



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 56 OF 2018**

**(Formerly Nairobi ELC No. 300 of 2016)**

**MARY WANJIKU NJOROGE.....PLAINTIFF**

**VERSUS**

**ESTHER MUTHONI KARAYA (Sued as the Administratrix of the**

**Estate of YUSUF MBURU NJOGU.....DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 10<sup>th</sup> September, 2020 brought pursuant to section 7 of the Appellate Jurisdiction Act, Sections 1A, 1B, 3A and 95 of the Civil Procedure Act, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff seeks the following orders:

1. Spent
2. That this Honourable Court be pleased to grant leave to extend time limited for filing of the Appeal herein following the Court's judgement delivered on 26<sup>th</sup> May, 2020.
3. That upon the grant of leave to appeal out of time, the Notice of Appeal lodged herein be deemed to be duly filed.
4. Costs

The application is premised on the grounds on the face of it and the supporting affidavit of MARY WANJIKU NJOROGE where she deposes that she filed this suit on 30<sup>th</sup> March, 2016 where she sought for orders of revocation as well as cancellation of the title issued to the Respondent in respect to land parcel number Block 11/825 Ngong previously known as Plot No. 145/4 which is the suit land. She contends that the suit land forms part of the estate of Kenneth Njoroge Kaleu who was her late husband. Further, that together with her late husband, they purchased the suit land from one Margaret Wanjiku Mbuthia but had the same solely registered in his name. She explains that after the purchase of the suit land, they separated and it was during that period that the late husband attempted to sell the suit land and she registered a Caution over the said suit land in the year 2008. Further, that the suit land was then fraudulently registered in favour of the Respondent. She contends that despite producing evidence to prove she holds unregistered beneficial interest, the Court proceeded to dismiss her suit. She confirms that the delay in filing this application is neither inordinate and she seeks leave to lodge the intended Appeal out of time. Further, that neither her advocates nor herself received the notice of delivery of judgement and only learnt of the same when the Respondent started fencing the suit land. She

reiterates that she has taken expeditious steps to commence the Appeal and has instructed her Advocate to lodge the instant application together with the Notice of Appeal, request for certified copies of typed proceedings, Judgement and Decree delivered on 26<sup>th</sup> May, 2020 but leave of Court is required. She avers that the intended Appeal raises serious and arguable issues with a strong probability of success. She risks to suffer substantial loss if leave is not granted.

The Respondent ESTHER MUTHONI KARAYA opposed the application by filing a replying affidavit where she deposes that she is the personal representative of the estate of YUSUF MBURU NJOGU – Deceased. She contends that the application is fatally defective, a sham, an afterthought, malicious, scandalous, vexatious and an abuse of the court process. She explains that on 2<sup>nd</sup> October, 2012 after verifying the ownership of the suit land at the then OI Kejuado County Council Land Registry, the deceased entered into a Sale Agreement with KENNETH NJOROGE KALEU (husband to the Plaintiff) who at that time was the sole rightful owner of the suit land. Further, the deceased was issued with a Certificate of Lease on 31<sup>st</sup> March, 2016, in his name as the registered proprietor of the suit land. She confirms that judgement was issued electronically on 26<sup>th</sup> May, 2020 due to the COVID 19 Regulations set out by the Government. She insists it was for the Plaintiff to be diligent enough to follow up on their matter since a previous judgement date had been issued by the Court. She avers that upon learning of the Judgement, she proceeded to have a Certificate of Confirmation of Grant issued on the 27<sup>th</sup> July, 2020 as the personal representative of the estate of the deceased. She reiterates that the instant application has been brought four months after the judgement which is an inordinate delay. Further, no evidence has been presented on the reason of delay. She reiterates that the Applicant has not demonstrated an iota of evidence that she is likely to be prejudiced by the administration of the estate and that the Appeal is merited.

The application was canvassed by way of written submissions but it is only the Applicant who filed her submissions.

### **Analysis and Determination**

Upon consideration of the Notice of Motion dated the 10<sup>th</sup> September, 2020 including the rivalling affidavits and Applicant's submissions, the following are the issues for determination:

- Whether the Plaintiff should be granted an extension of time to lodge the Notice of Appeal.
- Whether the Court should grant a stay of execution of the judgement delivered on 26<sup>th</sup> May, 2020 pending lodging and the determination of the intended Appeal.

