



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL CASE NO. 9 OF 2018

ANGELA JULIEF AUMA.....APPELLANT

VERSUS

SIDIAN BANK LIMITED.....RESPONDENT

**(Being an appeal from the Ruling of the Non. Ng'arng'ar C.M delivered on 7th September, 2017 at Kisumu in KISUMU
CMCC NO. 323 OF 2017)**

Arising from KISUMU CMCC NO. 323 OF 2017

ANGELA JULIEF AUMA.....PLAINTIFF

VERSUS

SIDIAN BANK LIMITED.....DEFENDANT

RULING

1. Angela Juliet Auma, the Appellant, seeks for stay of execution of the lower court order of 7th September 2017 in relation to Kisumu/Konya/6808 and leave to file an appeal out of time. The application is based on the nine (9) grounds on its face summarized as follows;

- **That the ruling of 7th September 2107 has allowed the sale of the suit land while the power of sale has not arisen.**
- **That the filing of the appeal was delayed due to the long time the lower court took to provide certified copies of the proceedings, and the process of changing the advocate and receiving of instructions.**
- **That the suit land has not been transferred and no party will be prejudiced if the application is allowed.**

The application is supported by the affidavit sworn by the appellant on the 20th February 2018 in which she among others depones as follows;

- **That no sale had taken place by the time the ruling of 7th September 2017 was made.**
- **That she had deposited with the Respondent Kshs. 1,000,000/= on the 27th July 2017 which the Respondent declined to acknowledge and instead returned it to her.**
- **That the Kshs. 1,000,000/= deposit was in exercise of her equity of redemption as it was before the purported auction.**
- **That the Appellant had filed applications dated the 15th June 2017 and 1st August 2017 seeking to stop the**

Respondent from auctioning and transferring the suit land. That the orders dated the 15th June 2017 and 2nd August 2017 were issued in the interim stopping the sale and transfer of the property pending the interpartes hearing of the two applications which were dismissed on the 7th September 2017.

- **That being dissatisfied with the ruling, the appellant changed advocates and instructed the present counsel to file an appeal and hence this application.**

2. The application is opposed by the Respondent through the four (4) grounds of opposition dated the 7th March 2018, summarized as follows;

- **That the ruling of the lower court was issued almost six (6) months before the filing of the application and no explanation for the delay has been offered.**
- **That no appeal has been filed to warrant the stay orders.**
- **That the application lacks merit and should be dismissed with costs.**

3. The application came up for hearing on the 16th April 2018 when Counsel for the parties consented to file and exchange written submissions. The submissions dated the 7th May 2018 and 15th May 2018 were consequently filed by Counsel for the Appellant and Respondent respectively.

4. The following are the issues for the Court's determination;

a. Whether the Appellant has presented reasonable grounds for extension of time to file the appeal order to issue.

b. Whether the Appellant has established sufficient cause for stay of execution order to issue.

c. Whether the application was filed without undue delay.

d. Who pays the costs.

5. The Court has carefully considered the grounds on the application, grounds of opposition, affidavit evidence, written submissions by both counsel, decided cases cited and come to the following conclusions;

a. That though the Appellant cited one of the reasons for delay in filing the appeal to be the time it took to obtain certified copy of the proceedings, there is no evidence tendered in the form of certificate of delay, to confirm the period the court took to prepare and issue the same. The date of applying for the proceedings and the date it was received has also not been disclosed.

b. That the other ground for delay was given as the time it took for the Appellant to appoint and give instructions to a new Counsel. The court has perused through the notice of motion, the affidavit in support and the annexures thereto, and there is no written document or disclosure on when Counsel was appointed and or instructions given. That however, the submission by the Appellant at the first paragraph of the second page indicates that the Counsel was appointed on the 17th December 2017, and that the notice of change of advocate was filed on the following day, that is, the 18th December 2017. That taking that to be the position, it is therefore clear that the Appellant gave instructions to the Counsel to file this application, as part of challenging the ruling of the 7th September 2017, after the lapse of about 100 days from the date of the ruling. That as **Section 79G** of the Civil Procedure Act requires appeals to be filed within thirty (30) days, the Appellant had a duty to explain that delay and has not discharged it.

c. That further to the finding in (a) and (b) above, the Appellant has not explained why having instructed Counsel in December 2017, the application was not filed immediately thereafter. The record shows it was only filed on the 27th February 2018, which is about five (5) months twenty (20) days after the ruling of the 7th September 2017. That delay is also not explained and is inordinate.

d. That though the lower court proceedings were not attached to the application, the court has perused the copy of the ruling provided and it shows that the auction of the suit land had been advertised by the time the suit, and the application dated the 15th June 2017, were filed in the lower court. That the ruling further confirms that the auction conducted by M/s Keysian Auctioneers

actually took place on the 15th June 2017, which was the date the suit and application of even date were filed. That the subsequent application of 1st August 2017 was to stop the transfer of the suit property to the successful bidder named Antonette Akoth Yogo. That upon the lower court hearing the two applications inter partes, the learned trial magistrate, Hon J. K. Ng'arng'ar held as follows; *"...I note that the genesis of this suit and in particular the initial application dated 15th June 2017 was to stop a sale of the suit property. The applicant came to court on the same day that the sale was scheduled.having seen the response by the respondents, I do find that they acted as per the law. All the required steps of sale has been complied with. There is no good reason why the Applicant waited till the last minutes to come to court.... The issue they are raising is one of interest and accounts and also payments. They are also talking of the value of the property and payments that has been made to the respondents.... I see no prima facie case established. The Applicant was in arrears and had defaulted in repayment. The damage can (be) quantified by way of money. The whole issue revolves around money. The parties can take account and any party to be refunded, order can be made...."*

e. That in view of the fact that the suit is still pending before the lower court and the Appellant, if successful in that suit may still get an order for taking of accounts, the court finds no evidence that the Appellant stands to suffer irreparable damages or loss if stay orders are not issued as prayed. That the suit property or the loss and damage suffered may easily be assessed and appropriate order of compensation or refund be issued.

6. That flowing from the foregoing, the court finds no merit in the Appellant's application dated the 26th February 2018. The application is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 6TH OF FEBRUARY 2019

In the presence of:

Appellant Absent

Respondent Absent


Counsel Mr. Aoko for the Appellant

Mr. Ojuro for the Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

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