



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC APPLICATION CASE NO. 199 OF 2016

ELIZABETH MUTHONI NYAGAAPPLICANT

VERSUS

JANE WANJIKU NDERITU.....RESPONDENT

RULING

1. In her application dated 1st November 2016, the applicant seeks for the following orders:

a) *That this honorable court be pleased to grant the applicant leave to appeal out of time against the judgment of Hon. S.K. Mutai Senior Resident Magistrate delivered on 6th November 2016 in Embu CMCC No. 176 of 2010.*

b) *That this honorable court be pleased to issue stay of execution of the judgment in CMCC No. 176 of 2010 and all consequential orders.*

2. The affidavit of Elizabeth Muthoni Nyaga contains several grounds. Firstly that although the judgment was delivered in the presence of the applicant her counsel was absent. The implications of the judgment were not explained to her and that she was not aware that her case had been dismissed with costs. It was not until the auctioneer came to attach her goods that she came to learn that her case had been dismissed and she was condemned to pay costs.

3. The applicant deponed that she was not satisfied with the outcome of the judgment and that she intends to appeal and that her appeal has overwhelming chances of success. It is contended that if the orders sought are not granted the applicant will suffer irreparable loss for her property is in danger of being attached and sold.

4. The application was opposed by the respondent in her replying affidavit sworn on 5th of November 2016. It stated that when the judgment was delivered the applicant and the respondent were both in court and there was a court interpreter who interpreted the proceedings to both parties in Kiswahili language. The applicant therefore understood the contents of the judgment but did not move to file her appeal until the auctioneer moved to attach her property.

5. The respondent also argues that the applicant has not explained what she was doing between the 6th of September 2016 when judgment was delivered and January 2017 when she filed this application.

6. The application was argued in way of written submissions Ms. Muthoni Ndeke represented the applicant while Joe Kathungu & Co. appeared for respondent.

7. The applicant explains her grounds in her submissions and argues that she blames her counsel on

record whom she had trusted to brief her on the progress of the case. It is further stated that the respondent is not opposed to the applicant being granted extension of time and only states that she will be ready to refund the costs of Kshs.83,100/- in the event that it is paid to her or recovered during execution. For this reason, the applicant prays for orders.

8. It was submitted by the respondent that there has been inordinate delay in filing this application which has not been explained. Further that the applicant is seeking for stay of payment of costs amounting to Kshs.83,100/- which is a money decree. The respondent is ready to refund the costs in the event that the appeal is successful. This means that the intended appeal will not be rendered nugatory by the refusal to grant the orders sought.

9. It is further submitted that the applicant requires to demonstrate that she has a sufficient cause; that she will suffer substantial loss if orders are not granted and that the application has been brought without delay and that she must furnish security. By this submission the respondent implies that the applicant has not satisfied the requirements of this application.

10. In an application for extension of time, the court has unfettered jurisdiction which must be exercised judicially to ensure justice between the parties. The court will consider the length of delay and the explanation given for it as well as whether sufficient cause has been shown. The applicant blames her advocate for failure to brief her on the outcome of the case. It is not denied that she was present when the judgment was read. In the circumstances it is the applicant who ought to have briefed her advocate.

11. The respondent states that there was a Kiswahili interpreter in court when the judgment was delivered which was not denied. The applicant did not say that she does not understand Kiswahili. Even assuming that she did not understand the contents of the judgment which is not the case, the applicant should have taken steps to discuss the matter with her advocate and get the necessary legal advice. I did not find this explanation plausible.

12. Concerning the delay, judgment was delivered on 6th of September 2016 and this application was filed on 2nd of November 2016. Except blaming her advocate the applicant did not explain why she failed to take any action towards filing the appeal. The delay of two months being a condition in this application has not been explained.

13. It is also a requirement that the court considers the chances of success of the intended appeal. The applicant says that her appeal has overwhelming chances of success but, no material was placed before the court to enable it determine that contention. The judgment and the proceedings of the learned magistrate were not annexed to the application and it is therefore not possible for this court to decide whether the appeal has any chances of success.

14. In most cases, the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appeal is not rendered nugatory. In this case the applicant does not talk of any subject matter requiring preservation. The prayer for stay of execution refers to the costs of the suit which is a money decree. The applicant has failed to show that she is likely to suffer any substantial loss if the orders are not granted.

15. The applicant has not offered to deposit security for costs and has failed to demonstrate that her appeal is arguable. She has failed to explain the delay and to satisfy this court that she has sufficient cause.

16. It is my considered opinion that this application lacks merit and it is hereby dismissed with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF APRIL, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Muthoni for Applicant.

Mr. Kamunya for Kathungu for Respondent.