



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MISCELLANEOUS APPLICATION NO. 1 OF 2015

SALOME KAUNGU M'KUUBANIA.....APPLICANT

VERSUS

JOSEPH KIRUKI MURUNGI.....RESPONDENT

RULING

The application before me is the notice of motion dated 14th January 2015 brought under order 50 rule 6 and order 51 rule 1 civil procedure rules section 1A, 1B, 3A and 79 (G) of the civil procedure acts. The applicant seeks the following orders:

1. Spent
2. That the honourable court be pleased to stay the execution of judgment and decree in CMCC no. 210 of 2007 (Meru) pending inter-partes hearing of this application.
3. That the Honourable court be pleased to stay the execution of the judgment and decree in CMCC no. 210 of 2007 pending the hearing and determination of the applicants intended appeal.
4. That the honourable court be pleased to grant leave to the applicant to file her intended appeal out of time.
5. That the annexed memorandum of appeal be deemed as properly filed and served.
6. That costs be provided for.

The application is premised on five (5) grounds shown on the face of that application and a supporting affidavit sworn by the applicant the same date.

The application is opposed with a replying affidavit sworn by the respondent on 6th November, 2017.

When the application came up for inte-parties hearing the parties through their advocate respective agreed to canvass the same by written submissions.

I have considered the affidavit evidence both in support and in opposition to the said application. I have also considered the submissions by the applicant and the rival submissions by the respondent. The substantive order in this application is the stay of execution of the decree of the court in CMCC No. 210 of 2007 pending appeal. Though the application is brought under order 50 rule 6, 51 rule 1, civil procedure rules and section 1A, 1B, 3A and 79 (G) civil procedure act the substantive prayer is for stay presumably under order 42 rule 6 (2) which provides as follows:

6 (2) No order for stay of execution shall be made under sub-rule (1) unless:-

- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delays and
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

The applicant in her supporting affidavit has deposed that she stand to suffer substantial loss given that the subject matter of the suit is family land and that she is ready to abide by any conditions imposed upon her by the court as security for the due performance of the decree pending

the intended appeal. The applicant has also deponed that she applied for proceedings and the judgment of the lower court and that the same were delayed until 22.12.2014 when she was given. She stated that she has obtained certificate of delay indicating that the period between 14/10/2014 and 18th November 2014 has been requisite for the preparation and delivery of the said proceedings judgment and decree.

The respondent did not say much in his replying affidavit save that he deponed say that the application has been brought late and that the applicant is an indolent litigant who should not benefit from a court of equity. Having carefully considered the affidavit evidence and the submissions by the counsels, both in support and opposition to the said application and directing my mind to the applicable law, I am inclined to allow the said application which I hereby do on the following terms:

- (1) The applicant to deposit the entire decretal sum of Kshs.360,000 in a joint interest earning account between both advocates for the applicant and the respondent in a reputable bank and/or financial institution of their choice within 30 days from today.
- (2) The applicant is granted leave to file and serve a memorandum of appeal out of time within 7 days from today.
- (3) Failure to comply with clause 1 & 2 above, the orders will be deemed as not to have been issued and any party is at liberty to apply.
- (4) The costs of this application shall abide the intended appeal.

**READ, DELIVERED AND SIGNED BY E. C. CHERONO,
ENVIRONMENT AND LAND COURT JUDGE KERUGOYA**

AT MERU THIS 7TH DAY OF DECEMBER, 2018.

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In the presence of:

Mr. Gikunda Anampiu holding brief for Mwanzia for applicant

Ms. Wambugu holding brief for Mwirigi for respondent

C/A: Janet