



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC MISC. APPLICATION NO. 273 OF 2014

MILKA MUTEI MWANGANGI.....APPLICANT

VERSUS

SOLOMON MUSYA MWANGANGI.....RESPONDENT

RULING

The Applicant filed an application dated **21st August 2014** seeking orders that pending the hearing and determination of the intended appeal, there be stay of execution of the Judgment delivered on **23rd October 2013** and ruling delivered on **13th August 2013** in **SRMCC No. 156 of 2009**. Secondly, that the time within which to file the appeal be enlarged and the Memorandum of Appeal be deemed as duly filled within the requested period of time.

The application is premised on grounds outlined in the application and supported by an affidavit sworn by the Applicant. The Applicant's case is that she is the widow of the **Mwangangi Nzuva** who is survived by other beneficiaries including the Respondent. The Applicant deposes that she is the registered owner of land known as **Migwani/Nzauni/1107** (the suit property) but that the Respondent who is her stepson fraudulently caused the sub-division of the same giving rise to **Migwani/Nzauni/2593**. Thereafter, she instituted a suit **SRMCC No. 156 of 2009** seeking orders to annul the sub-division and creation of **Plot 2593**, which suit was dismissed and an order for eviction granted.

The Applicant deposes that she instructed her advocates to appeal against the decision but that it was not until **10th July 2014** when her current advocates came on record and filed the appeal. The Applicant states that her previous advocates failed to carry out her instructions resulting to the delay in filing the appeal. It is the Applicant's deposition that she and the other beneficiaries should not be made to suffer the indiscretions and mistakes of her former advocates. Further, that the property in dispute is family property where all the beneficiaries reside and they therefore would be rendered homeless and destitute if the prayers sought are not granted. Additionally, that the Respondent would not suffer any prejudice if the orders sought are granted as he does not reside on the property and neither has he developed it.

The Respondent filed Grounds of Opposition and swore a Replying Affidavit on **28th August 2014** in response to the application. The Respondent averred that the application is bad in law, incompetent, defective and unmeritorious and thus ought to be dismissed with costs. In the Replying Affidavit, the Respondent deposed that Judgment was entered on **23rd October 2013** in the presence of both parties and that the Court clearly indicated that there will be a 28 day Stay of Execution. Therefore, the 10 month delay in filing the appeal is prejudicial in view of his entitlement to enjoy the fruits of the judgment. Further, that the Applicant has not satisfied the requirements for grant of stay as she has not established

the substantial loss to be suffered if stay is not granted and neither has she offered any security.

The application was further canvassed by way of written submissions. On behalf of the Applicant, counsel submitted that there was indeed a delay of 10 months before filing the appeal but recapped the Applicant's deposition that it was occasioned by the former advocates on record who misled the Applicant to believe that an appeal had been filed. Counsel submitted that the suit property being family land, it would be just and fair to allow the appeal to be filed out of time and heard on merit. It was further submitted that the Applicant is willing to give such security as ordered by the Court as well as cater for the costs of the application.

On behalf of the Respondent, counsel submitted that the Applicant had failed to meet the threshold for the grant of a stay order. First, that there is an unexplained delay in filling the appeal. It was submitted that the Applicant was granted 45 days stay of execution upon the delivery of judgment and subsequently withdrew their application for stay when the same came up for hearing on 16th December 2013. Subsequently, the Applicant failed to move the Court until the Respondent filed an application for eviction and obtained the orders, which prompted the Applicant to file the current application. Counsel submitted that the Applicant had not demonstrated substantial loss in the event the orders were not granted. In support of this submission counsel referred the Court to the lower court proceedings that Plots No. 1107 is different from 2593 and that the Applicant had trespassed on the latter, which is the Respondent's plot. Consequently, that it would be untrue to assert that the Applicant would be rendered homeless if the orders sought were not granted. In respect to security for costs, counsel submitted that the Applicant had not only offered security for the due performance of the decree, but had also not paid the costs of the suit in the lower court.

Judgment by the lower court was delivered in **October of 2013** but the Applicant failed to file an appeal within the requisite **30 days**. 10 months from the date of Judgment, the Plaintiff filed this application seeking stay of execution of the decree and enlargement of time within which to file the appeal. **Section 79G of the Civil Procedure Act** gives this court discretion to admit an appeal out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time. The provision of Section 79G is indicative that enlargement on time is a matter of discretion by the Court. After analyzing several authorities, Gikonyo J. in the case of **Transworld & Accessories (K) Limited v Commissioner of Investigations & Enforcement Nairobi Civil Suit No. 28 of 2014 [2014] eKLR** outlined the principles to be considered in an application such as this as follows:

“I must add, however, the sufficiency of such material should be such that it satisfies the principles laid down in law for enlargement of time to file appeal, wherein the Court should take into account: First, the length of the delay; secondly the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly the degree of prejudice to the Respondent if the application is granted.”

As stated hereinabove, the delay is a period of 10 months which the Applicant attributes to her previous advocates for failing to act on her instructions to appeal. The Applicant pleaded with the Court not to let her suffer from the mistakes of the said counsels arguing that she had every intention to appeal against the lower court's decision. With respect to the prejudice to be suffered by the Respondent, it is argued that the suit property is family land and it thus best for the appeal to be heard on merit so as to settle the dispute. I have considered the circumstances of the case and the reasons advanced by Applicant and I hereby exercise my discretion to allow the Applicant to file the appeal out of time.

With respect to the prayer for stay of execution, this Court is guided by the provision of Order 42 Rule 6 of the Civil Procedure Rules which sets the conditions that must be met as thus;

- a. ***Substantial loss may result to the applicant unless the order is made.***
- b. ***The application has been made without unreasonable delay.***
- c. ***Such security as the court orders has been given by the applicant.***

The cause of the delay has adequately been addressed in the first limb. As regards substantial loss, it is the Applicant's case that she and the other beneficiaries stand to unfairly evicted hence rendered homeless in the event the orders sought are not granted. It is also her averment that the property in dispute is family land which she holds in trust for the beneficiaries of the deceased. I am satisfied that the Applicant has established substantial loss likely to be suffered to warrant the Court to exercise its discretion in her favour.

The third condition for an order for stay of execution is on Security. On this aspect, counsel for the Applicant submitted that the Applicant is willing to give such security as ordered by the Court. In response, counsel for the Respondent submitted that the Applicant had not proposed to give security let alone settle the costs of the suit in the lower court. The circumstances of the case are that it is a dispute over family property and the parties are mother and step-son. It is their evidence that the beneficiaries of the deceased all reside on the disputed property. This being a dispute between family members, I opt to exercise my discretion to absolve the Applicant from depositing any security. I will however expect that the Applicant does expedite the appeal to alleviate further prejudice likely to be suffered by the Respondent.

Having now considered the applicant Notice of Motion dated 21st August 2014, I find it merited and I allow it in the following terms.

Orders of the Court:

1. ***The Applicant is hereby directed to file the memorandum and record of appeal within 14 days of the date hereof.***
2. ***The Applicant shall not be ordered to give security but is directed to expedite the prosecution of the appeal.***
3. ***Both parties are directed not to charge, dispose off, transfer, or in any other way alienate the respective plots pending the determination of the appeal.***
4. ***The costs of this application shall be borne by the Applicant.***

Dated, Signed and Delivered this 12th day of June 2015

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Applicant

.....For the Respondent

..... Court Clerk

L.GACHERU

JUDGE