



IN THE HIGH COURT OF KENYA

AT NAKURU

MISC.CIVIL APPLICATION NO.39 OF 2014

ESTHER WAITHERA NDUYU.....APPLICANT

VERSUS

FIRST FARM LIMITED1ST RESPONDENT

JOSEPH GICHURU.....2ND RESPONDENT

RULING

This application is brought by way of Notice of Motion dated the 10th February, 2014 and is made under the provisions of **Section 79G, 1A, 1B and 3A** of the **Civil Procedure Act** and **Order 50 Rule 6** of the **Civil Procedure Rules**.

The Applicant seeks the following orders:

- 1. That this Honourable Court be pleased to enlarge time within which the plaintiff/applicant is to file her intended appeal from the decision given on 9th October, 2013 outside the stipulated time.**
- 2. That the costs of this application abide the outcome of intended appeal.**

The Applicant relies on the grounds on the face of the application and on the Supporting Affidavit made by **Esther Waithera Nduyu** the Applicant herein made on the 10th February, 2014.

The Applicant avers that the judgment she seeks to appeal against was delivered on 9th October, 2013. Being aggrieved by the decision, she is desirous of exercising her right to pursue her appeal. That being indisposed, she was unable to instruct her Counsel to file the appeal within the stipulated time lines. A copy of the medical records was annexed to the application. The Applicant humbly prayed that the application be granted.

This application was opposed by the 2nd Respondent who relied upon his Replying Affidavit sworn on the 5th April, 2014. Counsel for the Respondent submitted that the suit against the 2nd Defendant/Respondent was dismissed and that judgment was obtained and entered in favour of the Applicant as against the 1st Defendant only. Counsel for the 2nd Respondent contended that the 1st defendant has ceased to exist and that the Applicant has been unsuccessful in her attempts to execute the decree as against the 1st Defendant and that this application is attempt to revive the suit so as to net the 2nd Respondent.

Further, it was submitted that the medical report annexed did not state that the applicant was

admitted into the health facility. That the last entry made on the Medical Report was in December, 2013 and therefore the Applicant, by January, 2014 ought to have been able to instruct her advocate to file the current application.

This court was urged to dismiss the application as the Applicant has a recourse in law as she could proceed to execute the judgment as against the 1st Defendant.

After hearing the submissions made by both Counsel for the Applicant and the 2nd Respondent, this court states that the only issue for determination is:

- i) Whether the applicant has demonstrated good and sufficient cause for not filing the appeal in time.

The Civil Procedure Act confers the right of appeal to any litigant and stipulates that the appeal to the High Court **'shall'** be filed within a period of thirty (30) days from the date of issuance of the judgment, decree or order.

In this instance, the judgment was delivered on the 9th October, 2013 and therefore the appeal ought to have been filed by the Applicant on or before the 9th November, 2013. The above notwithstanding, the proviso to Section 79G provides as follows:

“.....provided 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.”

The Applicant deponed that she was indisposed and therefore she was unable to instruct her counsel to file the appeal. To support this averment, the Applicant has annexed medical treatment notes from a health clinic whose name is not legible.

This court has had the occasion of perusing the medical treatment notes at length and finds no mention of the ailment(s) that the Applicant was being treated for and the level of the Applicant's incapacity. The treatment notes also make no mention as to whether the Applicant was admitted at the clinic as an in-patient nor does it mention any date of discharge.

It is incumbent upon the Applicant to demonstrate to this court to its satisfaction that she was truly indisposed so as to have been unable to instruct her advocate to file the intended appeal.

This court further notes that the Applicant did not annex to her application any copy of a letter requesting for copy of decree or typed proceedings to demonstrate that initial steps had indeed been initiated nor was a draft Memorandum of Appeal annexed to the application to support the fact that the Applicant truly intended to file an appeal.

For the reasons stated above, this court finds that the Applicant has not demonstrated to the satisfaction of this court, that she has good and sufficient cause for not having filed the appeal in time.

The application is found to be lacking in merit and it is hereby dismissed with costs to the 2nd Respondent.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 9th day of July, 2014.

A. MSHILA

JUDGE