



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL APPEAL NO. 14 OF 2018**

**PASCAL OBONYO AGWENA....1<sup>ST</sup> APPELLANT**

**PETER WERE AJULU.....2<sup>ND</sup> APPELLANT**

**EDWARD OCHAYE.....3<sup>RD</sup> APPELLANT**

**ROSEMARY OGUTU.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**SIMON JUMA ODIYO.....RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon M. Obiero, Principal Magistrate, Bondo delivered on 11<sup>th</sup> April 2018 in Bondo PM Civil Suit No. 102 of 2016)**

**RULING**

1. Vide a Notice of Motion dated 12<sup>th</sup> February 2020 brought under certificate of urgency under the provisions of Sections 1A,1B &3A of the Civil Procedure Act and Order 42 Rule 6(1),(2) and Order 51 Rule 1 of the Civil Procedure Rules, the Appellants/ Applicants herein seek for orders of stay of execution of the decree and or judgment delivered by this court on 25<sup>th</sup> November 2019 and the decision of the subordinate Court in Bondo PM Civil Suit No 102 of 2018 pending the hearing and determination of the Applicants 'intended appeal to the Court of Appeal.
2. The application is premised on the grounds on the face of the Notice of Motion and a supporting affidavit sworn by Peter Were Ajulu the second appellant/applicant herein on the signed authorization of all the appellants/applicants, restating the grounds in support of the application.
3. In the grounds and supporting affidavit, the applicants assert that they were aggrieved by the judgment of this court delivered on 25/11/2019 which dismissed their appeal against judgment and decree in Bondo PM CC No 102 of 2018 wherein the trial court found that the appellants were liable in damages for defaming the Respondent.
4. The applicants claim that on 28<sup>th</sup> November 2019 which was within seven days of the date of judgment they filed a Notice of Appeal and that they also applied for certified copies of proceedings and Judgment which they have not received.
5. Further, it is claimed that the Respondent is likely to execute the decree in the subordinate Court in the Bondo case and that this court had during the pendency of this appeal granted the applicants stay pending appeal on condition that the applicants deposited two title documents in court namely Siaya/Nyaguda/ 2412 and Siaya/Nyaguda/2235 which the applicants have offered to this court as security for the due performance of decree in the subordinate court. They claim that they hold sentimental value to the said parcels of land as farmers hence they stand to suffer irreparably if the said land is sold in execution of decree of the subordinate court
6. The applicants further claim that they stand to suffer substantial loss if stay is not granted and execution is carried out as they are farmers who have no other means of income hence they are not in apposition to settled the decree and that should the decree be executed then this application and the intended appeal shall be rendered nugatory with immense prejudice and inconvenience to the applicants who shall be condemned without legitimate opportunity to ventilate their undeniable statutory right to appeal as granted under section 66 of the Civil Procedure Act.
7. The applicants also deposed that they had made the application without unreasonable delay and that the Respondent had not demonstrated

that he would be prejudiced in any way if stay is granted pending hearing and determination of the intended appeal.

8. The applicants attached to their affidavit copies of Notice of Appeal as filed on 28/11/2019 and served upon the Respondent's counsel on 5<sup>th</sup> December 2019 the letters requesting for proceedings and Judgment delivered by this court on 25/11/2019, the ruling of stay made by this court on an application for stay of execution of decree of the lower court pending hearing and determination of this appeal, the title documents deposited in court as security for the due performance of decree of the trial court and valuation Reports for the security deposited in court.

9. The Notice of Motion was opposed by the Respondent through a Replying Affidavit sworn by the Respondent Simon Juma Odiyo on 20<sup>th</sup> February 2020 deposing that the purported authority is undated hence it lacks probative value as an authority to act; that a Notice of Appeal only acts as an intention to appeal and not an appeal *per se* hence there is no appeal preferred against the judgment of this court; that no decree has been taken out or warrants issued for execution hence the application is a misplaced misapprehension.

10. That the title documents being security for the due performance of decree cannot be of sentimental value yet they were voluntarily offered as such security with full knowledge of the consequences likely to happen should the appeal not be successful.

11. That the applicants have not demonstrated any substantial loss they are likely to suffer if stay is not granted and that there is no memorandum of Appeal filed to the Court of Appeal hence the application is intended to delay and frustrate the Respondent in his bid to realize the fruits of his judgment.

12. The application was argued orally with Ms. Oduor Advocate counsel for the applicants arguing that the application had met the threshold for granting of stay pending appeal as the stay granted pending this appeal had expired. She added that the application had been timeously as they had applied for but not received copies of proceedings. The rest of the oral submissions were a replica of the grounds and depositions by the second appellant/applicant.

13. On the delay, counsel for the applicants argued that it was occasioned by the negotiations for an out of court settlement which did not materialize. She urged the court to consider the security deposited in court as sufficient cover for the due performance of decree in the lower court and grant stay. She also submitted that the Respondent had not demonstrated that he was capable of refunding the decretal sum if the appeal succeeds as by that time the land in question would have been sold and hence it would be difficult to recover the decretal sum.

14. In opposing the application, Mr. Ooro Advocate holding brief for Mr. Odongo counsel for the Respondent submitted that the application was unmeritorious and a waste of the court's time. Further, that the application was premature and unfounded as no execution had been set in motion. That there was no demonstration of any loss by the applicants who voluntarily surrendered their title documents to their parcels of land as security for the due performance of decree hence they ought to have known the consequences thereof. In on alleged negotiations for a settlement Mr. Ooro argued that it was not a bar to execution and that there was no evidence of such negotiations ongoing between the parties. To explain the substantial delay. Additionally, counsel argued that the application was filed after inordinate delay which was inexcusable as it was not explained. He urged this court to dismiss the application with costs.

