



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MOMBASA

ELCA NO. 39 OF 2017

MARIAM MWALIMU.....APPELLANT

VERSUS

EZEKIEL WAITHAKA MULEWA..... 1ST RESPONDENT

KESI KAREMA MULEWA..... 2ND RESPONDENT

RULING

(Appellant filing an appeal out of time; appellant filing an application for the appeal to be allowed out of time; by consent the same agreed on conditions; appellant failing to abide by those conditions; appeal struck out)

1. I need to make a ruling on whether or not the appeal herein should be struck out. This appeal arises out of the judgment of the Mombasa Magistrate's Court delivered on 16 December 2016 in the case Mombasa CMCC No. 646 of 2010. In that case, the respondent had sued the appellant where he averred that he purchased from the 2nd respondent (sued in the case as the 1st defendant) a house without land. He averred that the appellant has been trespassing on the disputed land and wanted her restrained. On her part, the appellant (as 2nd defendant) pleaded that she had purchased the same house from one Saumu Khangawe. The defence of the 2nd respondent was that he had sold the land to the 1st respondent and that the appellant was conned. There was indeed evidence presented that the persons who had sold the house to the appellant were charged and convicted of the offence of obtaining money by false pretences, the false pretence being that they owned a house which they could sell when this was not true. After hearing the case, the learned trial Magistrate found for the respondent in his judgment delivered on 6 December 2016. Aggrieved, the appellant filed a Memorandum of Appeal on 24 February 2017. It will be observed that the Memorandum of Appeal was filed outside the 30 day prescribed period. In the meantime, the 1st respondent taxed his costs at the sum of KShs. 236,140/= and moved to execute for the same. Through an application dated 24 February 2020 but filed on 18 March 2020, the appellant sought orders for an extension of time for the filing of the Memorandum of Appeal and stay of execution of the decree. The 1st respondent filed a replying affidavit to oppose this application citing delay and submitting that the appellant was only woken up from her slumber by the imminent threat of execution.

2. On 12 May 2020 when the application came before me, Mr. Khatib for the appellant, and Mr. Njoroge for the 1st respondent, agreed by consent that the application dated 24 February 2020 may be allowed, subject to deposit of security in the sum of KShs. 150,000/= within the next 60 days, the said monies to be deposited in a joint interest earning account. I admitted the consent and added that the appellant needs to file the record of appeal in 90 days, or else the leave to appeal would lapse, one of the reasons being the time lapse from the time of delivery of judgment (which I recorded as December 2017 though in actual fact judgment was delivered in December 2016). I gave a mention date for 22 September 2020 to confirm compliance.

3. On the said day, Ms. Khalifa held brief for Mr. Khatib, learned counsel for the appellant whereas Mr. Njoroge was present for the 1st respondent. Mr. Njoroge raised objection on the appeal pointing out that the orders of the court have not been complied with. He submitted that no security for costs has been deposited. He further submitted that the record of appeal needed to be filed in 90 days which expired on 16 August 2020, but that the record was filed on 17 September 2020, out of time. He asked that the record be struck out. On her part Ms. Khalifa offered an apology for the non-compliance and sought an extension for a further 10 days.

4. I thus need to make a decision on whether or not this appeal should be struck out for non-compliance. It will be recalled that it was filed out of time, and that it was by consent that it was admitted, but with the condition that there be deposit of security in the sum of KShs. 150,000/= within 60 days and the record of appeal be filed in 90 days. It will further be observed that the judgment in this matter was delivered close to 4 years ago. It will be seen therefore that indulgence was being offered to the appellant to put her house in order so that she can be heard. Indeed this indulgence was by consent and it is trite that a consent is binding on the parties as if the same were a contract.

5. The condition for allowing the appeal out of time was that the appellant do deposit the said security as stipulated which has not been done.

This was a consent, and being a consent, I am unable to disturb it unless the parties come up with another consent. I am not therefore able to excuse the appellant for the non-deposit of the security as agreed by her. The result is that her appeal is not admitted out of time and that being the case the same is hereby struck out.

6. But before I close, I must say that the appellant is the author of her own misfortune. I think she was given a lot of indulgence but she spurned her chance. She failed to take seriously her own consent and the need to abide by it. She threw away her chance to be heard and she cannot be heard to complain.

7. Given the above, the judgment of the Magistrate's Court remains. The 1st respondent is thus at liberty to execute it.

8. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 8 DAY OF OCTOBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

IN THE PRESENCE OF:

Ms. Khalifa holding brief for Mr Khatib for the appellant.

Mr Njoroge for the 1st respondent.

No appearance for the 2nd respondent

Court Assistant; Wilson Rabongo.