



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. 594 OF 2015**

**NATIONAL BANK OF KENYA LIMITED.....APPLICANT**

**VERSUS**

**JOEL KIEMA MUTINDA..... 1<sup>ST</sup> RESPONDENT**

**VIOLET NDANU MUTINDA..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. National Bank of Kenya Limited, the Applicant herein, took out the motion dated 17/12/2015 in which it sought for the following orders:
  1. ***THAT this application be certified as urgent and be heard ex-parte in the first instance.***
  2. ***THAT pending the hearing and determination of this application inter partes this honourable court do and hereby order a stay of execution of the judgment and order made by the subordinate court on the 30<sup>th</sup> day of April 2015.***
  3. ***THAT this honourable court do grant the defendant/ Applicant herein leave to file the attached Memorandum of Appeal out of time and the same be deemed as duly filed upon payment of the requisite filing fees.***
  4. ***THAT pending the hearing and final determination of the Applicant's intended appeal, this honourable court do order a stay of execution of the judgment and consequential orders made by the subordinate court on the 30<sup>th</sup> day of April 2015.***
  5. ***THAT costs of this application be costs n the Applicant's intended appeal.***
2. The motion is supported by the affidavit of Musa Dumbuya sworn on 17.12.2015. Joel Kiama Mutinda and Violet Ndanu Mutinda the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively opposed the Application by filing the replying affidavit of Violet Ndanu Mutinda. The Applicant also further filed a further affidavit of Musa Dumbuya to answer the 2<sup>nd</sup> Respondent's replying affidavit.
3. When the motion came up for interpartes hearing learned counsels from both sides presented oral arguments. I have considered material placed before this court and the rival oral submissions. The history behind the current motion appear to be short and straightforward. The Respondents herein filed a suit before the Chief Magistrates court, Milimani, Nairobi against the Applicant. In the aforesaid suit, the Respondents sought to challenge the legal charge created over L.R. No. Kyangwithya/ Misewani/1391, Respondents' property. The suit was heard and eventually determined in the Respondent's favour on 30.04.2015. The Applicant has averred before this court that it was not notified of the judgement date hence by the time it learnt of the delivery of judgment time to appeal had lapsed. This prompted the Applicant to take out the current motion.

4. According to the Applicant, the trial court informed the parties that judgment would be delivered on 29.4.2015. Come that day, it is the Applicant's assertion that the learned trial magistrate informed parties that judgment would be delivered on notice. The Respondents are of the view that the trial magistrate had announced in open court that judgment would be delivered on 30.4.2015. The Respondents therefore asked this court to dismiss the motion. This court called for the file of the trial court to be availed on 1<sup>st</sup> April 2015; Miss Itonya appeared as holding brief for the advocate representing the Applicant. The record shows that the court minuted that judgment would be delivered the next day i.e on 30.4.2015.
5. After a careful analysis of the arguments presented to this court, it is now clear to me that though the proceedings of the trial court shows that the trial magistrate noted that judgment would be delivered the next day i.e. on 30.4.2015, it is possible the Applicant's advocate did not properly hear the court's order or direction being given. It should be appreciated that the only party who was present in court when the judgment was deferred from 29.4.2015 to 30.4.2015 was the Applicant's advocate. Neither the Respondents nor their advocate was present in court. In paragraph 3 of her replying affidavit, Violet Ndanu Mutinda avers that she was advised by her advocates that on 29.4.2015, the court deferred its judgment to 30.4.2015.
6. In the view of the fact that neither the Respondents nor their advocates were present in court on 29.4.2015, it is difficult to ascertain the veracity of the averment of Violet Ndanu Mutinda. Consequently, I will give the benefit of doubt in favour of the Applicant. I have taken note of the fact that there was a considerable delay in filing the application. However, the delay is excusable in the circumstances of this case. The Applicant has offered to make a deposit of ksh.148,505/= as security for costs.
7. In the end, I am satisfied that the motion dated 17.12.2015 is well founded. I grant the Applicant leave of 10 days to file and serve an appeal out of time. I further issue an order for stay of execution pending appeal on condition that the Applicant deposits a sum of kssh.148,505/= in an interest earning account in the joint names of the advocates or firms of advocates from both sides within 30 days from the date hereof. In default the motion shall be deemed as having been dismissed. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 8<sup>th</sup> day of April, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent