



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIV. APPLN NO. 141 OF 2019

IVY KIENDE KABURUAPPELLANT/APPLICANT

VERSUS

RUFUS KIRIMI NTONGAIRESPONDENT

R U L I N G

1. By a Motion on Notice dated 11/12/2019 brought under **Order 42 Rule 6, Order 22 Rule 22, Order 50 Rule 6 of the Civil Procedure Rules 2010 and Section 1A, 1B, 3A of the Civil Procedure Act**, the applicant sought an order for stay of execution of the judgment and all consequential orders made in **Meru CMCC NO. 135 of 2018**, pending the hearing and final determination of the applicant's intended appeal.

2. The grounds upon which the application was grounded upon were set out in its body and the supporting affidavit of **Ivy Kiende Kaburu** sworn on 11/12/2019. It was urged that the applicant has a serious and arguable appeal with overwhelming prospects of success. That if the orders sought are not granted, the appellant will suffer irreparable loss and damage.

3. It was further contended that the respondent will not suffer any prejudice if the orders sought is granted. Further, the application had been brought timeously without unreasonable delay.

4. The application was opposed by **Rufus Kirimi Ntongai** through his replying affidavit sworn on 16/1/2019. He deponed that an application for stay of execution is made once an applicant has already filed his appeal before the appellate court. The applicant has not filed any appeal thereby making her application to be fatally defective and ought to be dismissed.

5. Learned Counsels **Mr. Otieno** and **Mr. Githinji**, appeared for the applicant and respondent respectively. They powerfully submitted on their respective clients which submissions the Court has considered.

6. Under **Order 42 Rule 6(2) of the Civil Procedure Rules**, an applicant should satisfy the court that; he will suffer substantial loss unless the order is made; that the application has been made without unreasonable delay; and has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

7. In the present case, the judgment sought to be appealed against was delivered on 14/11/2019. The present application was lodged on 11/12/2019, after a period of 27 days. That was within the 30 days allowed for preferring an appeal. In this regard, the application was filed timeously.

8. On substantial loss, the onus is always on the applicant to prove that he/she will suffer substantial loss if the orders are not issued. In **Machira t/a Machira & co. Advocates East Africa Standard (No.2) (2002) KLR 63**, the court held:-

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

9. In the present application, the applicant stated that she would suffer substantial loss if the application is not granted. That she has an arguable and meritorious appeal. That she would suffer irreparable loss and damage. From the applicant's pleading, the particulars or nature of substantial loss to be suffered was not disclosed. Merely stating that she would suffer substantial loss is not enough.

10. This is a money decree. Ordinarily, it is seldom that a party will suffer substantial loss in money decree unless it is shown that the victorious party will be unable to refund the money if it is paid over and the appeal succeeds. This is ordinarily shown by an applicant swearing to those facts positively whereby the incident of proof then shifts to the respondent to rebut. This, the applicant did not do.

11. There was an issue which was raised that the applicant had not yet filed any appeal. I agree with Mr. Githinji, that unlike in the Court of Appeal where the filing of a Notice of Appeal gives that Court jurisdiction to grant a stay pending an appeal or intended appeal, not so for the High Court. The applicant must show that he/she has filed an appeal by way of a Memorandum of Appeal especially if the period given for filing of an appeal has expired.

12. In the present case, there is no appeal pending and no application for leave to file an appeal out of time has been filed. In the premises, the application is but an abuse of the Court process.

13. In view, of the foregoing, the application is without merit and is dismissed with costs.

DATED and **DELIVERED** at Meru this 30th day of January, 2020.

A. MABEYA

JUDGE