



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC CIVIL APPLICATION CASE NO 148 OF 2019

BENDOR ESTATE LIMITED.....APPLICANT

VERSUS

DANIEL MBUGUA MWANGI.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

IN

THIKA CMCC NO 49 OF 2011

BETWEEN

DANIEL MBUGUA MWANGIPLAINTIFF

VERSUS

BENDOR ESTATES LIMITED..... 1ST DEFENDANT

THE HON. ATTORNEY GENERAL2ND DEFENDANT

RULING

1. The application before me is filed by **Bendor Estate Limited** (hereinafter applicant). The Applicant by that application seeks orders for stay of execution, in the case Thika Chief Magistrate's Court Civil Case No.49 of 2011, pending determination of the intended appeal; and leave to file the Memorandum of appeal out of time.

2. The application is premised on the grounds that, following the judgment of the Thika case being delivered, on 13th September 2018, the Applicant's request for certified copies of proceedings and judgment could not be acted upon, by the Thika Court, because the court file could not be traced. In that regard the Applicant attached several Letters addressed to the Executive Officer of Thika Court requesting for the same. That the court file was only availed in October 2018 whereupon the Applicant unsuccessfully made an application for stay of execution before the Thika Court.

3. The application is opposed by **Daniel Mbugua Mwangi**, the 1st Respondent, on the grounds that proceedings before Thika Court commenced in year 2011. That the application is yet evidence of the applicant's endless applications with a view to delay the 1st Respondent's enjoyment of the fruits of his judgment. The 1st Respondent is doubtful whether the Thika Court case file was indeed missing.

4. The purpose of granting stay of execution was considered in the case **HGE V SM (2020) eKLR** as follows"

*"13. The court, in **RWW vs. EKW [2019] eKLR**, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:*

"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

5. In my view the Applicant has sufficiently shown that there was a follow up at the Thika Court when the file was said not to be available at the registry.

6. The Applicant also stated, and it is not contradicted by the 1st Respondent, that the trial court delivered, and only read out, the final orders of its judgment which left the Applicant unable to determine the grounds of appeal, if any.

7. On the whole I find that there are sufficient grounds to grant stay of execution and to grant leave for the (draft) Memorandum to be filed out of time. The appeal is out of time because it is beyond the 30 days of appeal provided under Section 79G of the **Civil Procedure Act**. In granting the stay of execution order, a balance will be struck so as to balance the interests of the Applicant and the 1st Respondent.

8. I grant the following orders:

a) A stay of execution of the Thika Chief Magistrate’s Court Civil Case No. 49 of 2011 is granted pending the hearing and determination of the intended appeal.

b) The stay of execution issued under Order (a) above is conditional on BENDOR ESTATES LIMITED filing into this court within 30 days a banker’s guarantee to pay the 1st Respondent Ksh. 700,000 (SEVEN HUNDRED THOUSAND) in the event the intended appeal is not successful.

c) BENDOR ESTATES LIMITED is granted leave to amend and file its Memorandum of appeal within 14 (FOURTEEN) days from today.

d) The costs of the application dated 26th February 2019 shall abide with the outcome of the intended appeal.

e) In default of BENDOR ESTATES LIMITED filing the intended appeal as ordered herein above the costs of the application dated 26th February 2019 shall be paid to the 1st Respondent by BENDOR ESTATES LIMITED.

SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF MARCH 2021.

MARY KASANGO

JUDGE

18th March 2021

Before Justice Mary Kasango

C/A - Kevin

For the Applicant – Ms Gatugi

For the 1st Respondent – Mr. Njoroge

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE