



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC MISCELLANEOUS CIVIL CASE NO. 05 OF 2018

**JACKSON KAMAU NTHIGA (LEGAL REPRESENTATIVE OF
NTHIGA MATUMO).....APPLICANT**

VERSUS

HUMPREY KIRIMI MBUBA.....RESPONDENT

RULING

1. This application states that it has been brought to court under Sections 1A, 1B, 79G, Order 51 Rule 1 of the Civil Procedure Rules and Section 19 of the Environment and Land Court Act. It seeks the following orders:

- a. That this application be certified urgent.
- b. That this honourable court be pleased to extend time for the applicant to appeal against the judgment of the Chief Magistrate Chuka in Chuka CMCC No. 16 of 2004.
- c. That pending the hearing of this application there be stay of execution of the judgment decree in Chuka CMCC No. 16 of 2004.
- d. That the costs of this application be provided for.

2. The application is supported by the affidavit of Jackson Kamau Nthiga sworn on **30th June, 2018** which states:

I, JACKSON KAMAU NTHIGA of P. O. Box 4383-00100, Nairobi make oath and state as follows:

1. That I am the applicant herein.
2. That I was the legal representative of the deceased NTHIGA MATUMO.
3. That I defended the case and filed an amended defence in which I raised several factual and legal issues (annexed is a copy of the said defence marked ('JKN I')).
4. That I applied for proceedings and judgment to enable me appeal in time but up to now I have not been supplied with same except a judgment which has not been proof read (Annexed is a copy of receipt for payment marked 'JKM ii' and Judgment marked 'JKM iii').
5. That due to the slow pace of supplying the required proceedings and judgment I am late to appeal and the plaintiff/respondent may take advantage and proceed with execution.
6. That I have good grounds of Appeal (annexed is a copy of the draft of grounds of Appeal marked ("JKM iv"))
7. That I pray that my application be allowed.
8. That the contents of this affidavit are true to the best of my knowledge, information and belief.

3. The application is responded to through the Replying affidavit of Humphrey Kirimi, the respondent, sworn on 26th July, 2018 which states:-

I, HUMPHREY KIRIMI MBUBA an adult male person of sound mind and of **P. O. Box 56, Magumoni** do hereby make oath and solemnly state as follows:-

1. That I am the plaintiff/respondent herein properly versed with all the issues stated herein.
2. That I have read and understood the defendant's/applicant's application dated 30.6.2018 and it is in response thereto that I swear this affidavit.
3. That the defendant has not satisfactorily explained the delay in instituting the appeal on time as a payment receipt in respect of the proceedings without proof of subsequent follow up is insufficient.
4. That the defendant, I am advised by my advocates, has not demonstrated that he has a strong appeal with the likelihood of success and that his failure to offer any security disqualifies him from benefiting from an order of stay of execution.
5. That this is an extremely old dispute and the defendant is intent on dragging the same in court forever in order to deny me the fruits of justice.
6. That I pray that the application be dismissed.
7. That I depose to the foregoing believing the same to be true and accurate to the best of my knowledge, belief and understanding.

4. During interpartes hearing on **30th July, 2018**, the applicant's advocate told the court that the application should be allowed as it was not seriously opposed.

5. The respondent, Humphrey Kirimi asked the court to dismiss the application. He told the court that the issues concerning this matter had been heard at Runyenjes, Chuka and even in Nairobi in a Succession Case that transferred the case to Chuka. In his replying affidavit, the respondent has said that the applicant has not demonstrated that this application should not be allowed, one of his reasons being that the applicant had failed to offer any security pending stay of execution.

6. In his very short submissions, the applicant's advocate proffered the case of **Samuel Mwaura Muthumbi Versus Josephine Wanjiru Ngugi and Another, Misc. Application No. 108 of 2017 at Kiambu [2018] eKLR**. In this case the applicant was allowed to file an appeal out of time. It constitutes good authority that in proper circumstances, a party can be granted extension of time to file an appeal.

7. The only issue to be determined in this matter is if or if not the applicant has satisfied this court that time for filing his intended file can be extended.

8. I have considered the pleadings proffered by the parties. I have also considered their oral submissions. The authority proffered by the applicant (supra) has also been taken into account. When one comes to court, one should do so with clean hands. Although the applicant had filed Misc. ELC Application No. 2 of 2018 and which was dismissed for non-prosecution on 12th June, 2018, the applicant concealed this information from the court.

9. When one comes to court, it is repeated, one should do so with clean hands. Although the applicant had filed Misc. ELC Application No. 2 of 2018, which was similar to this application and which was dismissed for non-prosecution on **12th June, 2018**, the applicant veritably and unorthodoxically concealed this information from the court.

10. In its ruling delivered on **10th July, 2018**, this court, inter alia, issued the following order:

- i. An order of stay of execution of the judgment decree in Chuka CMCC No. 16 of 2004 is issued pending the hearing of this application subject to the applicant depositing in court, within 14 days, a sum of Kshs. Four Hundred Thousand (Kshs.400,000/=) failing which the order of stay granted herein will automatically lapse.

11. It is noted that when this court granted the applicant the above order, the applicant had not made it aware that a similar application he had filed had been dismissed.

12. I find that except for mere allegations that the applicant had not been supplied with apposite proceedings and the impugned judgment in good time, the applicant has not tendered even an iota of evidence to support this assertion. He has only produced a receipt dated **24.4.2018**, headed "COURT FINES". This receipt may be proof that he applied for proceedings on **24.4.2018**. It is not proof that the proceedings were not ready in good time.

13. I have perused the impugned judgment delivered by Hon. J. M. Njoroge, CM at Chuka on 18th April, 2018 and I opine that it is well reasoned. However, in this matter I am dealing with the issue concerning whether or not I should extend time for the applicant to appeal against that judgment. The issue of stay of execution is no longer an issue since the applicant did not deposit security in court as ordered by this court on **10th July, 2018**.

14. I opine that the applicant should have filed an application to set aside the dismissal order issued on **12th June, 2018**. Instead, he filed this application without disclosing to this court that a similar application had been dismissed.

15. Upon consideration of apposite facts and the totality of the circumstances surrounding this matter, I find that the applicant has not satisfied this court that this application should be allowed.

16. In the circumstances, this application is hereby dismissed.

17. Costs shall follow the event and are awarded to the plaintiff/respondent.

18. It is so ordered.

Delivered in open Court at Chuka this **19th day of September, 2018** in the presence of:

CA: Ndegwa

Edwin Kimathi h/b Muriithi for the respondent

Applicant and his advocate absent

P.M. NJORGE

JUDGE