



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC MISC. CIVIL APPLICATION NO. 22 OF 2019**

**MARY AOKO.....APPELLANT/APPLICANT**

**VERSUS**

**FELISTA WAITHIRA KINUTHIA (suing as the personal representative of the estate of**

**JOSEPH KINUTHIA KIHIGI) .....RESPONDENT**

*(Being an intended appeal from the ruling of hon. W.K. Onkunya,*

*senior resident magistrate given at Kisumu on the 24<sup>th</sup> April 2019*

*in Kisumu Chief Magistrate's Court ELC No. 34 of 2018)*

**RULING**

1. Mary Aoko, hereinafter referred to as the applicant prays that **this Honorable Court be pleased to allow the Applicant to file its appeal out of the time prescribed by the law and that this Honorable Court be pleased to issue an order for stay of execution of the decree and/or judgment of the Subordinate Court in the original Kisumu Chief Magistrate's court E.L.C case No. 34 of 2018 between the parties herein while pending the hearing and determination of the Applicant's intended appeal. The costs of this application be provided for.**

2. The application is based on the facts that **the judgment was delivered against the Applicant in favour of the Respondent herein on 30<sup>th</sup> July 2018, in which the court ordered that the applicant do vacate the suit parcel KISUMU/NYALENDA "B"/945 within 30 days upon service of the judgment or decree and that in default of so vacating, an order be issued permitting the plaintiff to evict the defendant from the suit land.**

3. **The appellant thereafter filed an application dated 29<sup>th</sup> November 2018 in the trial court seeking among other orders stay of the execution of the decree and/or judgment delivered on the 30<sup>th</sup> July 2018 and setting aside of the said judgment and the applicant be allowed to call evidence in her defence.**

4. **The said application was heard and determined with the ruling delivered on the 24<sup>th</sup> April 2019 dismissing the said application. The positive effect of the dismissal of the said application dated 29<sup>th</sup> November 2018 is that the respondent (plaintiff in the lower court) is to proceed with the evicting of the appellant from the suit land.**

5. **The respondent has since moved with speed to evict appellant from the suit parcel despite the applicant being denied an opportunity to defend herself and be heard which is her constitutional right.**

6. **The applicant claims to have been unjustly condemned unheard against the rules of natural justice. The Applicant is keen to exercise its undoubted statutory right of appeal against the said ruling of the subordinate court and it had given the instructions to its advocates to do so within the time prescribed for lodging the appeal, but due to the inadvertent and excusable delay of waiting for the certified copies of typed proceedings which was ready sometime in 3<sup>rd</sup> September 2019 and thus, the appeal could not be lodged within time.**

7. **According to the applicant, the delay is reasonable and excusable in the circumstances and that the intended appeal has overwhelming chances of success in the event that the time sought to be extended is granted and the order for stay of execution is granted to preserve the substratum of the intended appeal.**

8. The supporting affidavit mostly reiterates the above facts. In the further affidavit the applicant states that she placed her faith and reliance on her advocate who let her down by not attending court and by failing to file appeal in time. She states that she has triable issues.

9. Felista Waithira Kinuthia filed a very lengthy affidavit whose gist was that Joseph Kinuthia Kingi was still the registered owner of the suit land. That Judgment was made on 30/7/2018.

10. According to Felista Waithira Kinuthia, the applicant filed an application in the lower court on 29/11/2018 to set aside the Judgment which was dismissed for lack of merit on 24/4/2019. He went to sleep again until notice of eviction was issued on 24/8/2019. She states that the applicant has used every trick in the book to delay the matter. She states further that the time taken from the delivery of the ruling on 24/4/2019 to date is inordinate delay.

11. The applicant submits that she has satisfied the conditions for extension of time to appeal. The applicant correctly submits that the length of delay was five months however, blames the delay in filing the appeal on time taken for the certified copies of typed proceedings.

12. The ruling was delivered on 24/4/2019 and the applicant applied for certified copies of proceedings for appeal through a letter dated 28/4/2019 and paid a deposit. The certified copies of typed proceedings were ready on 3/7/2019 and were collected on the very day. The application was made on 29/9/2019, 20 days after collection. The delay is therefore excusable.

13. She argues that the appeal has high chances of success because the mistakes of advocate even if they are blunders should not be visited on the clients when the situation can be rectified with costs.

14. Moreover, that land matters are very involving and judgment affects generation to come. No prejudice will be suffered by respondent.

15. The respondent on the other hand submits that the application is filed inordinately late as judgment was delivered on 30/7/2018. The applicant was given opportunity but never took advantage of the same. The application is an abuse of court process.

7. I have considered the application and the affidavits on record and rival submission and do find that Judgment was entered on 30/7/2018. An application seeking to set aside the judgment was made on 29/11/2018. More than 100 days after the judgment. The application was dismissed on 24/4/2019. It has taken the applicant 5 month to come to this court after the dismissal of the application.

8. The application is made under **Section 79 G of the Civil Procedure Act Chapter 21 laws of Kenya and Order 42 rule 6 (1) (2) and order 50 rule 6 of the Civil Procedure Rule.**

9. **Section 79 G of Civil Procedure Act Provides:**

**“79G. Time for filing appeals from subordinate courts. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court 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.”**

10. **Order 42 Rule 6 (1) (2)** provides:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. (2) No order for stay of execution shall be made under subrule (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.”

11. **Order 50 rule 6 of the Civil Procedure Rule** provides:

“7. The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court.”

12. This court observes that the application seeks the court to exercise its discretion but **Section 79 (G) and 50 (6) and 42 6 (1) of the Civil Procedure Rules**. Under Section 79(G) the applicant must show good and sufficient reasons. 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 to lay the basis to the satisfaction of the court. Any delay should be explained.

13. I do find that the applicant has not sufficiently explained the delay in filing the Memorandum of Appeal. She did not need certified proceedings to file the Memorandum of Appeal. The delay of more than 100 days in filing the application to set aside judgment in the lower court was inordinate and in excusable.

14. The delay in filing the application before the court after the dismissal of the application in the lower court is not sufficiently explained.

15. Blaming her advocate does not exonerate the applicant from blame.

16. I do find the application with no merit and is dismissed with costs. Orders accordingly.

A. O. OMBWAYO

**ENVIRONMENT & LAND**

**JUDGE**

DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2019.

**In the presence of:**

Mr Kirenga for Respondent

M/s Otieno for Applicant

A. O. OMBWAYO

**ENVIRONMENT & LAND**

JUDGE



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