



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MISC APP. NO. 26 OF 2014**

**ROSE JILLOH.....APPLICANT**

**=VERSUS=**

**ROSELYNE WANJIKU GICIRA.....RESPONDENT**

**R U L I N G**

**Introduction:**

1. This Ruling is in respect to the Preliminary Objection filed by the Respondent dated 3<sup>rd</sup> February 2014 and the Plaintiffs Application dated 29<sup>th</sup> September 2014.
2. The Preliminary Objection is premised on the grounds that the intended appeal lacks merit; that the orders by the Applicant have been overtaken by event and that the Application lacks merit.
3. The Respondent's Preliminary Objection was filed in opposition to the Applicant's Application dated 29<sup>th</sup> September 2014 in which the Applicant is seeking for the following orders:

**(a) That a stay of execution in Lamu PMCCC No. 35 of 2011 be granted pending the hearing and determination of the appeal herein.**

**(b) The court be pleased to grant leave to the Appellant/Judgment debtor to appeal out of time against the Judgment made by the Hon. Mr. J. N. Munguti on the 18<sup>th</sup> of March 2014 in Lamu PMCC No. 35 of 2011.**

**(c) The said leave do operate as a stay of all proceedings.**

**(d) The applicant do file her appeal within such time as the honourable court would such direct.**

**(e) The costs of this Application be provided for.**

**(f) Any other orders that meet the ends of justice.**

**The Applicant's case:**

4. The Applicant's Application is premised on the grounds that immediately after the Judgment of the Magistrate in PMCC No. 35 of 2011 which was concluded on 18<sup>th</sup> March 2014, she applied for typed proceedings for purposes of lodging an appeal; that the proceedings have not been availed to

- her and that the time allowed for appeal has run out.
5. According to the Applicant, her interests in parcel of land number Lake Kenyatta II Settlement Scheme 375 (the suit property) were noted by the County Settlement Officer but the Title Deed was fraudulently issued to the Respondent.

### **The Respondent's case**

6. Other than the Preliminary Objection, the Respondent filed a Replying Affidavit in which she deponed that she has been in possession of the suit property since August 2014 having executed the decree; that the Applicant was indolent and that the Application has been overtaken by events because she is the one in occupation.
7. According to the Respondent, the Applicant has no arguable appeal and that litigation must come to an end.

### **Supplementary Affidavit:**

8. In the Supplementary Affidavit, the Applicant deponed that she was not represented in the lower court; that she is the one in actual possession of the suit property which she has been cultivating since the year 2002 upto now and that she has her crops on the land.
9. The advocates filed brief written submissions which I have considered. I have also considered the filed authorities.

### **Analysis and findings:**

10. The Applicant's Application is seeking for two substantive orders: A stay of execution of the Judgment in Lamu PMCCC NO. 35 of 2011 pending the hearing of the intended Appeal and leave to file the appeal out of time.
11. The prayer for stay of execution is dependent on the granting of leave to file the Appeal out of time. However, it does not follow that once leave to file an appeal out of time is given, then one is entitled to a stay of execution.
12. The evidence before me shows that the Magistrate delivered his Judgment on 18<sup>th</sup> March, 2014 in which he ordered the Applicant herein to vacate the suit property within 30 days.
13. On 19<sup>th</sup> March, 2014, the Applicant herein requested for proceedings. The proceedings were certified on 17<sup>th</sup> June 2014.
14. Section 79 G of the Civil Procedure Act provides 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.
15. The appellate court need not satisfy itself whether the intended Appellant has any chances of success or not.
16. Considering that the Applicant was not represented, and in view of the fact that the certified proceedings were not certified until 17<sup>th</sup> June 2014, I am satisfied that the Appellant has shown good and sufficient cause for not filing the appeal in time.
17. The proposed Appellant having requested for proceedings one day after the Judgment was read to her shows that she was keen with appealing against the Judgment of the court.
18. Having granted to the Intended Appellant leave to file an appeal out of time, I will consider if she is entitled to an order of stay pending the hearing of the appeal.
19. Order 42 Rule 6(2) of the Civil Procedure Rules provides that no order of stay of execution shall be made unless the court is satisfied that substantial loss may result to the Applicant unless the order is made and the application has been made without unreasonable delay. The court may also order for security for the due performance of the decree.
20. The Applicant has deponed that she is the one in possession of the suit land and that she has crops on the land.
21. Although the Respondent has deponed that she evicted the Applicant pursuant to the order of the court, there is no evidence before me to show that indeed the court bailiff extracted the order of eviction and evicted the Applicant.
22. Considering that the Applicant's crops are on the land and in view of lack of evidence that the Respondent is residing on the land, the Applicant is likely to suffer substantial loss if she is

- evicted from the land.
23. The Applicant could not file an Application for stay of execution before obtaining leave to file the appeal out of time. Having allowed her to file the appeal out of time, the issue of whether this Application was filed within reasonable time does not arise. The Applicant also need not provide security for the due performance of the decree considering that the subject matter is land which will be available once the appeal is heard and determined.
24. For those reasons, I allow the Applicant's Application dated 29<sup>th</sup> September 2014 in the following terms.

**(a) Leave be and is hereby granted to the Applicant to file the Appeal out of time against the Judgment of the lower court in Lamu PMCC No.35 of 2011 and in any event within 30 days from the date of this Ruling.**

**(b) A stay of execution of the Judgment in Lamu PMCC No. 35 of 2011 be and is hereby granted pending the hearing and determination of the appeal.**

**(c) Each party to bear their own costs.**

**Dated and delivered in Malindi this 3<sup>rd</sup> day of July 2015.**

**O. A. Angote**

**Judge**