



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Miscellaneous Application 47 of 2012

MBOLU MULEVU APPLICANT

VERSUS

**CATHERINE MUTINDI WAMBUA
RESPONDENT**

RULING

Before me is a Notice of Motion dated 6th March 2012 filed by Mbolu Mulevu, for stay of execution of judgment in Civil Suit No. 215 of 2010 pending hearing and determination of appeal.

The application has grounds on the face of the Notice of Motion. The grounds are that the judgment was delivered on 12th January 2012 in which the applicant was ordered to move out of plot Machakos Town Block 3/1071 within 60 days. That the applicant intended to appeal and had made payment towards procuring copies of proceedings and judgment. That the respondent had already served a draft decree for approval, which was a threat against the applicant's occupation and possession of the suit land.

The application was filed with a supporting affidavit sworn on 6th March 2012 by the applicant, as well another supporting affidavit sworn on 15th March 2012. Filed with the affidavit sworn on 15th March 2012, was a draft memorandum of appeal.

The application is opposed. A replying affidavit sworn by the respondent Catherine Mutindi Wambua, on 23rd March 2012 was filed. It was deponed *inter alia* that the applicant merely applied for proceedings on 6th March 2012 after the 30 days period for appealing had lapsed, which showed that he had no interest with any appeal. That the applicant had no documents or evidence of title to the land.

At the hearing of the application, Mr Mbaya, for the applicant and Mr A Mutua, for the respondent made submissions in court.

Under Order 40 of the Civil Procedure Rules, this court has jurisdiction to grant stay of execution of judgment or decree, pending an intended appeal. I have seen the draft grounds of appeal. They raise substantial issues. However, appeals from the subordinate courts have to be filed within 30 days – see **section 79G of the Civil Procedure Act (Cap 21)**. Even assuming that the applicant was informed about

the judgment on 2nd February 2012 as he says, his counsel only wrote a letter to the Deputy Registrar requesting a copy of proceedings on 1st March 2012. The said letter was presented on 6th March 2012 and stamped on that date with the court stamp. In effect the request for proceedings was made more than 30 days after 2nd February 2012. To date, there is no indication that the applicant has applied for leave to appeal out of time. This is a grave omission, which makes it appear that he might not be interested in appealing. For this reason, I find this application to be incompetent, and ill timed. It appears to be a gamble, without any foundation to stand on. Courts should not issue orders for the sake of it. There has to be a basis. I will strike it out.

Consequently, the application is struck out with costs to the respondent.

Dated and delivered at Machakos this 5th day of **July** 2012.

George Dulu

Judge

In presence of:-

Court clerk – Nyalo

N/A for Applicant

Mr A.K. Mutua for Respondent