



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT AND LAND COURT**

#### **AT NYERI**

#### **ELC NO. 121 OF 2017**

***(Formerly NYERI HCCC 142 OF 2011 (O.S))***

**EDITH WANGARI WANDUNA.....PLAINTIFF**

**-VERSUS-**

**JOSEPH MUNYUA MUKIRI.....1<sup>ST</sup> DEFENDANT**

**CHRISTOPHER GATHUA MUKIRI.....2<sup>ND</sup> DEFENDANT**

#### **RULING**

1. Vide a ruling delivered on 5<sup>th</sup> April, 2018 this court allowed the appellant/applicant's application for stay of execution of the decree issued by this court on 5<sup>th</sup> October, 2016 pending the hearing and determination of the appellant's intended appeal.
2. The application was allowed on condition that the appellant/applicant would within 40 days from the date of delivery of the ruling deposit in an interest bearing account to be opened in the names of the advocates of the parties, Kshs. 300,000/= and within 21 days of the ruling, file an undertaking to prosecute the appeal without unreasonable delay.
3. Being unable to comply with the 1<sup>st</sup> order, the appellant/applicant through the notice of motion dated **28<sup>th</sup> July, 2018** moved the court for enlargement of the time within which they ought to have complied with the first order.
4. The application is premised on the ground that the applicants were unable to raise the amount within the time ordered by the court; that the applicants have managed to raise the amount, albeit out of time ordered by court; that the appellants/applicants have deposited the amount with their advocate and that the respondent's advocate has refused to cooperate with their advocate in opening of the account citing lapse of time within which the order of the court ought to have been complied with; that failure to comply with the order within the time ordered was not intentional but was occasioned by the fact that the appellants are advanced in age, 68 and 70 years, respectively without an independent source of income (peasant farmers).
5. The applicants are apprehensive that unless the orders sought are granted, the respondent may execute the decree appealed from rendering them destitute and their appeal nugatory.
6. In support of their compliance of the order of the court, albeit out of time, the appellants have annexed a receipt issued by their advocate, marked JKM-2, showing that they have since deposited with their advocate the amount ordered by the court.
7. The applicants have also annexed a letter from their advocate to the respondent's advocate, marked JKM-1, showing that their advocate wrote the respondent's advocate requesting for extension of time within which they ought to have complied with the order of the court.
8. The application is opposed through the replying affidavit of the respondent filed on **25<sup>th</sup> September, 2018** on among other grounds, the ground that she will suffer prejudice if the order sought is granted.
9. I have considered the reasons given for seeking extension and the opposition by the respondent. I have also considered the law applicable to such an application, in particular **Order 50 Rule 6** of the Civil Procedure Rules which provides as follows:-

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:**

**Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”**

10. It is common ground or admitted that this court has discretion to grant the orders sought by the applicant.

11. The sole issue for the court’s determination is whether the applicants have made up a case for issuance of orders sought in their favour.

12. With regard to that question, having considered the explanation offered by the applicants and cognizance of the fact that the order of the court has since being complied with and further taking into account that failure to grant the orders sought will render the appeal nugatory, I am inclined to grant the orders sought.

13. The order is extended for a further 14 days.

14. The costs of the application to abide the outcome of the appeal, which in any event should be heard and determined within 1 year failing which it shall stand automatically dismissed with costs to the respondent.

Orders accordingly.

**Dated, Signed and Delivered in open court at Nyeri this 18<sup>th</sup> day of December, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. Macharia Waweru for the defendants/applicants

N/A for the plaintiffs/respondents

Court assistant - Esther