15. In a brief rejoinder, Ms. Oduor submitted that the application had not been filed prematurely as they were served with a bill of costs and the same was due for taxation on 25/2/2020.

## **DETERMINATION**

16. I have considered the applicants' Notice of Motion, the Grounds and supporting Affidavit and annexures as well as the replying affidavit in opposition and the oral submissions for and against the Notice of Motion.

17. In my humble view, the main issue for determination is whether the application for stay of execution pending hearing and determination of the intended appeal has any merit.

18. The application for stay of execution of judgment is primarily governed by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

**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 sub-rule (1) unless—**

**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**

**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.**

19. An Applicant has to satisfy a four-part test as was highlighted in the case of **UAP Provincial Insurance Company Limited v Michael John Beckett, Civil Application Number 204 of 2004**. They must demonstrate that:

- a. **The appeal they have filed is arguable;**
- b. **They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;**
- c. **The application was made without unreasonable delay; and**
- d. **They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.**

20. However, first things first. Is the intended appeal arguable? First and foremost, is that the applicants claim that they are aggrieved by the judgment of this court delivered on 25<sup>th</sup> November 2019 dismissing their appeal against the judgment and decree of the Bondo PM's Court which awarded general damages to the Respondent for defamation of character. It is alleged that the applicants filed Notice of Appeal on 28<sup>th</sup> November 2019 which was only three days after the said Judgment.

21. I have perused the court file and indeed a Notice of Appeal was filed as stated. However, even after asking counsel for the applicants, Ms. Oduor for a copy of Official Receipt for the filing of the said Notice of Appeal, she only fumbled through her files and never supplied one to the court at the hearing of this application. This court had perused the court file to establish whether there was any such Official Court receipt but there was none. That being the case, there can be no such Notice of Appeal capable of demonstrating an intended appeal against the judgment of this court and decree of the lower court, subject of this appeal. On that ground alone this application is amenable for dismissal. I am fortified by the following plethora of authorities:

22. In **Attorney General v Theuri [1985] e KLR** the Court of Appeal stated:

**“Now a NOTICE OF APPEAL is an uncomplicated document. Musyoka JA of the former Court of Appeal for East Africa described a notice of appeal over ten and a half years ago in *Njagi v Muniyiri* [1975] EA 179, 180 I as-**

**“..... nothing more than a formal written information to the Court of an intention to appeal, and it may be withdrawn at any time. It is normally lodged as a matter of course, on payment of a small fee, by any person wishing to appeal against a decision of a superior court, irrespective of whether the intended appeal has merits or not, and no documents of the superior court are required at this stage. Accordingly the applicant's contention that his failure to lodge the notice of appeal in time was caused by the High Court's inability to supply certain documents is irrelevant.”**

**Today we would not go so far as to suggest that a notice of appeal should be lodged as a matter of course, whether the appeal had merits or not, but certainly no skill in drawing one or filing it is necessary. The fee is only Shs 150.00 for everyone save for the Attorney for whom there is no charge at all.....”**

23. The burden of payment of filing fees is on the Plaintiff. This is why even where a suit has been accepted as a pauper brief and exempted from fees, **Order 33 Rule 10 of the Civil Procedure Rules** allows such fees to be recovered from the amount of money the pauper gets if he wins the case. Court fees become the first charge on such compensation.

24. This court is aware that payment of Court filing fees is a jurisdictional prerequisite to the commencement of an action and that failure of such immediate payment can be cured under Section 96 of the Civil Procedure Act which provides:-

**“Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.”**

25. Nonetheless, the applicants in this case never gave any explanation for failure to pay court fees for filing the Notice of Appeal. A notice of Appeal initiates an appeal to the Court of Appeal. Where no such court fees is paid and no explanation is given, this court cannot on its own motion invoke discretion under section 96 of the Civil Procedure Act.

26. In **Mombasa Cement Ltd v Speaker, National Assembly & Another (2018)eKLR**, the Court was faced with similar dilemma of non-payment of requisite court fees and its consequences. Hon. Justice J.M Mativo held:

**“The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case. Consequently, I find and hold that failure to pay the requisite Court filing fees, which is a prerequisite for instituting suits renders this Petition incompetent.”**

27. In **Rose Mbithe Ndetei v Mathew Kyalo Mbobu [2008] eKLR** the Court of Appeal when considering an application for stay where there was no Notice of Appeal filed stated:

**“It is necessary to note that one of the matters to be considered under rule 5(2) (b) is the arguability of the appeal or intended appeal. However, we would find it difficult to accept that in law, we can stay execution of a decree such as the one before us, under rule 5(2) (b) against which no notice of appeal was filed.”**

28. In this case, as no court fees was paid for filing of the Notice of Appeal, there is no such Notice of Appeal upon which this court can exercise discretion to consider the merits of the prayers for stay of execution of decree pending hearing and determination of the intended appeal.

29. For the above reason alone, the Application dated 12/2/2020 must fail. It is declined and dismissed with costs to the Respondent

30. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 25<sup>th</sup> Day of February, 2020**

**R.E.ABURILI**

**JUDGE**