As to whether the Plaintiff should be granted an extension of time to lodge the Notice of Appeal. The Plaintiff has sought for extension of time to file her Notice of Appeal and in her submissions reiterated her claim and relied on various decisions including **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi, (1999) 2 EA 231; Hajar Services Limited V Peter Nyangi Mwita (2020) eKLR and Hannah Muthii V Stephen Njine Kibindu & Another (2020) eKLR to support her averments.** She has contended that the delay was not inordinate as she was not notified when the judgement was delivered and only learnt about it when she realized that the Defendant was fencing the suit land. There are various legal provisions governing extension of time to wit: Rule 75 (1) & (2) of the Appellate Jurisdiction Act provides as follows: **'(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court. (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.**

While Order 50 Rule 6 of the Civil Procedure Rules stipulates that: **'Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.'**

The Court of Appeal in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi, (1999) 2 EA 231**, laid down the parameters in extending time and stated thus;

**'It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time**

**are: 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”.**

Further, in the case of **Hannah Muthii Kibindu V Stephen Njine Kibindu & Another (2020) eKLR**, it is the Court of Appeal that extended time to lodge a Notice of Appeal out of time.

In the instant case, Plaintiff’s suit was dismissed. The Plaintiff seeks to Appeal against the said Judgement and insists she was not aware of the delivery of the judgement. I note the Plaintiff was represented by Counsel and has not filed a sworn affidavit from the said Counsel to confirm she was not aware when the said Judgement was delivered. She has not provided proper reasons why she failed to instruct her erstwhile advocate to lodge a Notice of Appeal on her behalf, within the requisite time. She contends that she holds non registered beneficial interest over the suit land and stands to suffer if the Notice of Appeal is not lodged. From a reading of Rule 75 cited above while associating myself with the decisions quoted above, I note it is the Court of Appeal that has the jurisdiction to grant leave to the Plaintiff to file her Notice of Appeal out of time as this Court is devoid of the same. In the circumstance, I will decline to grant the prayer sought for enlargement of time to lodge the Notice of Appeal.

As to whether there should be a stay of execution of the Judgement delivered on 26<sup>th</sup> May, 2020 pending lodging and determination of the intended Appeal. The Plaintiff has sought for a stay of execution of the Judgment pending appeal, which application is opposed by the Defendant. In her submissions she contended that she shall suffer substantial loss as the suit land is matrimonial property. She relied on the following decisions: **Nairobi Commercial & Admiralty Division Case No. 422 of 2006 Antoine Ndiaye Vs African Virtual University; Mawji Vs US International University & Another (1976) KLR 185 and Felix Kipchoge Limo Langat Vs Robinson Kiplangat Tuwei (2018) eKLR** to support her arguments.

Order 42 Rule 6(2) provides that: ‘ **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.**’

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution pending appeal and stated thus:’

**“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.’**

Further, Rule 5 (b) of the Appellate Jurisdiction Act provides that ‘ ..... in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.’

In the current scenario, I note the Plaintiff is yet to lodge the Notice of Appeal. I further note the suit land was not registered in her name prior to the filing of the suit and except for claiming she holds unregistered beneficial interest, as the suit land is matrimonial property, she has not demonstrated what prejudice she will suffer if the stay sought is not granted as she is not in occupation thereon. She has further not disputed that the deceased husband disposed of the suit land to the husband of the Defendant prior to his demise. The Defendant has explained that her suit land forms part of her late husband’s estate and after the judgment she proceeded

to have a Certificate of Confirmation of Grant issued on the 27<sup>th</sup> July, 2020 as the personal representative of the estate of the deceased.

Based on the facts as presented while relying on Rule 5 (b) of the Appellate Jurisdiction Act cited above and associating myself with the quoted decisions, I find that the Plaintiff has **not met the threshold of stay of execution and will decline to grant the said orders.**

**It is against the foregoing that I find the Plaintiff's** Notice of Motion application dated the 10<sup>th</sup> September, 2020 unmerited and will proceed to dismiss it with costs.

**Dated Signed and Delivered at Kajiado this 2<sup>nd</sup> Day of December, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**



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