



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CIVIL APPEAL NO. 393 OF 2013

GENEVEVA ATSANGO.....APPELLANT

VERSUS

DEOGRASIS K. OPALAKADI.....RESPONDENT

RULING

Through the application dated 10/7/2013, the Appellant seeks leave to appeal out of time and to stay execution of the judgement of the Honourable Mrs. Oganyo delivered on 7/6/2013.

The main ground advanced is that the Appellant's advocates were unable to reach her to inform her of the judgement until 24/6/2013 since she was in Shinyalu Division attending to her sick aunt who later passed on. She argues that after her aunt died, she was not in the frame of mind to instruct her advocates to lodge an appeal in time. Her aunt died on 24/6/2013 and was buried on 6/7/2013. She annexed a copy of the obituary carried in the Daily Nation of 1/7/2013 which shows that her aunt died on 24/6/2013 and was to be buried on 4/7/2013. Thereafter, she instructed her advocates to file this application seeking leave to file her appeal out of time.

She maintains that she has an arguable appeal that raises issues of law and annexed a draft memorandum of appeal. She urges the court to stay the execution of the judgement of the Honourable Magistrate.

The Respondent filed a Replying Affidavit in which he argues that the Applicant has not met the threshold for the grant of stay of execution. He contends that the Applicant has failed to prove that she will suffer substantial loss if there is execution and that she has not furnished security for the performance of the decree pending the determination of her intended appeal.

He argues that since the Applicant had instructed advocates to act for her, the advocates had a duty to inform her when the judgement was delivered on 7/6/2013 and to seek stay of execution when the judgement was delivered. He also relies on the obituary which indicated that the cortege would leave Nairobi for burial at Shinyalu which confirms that the Applicant's aunt died in Nairobi and not in Shinyalu. This contradicts the Applicant's assertion that she was taking care of her aunt in Shinyalu and was not in a position to instruct her lawyers to lodge an appeal timeously. He also argues that the Applicant has not satisfactorily explained why she had to wait from 6/7/2013 when her aunt was buried to 15/7/2013 to file this application. The Respondent also contends that the intended appeal has no chance of success.

The parties lived together as husband and wife. The dispute is over ownership of Plot No. R9 purchased from Lucky Summer Estate Company Limited on which a permanent building with six flats is erected. The Learned Magistrate granted the Respondent one of the flats. This is what the Applicant is aggrieved by.

This application has taken long to be heard. It first came up on 19/7/2013 when the court fixed it for inter partes hearing on 28/11/2013. The court granted interim stay of execution and directed parties to file submissions on 28/11/2013 which would be highlighted on 13/2/2014. The matter was adjourned on 13/2/2014 at the Applicant's instance to 7/5/2014. On these occasions the court extended the orders of stay of execution. The High court transferred the matter to the Environment and Land Court on 7/5/2014. The matter came up for mention on 24/7/2014 and 15/10/2014 when the court directed that the lower court file being **CMCCC No. 10029 of 2002** should be brought up before 8/12/2014. There was no further activity until 2/5/2017 when the matter came up for mention before the Deputy Registrar who fixed it for further mention on 28/6/2017. The Applicant's advocate did not attend court on 28/6/2017. The matter was fixed for mention before me on 8/11/2017. On that day parties informed me that the present application had not been determined.

At the hearing on 21/11/2017, the Applicant's advocate submitted that the Applicant's advocate was indisposed when the judgement was delivered and the advocate who held brief did not seek stay of execution of the judgement. The Applicant's advocate argued that the delay was beyond the Applicant's control.

The court is inclined to agree with the Respondent's submission that no evidence was tendered to confirm that the Applicant's advocate was indisposed when the judgement was delivered. The court notes that this issue came up for the first time during the highlighting of submissions and is not averred in the supporting affidavit.

Appeals from the subordinate court are to be filed within 30 days from the date of decree under Section 79G of the Civil Procedure Act. 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 relied on the decision in **Joseph Wanjohi Njau v Benson Maina Kabau Nyei** Civil Application No. 97 of 2012 in which the court set out the grounds upon which the court exercises its discretion in an application for extension of time. These include the length of delay; the reason for delay; the chances of the appeal succeeding and the degree of prejudice to the Respondent if the application is granted.

The reasons for the delay are that the Applicant only learnt of the entry of judgement at the end of June 2013 when she was at Shinyalu nursing her sick aunt. The Applicant is not certain that she was in Shinyalu but avers at paragraph 4 of her Affidavit that it appears that she may have been in Shinyalu at the time. The Applicant's advocates could have contacted her on phone to let her know of the entry of judgement against her and to take instructions on lodging an appeal against the judgement. There is no evidence to show that the Applicant was in Shinyalu nursing her aunt, who unfortunately passed on, when the judgement was delivered. The obituary in the newspaper confirms the Applicant's aunt's body was in Nairobi when burial arrangements were being made. It also took the Applicant more than 20 days to bring this application after she learnt of the judgement. It has taken more than three years to prosecute the application, the Applicant initially obtained interim orders of stay of execution which were later extended by the court. No doubt this would prejudice the Respondent who is also entitled to enjoy the fruits of his judgement. A copy of the decree was not attached to the application. The subordinate court file is yet to be forwarded to this court.

For an order of stay of execution to be made under Order 42 Rule 6 of the Civil Procedure Rules, the court must be satisfied that substantial loss may result if the order is not made; the application has been made without delay and such security as the court orders has been given for the due performance of such decree as may ultimately be binding on the Applicant. The Respondent relied on **Westend Butchery v Arithi Highway Developers Limited & 6 Others** Nairobi Civil Suit No. 167 of 2007 in which the court stated that the provision of security is mandatory and the conditions under that rule must be met by an applicant. The Applicant's counsel submitted orally that the court has not ordered them to furnish security and that if they are ordered to do so they will furnish security. The court agrees with the Respondent that the Applicant has not offered to give any security as required by the rule under which she has moved the court.

The court grants the Applicant leave to appeal out of time but declines to grant stay of execution of the judgement of the Honourable Magistrate delivered on 7/6/2013. The Applicant shall pay the costs of the application.

Dated and delivered at Nairobi this 6th day of February 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Fundi for the Appellant

No appearance for the Respondent

Mr. V. Owuor- Court Assistant