2019

MBITHI MUTISYA MBITHI.....APPLICANT

VERSUS

NDUNDA THYAKA MUSYOKA.....1ST RESPONDENT

MARY MUTISYA MBITHI.....2ND RESPONDENT

RULING

1. In the Notice of Motion dated 2nd July, 2019, the Applicant is seeking for the following orders:

- a. That leave be granted to the Applicant to Appeal the Judgment in Machakos CMCC No.1187 of 2010 delivered on the 26th day of April, 2019.**
- b. That the court do extend the time within which to file an Appeal from the Judgment in Machakos CMCC No.1187 of 2010.**
- c. The annexed Draft Memorandum of Appeal be deemed as properly filed upon payment of the requisite court fees.**
- d. That this Honourable Court be pleased to grant stay of execution of the Judgment and all consequential orders delivered by the trial court on the 26th day of April, 2019 pending the hearing and determination of the Appeal.**

2. The Applicant has deponed that he was the Defendant in Machakos CMCC No. 1187 of 2010 in which Judgment was entered in favour of the Respondents on 26th April, 2019; that the Judgment was initially reserved for 22nd March, 2018 and that the trial court deferred the delivery of the Judgment to 28th March, 2018 on which day the court deferred it once more to 5th April, 2018.

3. According to the Applicant, on 5th April, 2018, the court informed the parties to attend court for the delivery of the Judgment on 6th April, 2018 on which day the Judgment was not ready. The court adjourned the matter for the delivery of Judgment on 11th April, 2018 and on 29th August, 2018.

4. According to the Applicant, on 29th August, 2018, the trial court informed the parties that the Judgment will be delivered on notice; that notice ought to have been served to all the parties and that no notice was served on his advocate indicating that Judgment will be delivered on 26th April, 2019.

5. The Applicant deponed that by the time he gave to his advocates instructions to prefer an Appeal, the statutory period granted for the filing of the Appeal had already passed; that he has an arguable Appeal and that unless the orders are granted, his Appeal will be rendered nugatory.

6. The Applicant finally averred that he is the proprietor of share number 574, Konza Ranching and Farming Co-operative Society Limited; that the Judgment of the trial court reverted the said share to a deceased person and that the Application should be allowed.

7. In the Replying Affidavit, the 1st Respondent deponed that there is no eminent threat of execution; that there is no evidence to confirm that the Applicant or his advocate followed up on the file to confirm if the Judgment was delivered and that the Applicant has filed this Application to deny them the fruits of their Judgment.

8. In his submissions, the Applicant's advocate submitted that all Appeals from the sub-ordinate courts to the High Court ought to be filed

within thirty (30) days; that the Applicant and his advocate dutifully attended court on numerous occasions to take the Judgment and that although a notice was supposed to be to be sent to all the parties, the Judgment of 26th April, 2019 was delivered without the notice.

9. Counsel submitted that with the subject share having been left within the disposal of the representatives of the Estate of Thyaka Musyoka, the said share could be disposed off to third parties to the detriment of the Appellant. Counsel relied on numerous authorities which I have considered.

10. The Respondents' counsel submitted that the onus of proving that substantial loss would occur unless an order of stay of execution is issued rests upon the Applicant and that in any event, the Applicant has not proved that the Respondents are in the process of disposing off the suit property.

11. The Respondents' counsel finally deponed that the Applicant has not made any provision for costs; that the Applicant has not deposited the decretal sum or furnished such security with the court and that the Applicant ought to have filed his Appeal before seeking for leave to strike the Appeal out of time. Counsel relied on several authorities which I have considered.

12. The main prayers that the Applicant is seeking in the current Application is for leave to file the Appeal out of time and for stay of execution of the Judgment of the lower court pending the hearing of the Appeal.

13. Although the Applicant has deponed that the impugned Judgment was delivered on 26th April, 2019, and that unless the said Judgment is stayed by this court he will suffer substantial loss, he has not annexed a copy of the said Judgment and the pleadings that were filed in the lower court.

14. In the absence of a copy of the Judgment of the trial court, this court is unable to ascertain all the allegations raised by the Applicant. Consequently, and without going into the merits of the Application dated 2nd July, 2019, I strike out the Notice of Motion dated 2nd July, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF MARCH, 2020.

O.A. ANGOTE

JUDGE