



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC APPEAL NO. 15 OF 2015**

**PURITY MUTHONI PLEIN.....PLAINTIFF**

**-VERSUS-**

**MWAKONDO JUMA MWALIMU.....DEFENDANT**

**RULING**

1. In the notice of motion dated 16.2.2015, the applicant sought the following orders ;

**1. Spent**

**2. That this Honourable Court do hereby make an order that the applicant be granted leave to appeal out of time against the whole judgment and decree directed delivered on 12<sup>th</sup> day of March 2014.**

**3. That there be temporary stay of execution against the judgment entered in Mombasa CMCC No. 882 of 2012 pending hearing and determination of this application interpartes.**

**4. That this Honourable Court do set aside the eviction order issued by Hon. Kitagwa on 14<sup>th</sup> August 2014**

**5. That costs of this application be provided for.**

2. The motion is grounded in the affidavit sworn by Mwakondo Juma and the grounds listed on the face of it. The motion is opposed by the Respondent vide his replying affidavit filed on 14.3.2015.

3. The application was argued by way of written submissions filed. I have considered the pleadings and the written submissions filed by both parties. It is not in dispute that the Respondent has a decree which has not been appealed against. The Applicant is seeking extension of time to appeal this decree.

4. On the face of the application, prayer 4 cannot be granted as it would amount to setting aside the decree before hearing the appeal. I will therefore determine prayer 2 on extension of time and prayer No 3 on stay of execution. The applicant avers that the appeal was not filed on time because his previous advocates on record Ms Alando & Co advocates had misinformed him that the appeal was filed. He

submitted that his appeal has probability of succeeding.

5. The Respondent deposes that no instructions note to appeal has been annexed by the applicant to show he instructed his previous advocates to lodge an appeal. Further that his advocate on record wrote to the applicant on 4.6.2014 asking the Applicant to demolish the structures on the land and the Applicant ought to have been diligent to pursue his appeal on receipt of this letter.

6. The applicant annexed a draft memorandum of appeal to this application. He urged the Court not to visit the mistake of his previous counsel on him. In an instance such as this, the proper process would be for the Applicant to sue his previous advocates for professional negligence for failing to act on his instructions see decision in **Ratemo Ongeru vs Zacharia Isaboke & Another (2014) eKLR**. However the right to a party to present his case to the highest arbitral body is provided for in article 22 and 48 of the Constitution. On this account, I will grant the Applicant leave to file his appeal out of time and to do so within 14 days of this date.

7. On the second prayer for stay of execution of the judgement, the Applicant pleaded that he is faced with eminent threat of eviction. This is confirmed with the deposition in paragraph 6 of the replying affidavit where the Respondent deposes that his advocate extracted a decree, certificate of costs and obtained demolition warrants. The Respondent deposes that the application is only meant to delay the execution process. This means that eviction of the Applicant is indeed imminent.

8. In considering whether to grant an application for stay of execution or not, the applicant must satisfy the provisions of Order 42 rule 6 (2) i.e.

**(i) application is brought without undue delay**

**(ii) Substantial loss will result**

**(iii) Provision for security for costs**

The judgement to be appealed against was delivered on 12<sup>th</sup> March 2014. The application for stay was filed on 16<sup>th</sup> February 2015 one year later. It therefore fails the first principle as it was filed after undue delay.

9. The second issue is on substantial loss. The applicant is threatened with eviction and a warrant of demolition has already been issued. He deposes that he has a good appeal which has a probability of succeeding. From the judgement, it appears both the Respondent and the Plaintiff purchased the plot in dispute. The trial magistrate found in favour of the Plaintiff. In order not to render the appeal to be lodged by the Applicant a mere academic exercise, it is important that the eviction is stayed.

10. The only question the Court will answer is what conditions are provided for the interest of both parties to be taken care of. The Respondent has a decree which she is being stayed from executing. From the decree although there is no monetary value that was assessed except for costs, the Applicant is enjoying possession. In order to protect the interest of the Respondent and given that the Applicant brought this application after undue delay, I do grant the Applicant a conditional stay of execution.

11. This Court do issue an order of stay of execution on the following terms ;

- i. **That the Applicant lodges an appeal against the decree of the lower Court within 14 days of this date.**
- ii. **That upon filing of the memorandum of appeal in one above, the Applicant do prepare, file and serve a record of appeal within 45 days.**
- iii. **That the applicant do pay into Court half of the taxed costs in the sum of Kenya Shillings Seventy Six Thousand Seven Hundred & thirty five within 30 days of this ruling.**
- iv. **In default of any of the clauses (i), (ii) or (iii) above, the stay granted automatically lapses.**

12. The costs of this application is awarded to the Respondent.

**Ruling dated an delivered in Mombasa this 22<sup>nd</sup> day of April 2016**

**A. OMOLLO**

**JUDGE**