



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC MISC. APPLICATION NO. 329 OF 2014

RACHAEL WANJIRU KARIUKI.....APPLICANT

VERSUS

JULIA MWIHAKI WANYOIKE.....RESPONDENT

RULING

Coming up for determination before this Court is an application filed by the Applicant herein dated **14th November 2014**. The Applicant seeks for orders that,

- i. *First, she be granted leave to file an appeal out of time.***
- ii. *Secondly, pending the hearing and determination of the application, the Court be pleased to order stay of execution of a decree in Thika ELC No. 24 of 2013.***
- iii. *Thirdly, the Memorandum of Appeal annexed to the application be deemed as duly filed upon payment of the requisite fees.***
- iv. *Lastly, costs of the application be provided for.***

The application is premised on grounds stated on the face of the application . These grounds are;-that the Ag. Principal Magistrate Thika dismissed an application for stay of execution exposing the Applicant to eminent loss and damage of her properties.-Further, that the Applicant has an arguable appeal with high chances of success on the basis that the learned Magistrate erred in law and in fact in making a final finding and granting liquidated judgment in favour of the Respondent without a full trial. It is averred that the delay in filing the appeal was caused by the due process of the court as proceedings applied for on 23rd September 2014 were only made available on 7th November 2014.

The application is also supported by an affidavit sworn by the Applicant wherein she reiterated that the orders for stay of execution were dismissed for non-attendance. The Applicant deposed that she is apprehensive that the Respondent will execute the decree before the appeal is heard and determined. It was her deposition that she was dissatisfied with the ruling of the Learned Magistrate and has the intention to appeal against the entire ruling and order. Consequently, that she is likely to suffer irreparable

loss and damage including attaching of her assets unless the orders sought are granted.

The application is opposed and the Respondent swore a Replying Affidavit on **2nd December 2014**. Therein the Respondent deposed that there was no sufficient reason given for the Applicant's failure to lodge an appeal on time noting that Judgment in the lower court was entered on **4th August 2014**. Additionally, the Applicant had not annexed a Certificate of delay to his application. It is deposed by the Respondent that his claim against the Applicant was for **Kshs. 1.3 Million**, being part payment of the purchase price of a plot which the Applicant disposed off during the pendency of the suit. Thus, that the Applicant's intent is to frustrate him through unnecessary litigation.

This application was canvassed by way of written submissions. Wachakana & Co. Advocates for the Applicant filed submissions dated **10th December 2014**, wherein counsel submitted that the delay in filing the appeal was not inordinate as it was caused by the process in the Court registry. Counsel further submitted that an appeal would still be admitted though filed out of time where the Appellant had sufficient cause for filing the appeal out of time. In support of this submission, counsel referred the Court to the provision of Section 79G of the Civil Procedure Act, which reads:

Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of decree or order appealed against, excluding from such period any time which the lower may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

Counsel further relied on the Supreme Court decision in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others S.C. Application No. 16 of 2014** which laid down the principles that a court should consider in exercise of discretion to extend time, as follows:

- ***Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
- ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
- ***Whether there will be any prejudice suffered by the respondents if the extension is granted;***
- ***Whether the application has been brought without undue delay; and***
- ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

Kirubi, Mwangi Ben & Co. Advocates for the Respondent filed submissions dated **5th December 2014**, wherein counsel submitted that no cogent reason was advanced for filing the appeal 3 months after the final order was issued on **15th August 2014**. Counsel also submitted that the Applicant could not seek for orders of stay whereas no appeal had been filed. In support of this submission, counsel relied on the case of **Redland Enterprises Limited v Premier Savings & Finance Limited H.C Misc. Appl. No. 10 of 2002** wherein the court held, inter-alia, that, “

Order XLI Rule 4 of the Civil Procedure Rules contemplated that an appeal must be in being before an application can be entertained therein.”

The first prayer sought by the Applicant is that of extension of time within which to file an appeal. It is the Applicant's averment that the delay in filing the appeal was occasioned by the process of the Court registry in obtaining the lower court's typed proceedings. The ruling that the Applicant seeks to appeal against was delivered on 31st June 2014. The lower court record indicates that the ruling was delivered in the absence of both parties. It is not until **23rd September 2014**, that the Applicant made a request for typed proceedings. The Applicant offers no explanation as to the delay in the request for the proceedings. Nonetheless, this court is called upon to do justice and I do so in exercising my discretion in granting extension of time because failing to do so would have the effect of shutting out the Applicant and deny him the right of appeal.

The second prayer is for stay of execution pending the hearing and determination of the intended appeal. The factors to be considered by this Court in determining an application for stay of execution is set out under **Order 42 Rule 6(2) Civil Procedure Rules:**

(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 delay; 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 deposed in her affidavit that she stands to suffer irreparable loss including the attachment of her property in the event that stay is not granted. In opposing the application, the Respondent averred that the Learned Magistrate was justified in entering Judgment and finding that his claim of Kshs. 1.3 Million was a liquidated demand being part payment of the purchase price for the suit property which the Applicant disposed of during the pendency of the suit. The Respondent contended that the appeal herein would be nothing but a means of frustrating him from realizing the fruit of his judgment.

The grant of stay of execution pending appeal is a discretionary relief and in exercising this discretion, the Court must balance the competing rights of either party; the Applicant's right to appeal against the Respondent's right to enjoy the fruits of the judgment delivered in his favour. See the case of **Redland Enterprises Ltd v Premier Savings & Finance Ltd (2002) 2 KLR.**

I have carefully gone through the lower court's ruling of **31st June 2014**. The Learned Magistrate entered judgment summarily whereas according to the Applicant, her Defence raised triable issues. In the circumstances, I find that there is a just cause for depriving the Respondent of his right. This finding notwithstanding, this Court is mandated to balance the rights of the said parties. In doing so the Court is empowered to ask the Applicant to deposit security. Such security as stated in **Order 42 Rule (6)(2)(b)** is for the due performance of such decree or order as may ultimately be binding on him. The lower court proceedings show that the amount in contention is **Kshs. 1.3 Million** which is averred to have been part payment for the purchase of the suit property.

On the foregoing, I hereby allow the application and make orders as follows:

1. An order for stay of execution pending the hearing and determination of the appeal on condition that the Applicant shall within 21 days from the date of this ruling deposit Kshs.1.3 Million in a joint earning interest account at Kenya Commercial Bank, Milimani High Court Branch. In default, the stay shall automatically lapse.

2. The Applicant is hereby directed to file her Record of Appeal within the said 21 days and serve upon the Respondent.

3. Since there was an unexplained delay in filing this application, the Applicant is condemned to pay the costs of the application.

Dated, Signed and Delivered this *22nd* day of *May, 2015*

L.GACHERU

JUDGE

In the Presence of:-

.....For the Applicant

.....For the Respondent

..... Court Clerk

L.GACHERU

JUDGE