

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 354 OF 2018

ROSEMARY NJERI MUIRURIAPPLICANT

VERSUS

MARGRET NJERI KIMANIRESPONDENT

RULING

This is an application by way of Notice of Motion under Sections 3A, 63 (e),75,78,79G and 95 of the Civil Procedure Act, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules for orders that there be a stay of execution of the lower court judgment delivered on 10th January, 2012.

There is also an order sought that leave be granted to appeal out of time against the same judgment, and that the said leave do operate as a stay of all proceedings. There are grounds set out on the face of the application alongside a supporting affidavit sworn by the applicant upon which the said orders are sought.

The application is opposed and there is replying affidavit sworn by the respondent herein. Parties have also filed submissions and cited some authorities which I have noted.

Going by the record, after the delivery of the judgment of the lower court on 10th January, 2012 the applicant filed an application before the lower court dated 6th February, 2012 for stay of execution pending an appeal.

The lower court on 17th February, 2012 granted an order of stay of execution of its judgment. Thereafter the applicant herein never took any action to prosecute the appeal until the respondent filed an application to have the said orders discharged. Indeed, the said orders were discharged by the court on 6th September, 2016 in Civil Appeal No. 2 of 2012.

The applicant filed an application by way of Notice of Motion dated 27th March, 2017 to set aside the dismissal order made on 6th September, 2016 aforesaid and reinstatement of the stay orders. After hearing the parties, the court dismissed the said application on 24th May, 2018.

Although the parties herein have addressed the court in their written submissions at length on the orders sought, I am constrained to observe that, at the centre of this application is whether or not this court has jurisdiction to address the application in view of its ruling delivered on 24th May, 2018.

I say so because, the doctrine of *functus officio* has been raised and I cannot overlook the same. There was already an appeal No. 2 of 2012 which was filed after the delivery of the lower court judgment. The said Memorandum of Appeal having been dismissed on 6th September, 2016 and the move to reinstate the same having been rejected on 24th May, 2018 there is no Memorandum of Appeal on record capable of having been filed as sought in the present application.

A lot of blame has been directed to the advocate who was representing the applicant in the course of these proceedings. Whatever may have transpired between the applicant and her counsel may not be of any assistance because, when one looks at the length of time it has taken the applicant to move the court, resting with the present application, the delay is obviously inordinate and inexcusable. It must be appreciated that a suit belongs to the party instructing counsel, and such a party should be at the forefront in monitoring the progress of the case.

In the ruling dated 24th May, 2018, the court observed that there had been default on the part of the applicant which was not explained. I also observed that if there is any recourse in law or fact, then the appellant was in the safe hands of counsel for advice.

The applicant has been contented with litigating by way of applications instead of pursuing the appeal. If she was aggrieved by the orders made on 24th of May, 2018 she was at liberty to file an appeal. I observe that, if I were to address the application as drawn, I will be delving into matters that I have dealt with before, thereby breaching the principle of *functus officio*.

I find as I hereby do, that I have no jurisdiction to revisit this dispute at this stage. In that regard, I do not even deem it necessary to go into the merits of the application because if I were to do so I will be assuming jurisdiction that I have declared I do not have. The end result is that this application is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 4th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE