



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. MISC. APPLN. NO. 39 OF 2019**

**CRAWFORD KIOKO MATHEKA.....1<sup>ST</sup> APPLICANT**

**LYDIA MWIKALI MUTHYA.....2<sup>ND</sup> APPLICANT**

**BERITA MBITHE MUANGE.....3<sup>RD</sup> APPLICANT**

**MARTHA MWIKYA MUTISO.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**FRANCIS MUOKA MATHEKA.....1<sup>ST</sup> RESPONDENT**

**BENEDICTA SYOMBUA MUSEMBI.....2<sup>ND</sup> RESPONDENT**

**AND**

**SUSAN ANN KARANJA.....INTERESTED PARTY**

**RULING**

1. In the Notice of Motion dated 26<sup>th</sup> July, 2019, the Applicants have sought for the following reliefs:

***a. That there be a stay of execution of the Judgment entered herein on 11<sup>th</sup> June, 2019 pending the hearing and determination of this Application.***

***b. That the Applicants be granted leave to file Appeal out of time against the Judgment entered on 11<sup>th</sup> June, 2019 in Machakos CMCC No. 552 of 2013.***

***c. That the costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Applicant who has deponed that the Applicants instituted in the lower court Machakos CMCC No. 552 of 2013 seeking for the lifting of the caution registered over parcel of land number Athi River/Athi River Block 1/208.

3. The 1<sup>st</sup> Applicant deponed that as at the time of filing the suit, all the family members, including the Respondents, had consented to the sale of the suit property to the Interested Party and a Title Deed had been issued in her name; that the Respondents herein counter-claimed for the cancellation of the Interested Party's Title Deed and that by a Judgment of 11<sup>th</sup> June, 2018, the trial court dismissed their suit and allowed the Respondents' Counter-claim.

4. The 1<sup>st</sup> Applicant deponed that by the time they got sufficient funds to instruct their advocate to lodge an Appeal, the period for filing the Appeal had lapsed on 11<sup>th</sup> July, 2019 and that the Interested Party has already filed her Appeal and both Appeals will be consolidated.

5. The 1<sup>st</sup> Applicant finally deponed that the intended Appeal is arguable and has high chances of success; that the Judgment delivered on 11<sup>th</sup> June, 2019 should be stayed because it ordered for the cancellation of the Title Deed and that the Applicants may be sued for breach of contract and a refund of the purchase price of Kshs. 3.4 million which they cannot afford.

6. In her Replying Affidavit, the 2<sup>nd</sup> Respondent deponed that the Judgment in the lower court was delivered on 11<sup>th</sup> June, 2019 in the presence of all parties; that no good reason has been advanced as to why an Appeal was not preferred within time and that the Applicants have always had money after selling part of the Estate of the deceased and shared the money amongst themselves.

7. The 2<sup>nd</sup> Respondent deponed that the intended Appeal is not arguable at all because the purported sale was conducted fraudulently and without the knowledge of the Respondents; that the purported Sale Agreement was never signed by any of the parties, including the Applicants; that the purported consents were all forgeries and that the purported payments to the Respondents through cheques were never delivered to the Respondents.

8. The 2<sup>nd</sup> Respondent finally deponed that they have not been served with any Appeal by the Interested Party; that the Interested Party's Application for stay of execution was dismissed by the lower court and that the Application should be dismissed. Both the Applicants' and the Respondents' advocates filed submissions which I have considered.

9. The Applicants are seeking for a stay of execution of the Judgment of the lower court and for leave to file the Appeal against the said Judgment out of time. Indeed, the issue of stay of execution of the Judgment can only be considered by this court once leave is granted to the Applicants to file the Appeal out of time.

10. The impugned Judgment of the lower court was delivered on 11<sup>th</sup> June, 2019 in the presence of the Applicants' and the Respondents' advocates. Section 79G of the Civil Procedure Act provides that every Appeal from a subordinate court to the High Court shall be filed within a period of thirty (30) days from the date of the Decree or Order appealed against. The said Section provides 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.

11. In the *County Executive of Kisumu vs. County Government of Kisumu & 8 Others (2017) eKLR*, the Supreme Court laid down the principles that should guide the court while considering an Application for leave to file an Appeal out of time as follows:

***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. There must be a reasonable reason for the delay.***

12. The Applicants have deponed that they were unable to file the Appeal within the requisite period of thirty (30) days because they did not have funds to instruct their advocate. The lack of funds to file a pleading within the requisite period, or instruct an advocate, cannot be a satisfactory reason for leave to file such a pleading out of time.

13. Indeed, considering that a party who moves the court at any particular point in time is presumed to have the court filing fees, and in view of the fact that a party can file a pleading in person, it cannot be stated by any stretch of imagination that the failure by a party to raise advocate's fees can be a reason for the late filing of pleadings.

14. Considering that the only reason the Applicants gave for not filing the Memorandum of Appeal within thirty (30) days was because they did not have money to pay their advocate, I find that the reason is not only unsatisfactory, but also unreasonable.

15. For those reasons, I decline to allow the Applicants' prayer for filing the intended Memorandum of Appeal out of time. That being so, the prayer for stay of execution of the Judgment of the lower court cannot be considered. The Notice of Motion dated 26<sup>th</sup> July, 2019 is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF MAY, 2020.**

**O.A. ANGOTE**

**JUDGE**