



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MISCELLANEOUS CIVIL APPLICATION NO. 44 OF 2017

JOYCE WAIRIMU MAKUMI.....APPLICANT

VERSUS

MARTHA WARUGURU WAMBARI *and*

STANLEY NGURE (*Suing as the legal representatives of*

JOSEPH WAMBARI).....RESPONDENTS

RULING

1. The applicant's notice of motion dated 24th July 2018 is *four-pronged*. First, the applicant craves for *stay of execution* of the decree of the learned trial magistrate dated 2nd August 2017. Secondly, that the proclamation or warrants of attachment by *Kingpin Auctioneers* be *set aside*. Thirdly, that the court *reinstates* an earlier application dated 18th September 2017 which was dismissed for non-attendance. Fourthly, that upon grant of the above prayers, the court do reinstate the terms of a consent order recorded on 4th October 2017.
2. The applicant's learned counsel, *Ms. J. Moragwa*, has sworn an affidavit dated 24th July 2018. The applicant is aggrieved by the judgment of the learned trial magistrate dated 2nd August 2017. The decree was in the sum of Kshs 2,191,700. But the applicant failed to file an appeal within thirty days. An application for leave to file appeal out of time was lodged on 20th September 2017.
3. The parties then filed a *consent* in the *lower court* dated 28th September 2017 granting stay of execution of the decree on terms: Part of the decretal sum of Kshs 1,285,957 was to be paid to the plaintiff's counsel together with costs of Kshs 214,043. The balance of Kshs 905,742.50 was to be deposited in an interest earning account of both counsel "*pending the hearing and determination of the intended appeal.*"
4. In the meantime, the application for leave to file an appeal out of time was fixed for hearing at the High Court for 21st May 2018. The applicant's learned counsel submitted before me that she failed to *diarize* the date. But she deposes that she was throughout under the mistaken belief that the consent of 4th October 2017 allowed the applicants to lodge an appeal out of time. As a result, she did not attend court on 21st May 2018; and, the application dated 18th September 2017 was dismissed. She avers that the process of execution of the decree has commenced; and, that unless the orders are granted, her clients will suffer great prejudice.
5. The motion is contested by the respondents. There is a replying affidavit sworn by *Martha Waruguru* on 7th August 2018. In a synopsis, she avers that the application lacks merit; that there has been inordinate delay; and, that it is a scheme to frustrate a legitimate decree.
6. On 10th August 2018, I heard brief submissions from the learned counsel for both parties. I have considered the application, depositions and the rival submissions.
7. At the heart of this matter is failure by counsel to appear in court on 21st May 2018. The High Court is a court of record. The date was taken by the applicant's counsel *ex parte* on 25th September 2017. The respondents were served with a hearing date. On the date of the hearing, the applicant's counsel never appeared. The court was entitled to dismiss the motion for non-attendance.
8. Has the absence of counsel been well explained as required by Order 12 Rule 7?
9. Learned counsel deposes that the file was handed over to her by her colleague on 1st March 2018. That was nearly two and a half months before the hearing date. Although in her submissions she blamed it on her diary, the affidavit has a different narrative: Paragraph 7 states that she was under the "*mistaken belief*" that the consent allowed the respondents to lodge the appeal out of time.

10. I have studied the consent recorded in the lower court. It is on the note paper of *Kairu & McCourt*, the lawyers for the applicant. The obvious *inference* is that the firm drew the consent. The consent did *not* allow the applicant to file the appeal out of time. There is also no suggestion that the written consent was missing from counsel's file when she took over the matter in March 2018.

11. I have reached the conclusion that there is no sound or reasonable explanation for absence of counsel or the applicant in court on 21st May 2018. I thus *dismiss* the prayer for reinstatement of the notice of motion dated 18th September 2017.

12. I will now turn to the prayers for stay of execution of the decree or warrants. The present motion is predicated largely upon Order 42 rule 6 (1) of the Civil Procedure Rules. Stay may be granted by *either* the court that granted the decree; or, *the court to which such appeal is preferred*. No appeal has been preferred to the High Court. What was before the High Court was an application for *leave* to lodge an *intended* appeal. I thus find that Order 42 cannot aid the applicant.

13. The other limb of stay under Order 22 would properly lie before the court that issued the impugned decree and more so in view of the substantial sums paid under the consent recorded in the *lower court*. I am afraid I *cannot* reinstate a consent that was not recorded before the *High Court*.

14. For all those reasons the applicant's notice of motion dated 24th July 2018 is *dismissed*. Considering the predicament the applicant finds herself in; and, in the interests of justice, I order that each party shall bear its own *costs*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 19th day of September 2018.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Ms. Moragwa for the applicant instructed by Kairu & McCourt Advocates.

No appearance by counsel for the respondents.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.