



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 720 OF 2015 (FORMELY KSM. HCC NO. 60 OF 2008

ALICE AFANDI EBOYL.....1ST PLAINTIFF

ERNEST MANOTI NYACHOTI.....2ND PLAINTIFF

VERSUS

ROSELYNE ADHIAMBO HUMPHREYS.....DEFENDANT

AND

HON. ATTORNEY GENERAL.....THIRD PARTY

RULING

1. The Attorney General, Third Party, moved the Court through the notice of motion dated 15th March 2018 brought under **Section 7 of the Appellate Jurisdiction Act, Rule 4 and 75 of the Court of Appeal Rules and Section 95 of the Civil Procedure Act**, seeking for the following three prayers;

- a) That the Third Party be granted leave to lodge Notice of Appeal out of time.**
- b) That the annexed Notice of Appeal be deemed as duly filed and served.**
- c) Costs of this application be provided for.**

The application is based on the five grounds on its face marked (a) to (e) and supported by the affidavit of Grace Essendi sworn on the 15th March 2018.

2. The application is opposed by the Defendant through her replying affidavit sworn on the 26th March 2018.

3. The application came up for hearing on the 4th April 2018 when Mr. Que and Mr. Ragot, Learned Counsel for the Third Party and Defendant respectively made their oral submissions for and against the application.

4. The following are the issues for the determinations by the Court;

- a) Whether the Third Party has made a reasonable case for extension of time to file Notice of Appeal.**
- b) Who pays the costs.**

5. The Court has after considering the grounds on the notice of motion, affidavit evidence, oral submissions by Counsel the record and come to the following findings;

- a) That the judgment the Third Party seeks to appeal on was delivered on the 31st January, 2018 in the presence of Counsel for the Plaintiff and the Defendant only. That the date of delivery of the judgment had been fixed on the 17th October 2017 in the presence of M/s Essendi, Counsel for the Third Party and there is no explanation offered why no representative was in court on the day of delivery of judgment.

b) That the main ground for the application is that the Third Party delayed in filing in Notice of Appeal due the time taken by the State Department for Housing and Urban Development in giving instructions. The Court has noted that the letter to the said department was done on the 15th February 2018. That by the time the instructions were given through the letter dated 1st May 2018, the time for filing the Notice of Appeal had lapsed.

c) That as submitted by Mr. Ragot for the Defendant who referred the Court to the decision in **Fidelis Kitili Kivaya, Returning Officer Vs Karanja Kabage & Another [2014] eKLR**, extension of time to file an appeal is the discretion of the Court which discretion must be exercised judiciously. That the party seeking for the Courts discretion to be exercised in their favour must explain the delay. That in deciding whether or not to extend time to file the appeal, the Court must among other factors consider the length of the delay and the possibility of the other parties being prejudiced.

d) That this application was filed about one month after the expiry of the time for filing the Notice of Appeal. That as the Third Party had to obtain the judgment from the court and write to the Instructing State Department before filing the notice, the Court finds the delay is reasonably explained and excusable. That further, the affidavit evidence availed do not disclose any prejudice likely to be suffered by the Defendant or the Plaintiff for that matter, if the application is granted. That the Defendant continues to be in occupation of the suit property and there is no manifestation of eviction threats from the Third Party.

6. That following from the foregoing the Court finds merit in the Third Party's Notice of Motion dated 15th March 2018, and filed on the 16th March, 2018. That accordingly the Third Party is granted leave to file the Notice of Appeal outside the time, and that the attached Notice of Appeal is hereby deemed as duly filed and served. That the costs of this application will abide the outcome of the appeal.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 7TH DAY OF MAY 2018

In the present of:

Plaintiff: Absent

Defendant: Absent

Third Party: Absent

Counsel: None

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE