REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. CIVIL APPLICATION NO. 385 OF 2018

MUATINE DANIEL.....APPLICANT

VERSUS

RICHARD KYALO KINYANZWII (Suing as the administrator of the

Estate of the late **MWANZIA KINYANZWII (**Deceased**).....RESPONDENT**

RULING

1. What remains for determination in this application is the prayer for an order of stay of execution of the judgement and decree by the Honorable Court on 31st July, 2018 pending the hearing and determination of the Applicant's rightfully filed Appeal. The application is brought under Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules and Section 3A, 79G and 95 of the Civil Procedure Act. It is supported by the affidavit of Kelvin Ngure.

2. The background to the application, as gleaned from the pleadings and the annexures thereto, relates to a civil suit **Machakos CMCC 716 of 2013.** There is a draft memorandum of appeal.

3. The grounds were stated briefly in the Notice of Motion and laid out in detail in the affidavit in support of the application where the applicant averred that the trial court delivered judgement on 31st July, 2018 and that the applicant is aggrieved with the judgement and is apprehensive that execution may be levied. The applicant attached a draft memorandum of appeal in that regard.

4. In opposition to the application, Richard Kyalo Kinyanzwii vide affidavit deponed on 17th January, 2019 averred that the instant application is frivolous, vexatious, devoid of merit and based on an erroneous understanding of the applicable law. He averred that it is well over three months after the decision of the lower court was issued and further that the appeal is yet to be filed. He averred that the application is intended to deny him the right to enjoy the fruits of his judgement.

5. The court directed that the matter be canvassed vide written submissions. The applicant's submissions are dated 6.12.2018. It was submitted by counsel for the applicant that this court has power to enlarge time within which to lodge an appeal. It was further submitted that the applicant has satisfied the conditions imposed by Order 42 Rule 6 of the Civil Procedure Rules as enumerated by the applicant vide his affidavit in support. Vide submissions filed on 19th June, 2019, learned counsel for the respo ndent submitted that the operative law is Order 42 Rule 6 of the Civil Procedure Rules and the applicant has not met the conditions for grant of the said order. It was submitted that no security has been offered and no substantial loss has been proven. It was submitted that the instant application has been brought five months after the judgement was delivered and no satisfactory explanation was given. Reliance was placed on the case of **Charles Nyamwega v Asa Njeri Kimata & Another (2017) eKLR** in submitting that the applicant was guilty of inordinate and inexcusable delay and hence counsel urged the court to dismiss the application with costs as lacking in merit.

6. This application has been brought under Section 79G of the Civil Procedure Act. Section 79G provides as follows:-

> ‘‘**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**. ”

7. The judgement intended to be appealed from was delivered on the 31st July 2018. Under Section 79G of the Civil Procedure Act, the appeal ought to have been filed by 30th August, 2018 which is 30 days from the date of the judgement. The applicant concedes that he did not take those necessary steps and no prayer to extend time has been sought and hence in this regard the said section is of no assistance both to the applicant and to the court.

8. In this regard, the singular issue for determination in this application is **whether the applicant has established sufficient reasons for the court to grant stay of execution.**

9. 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.**

10. The applicant has to satisfy a four-part test as was highlighted in the case of **UAP Provincial Insurance Company Limited v Michael John Becrett, Civil Application Number 204 of 2004**. He must demonstrate that:

> a. **The appeal he has filed is arguable;**
>
> **b. He is likely to suffer substantial loss unless the order is made. Differently put, he 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. He has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.**

11. A careful perusal of the pleadings shows that there is no appeal before this court in respect of the instant matter. To my mind, the applicant has reproduced an application where the orders sought are not supported by the cited law or by the affidavit in support. Hence it will not be incorrect to hold that there is no evidence of an appeal envisaged under Order 42 Rule 6 of the Civil Procedure Rules.

12. In the case of **Legal Brains Trust (LBT) Limited vs Attorney General, Civil Appeal No. 4 of 2012 of the Appellate Division court in the East African Court of Justice**, it was held that a court of law will not adjudicate hypothetical questions. A court will not hear a case in the abstract, or one which is purely academic and speculative in nature where no underlying facts in contention exist. For this court to indulge in a hypothetical and speculative appeal would amount to an abuse of court process. In the absence of such appeal, it would be needless to consider the rest of the grounds of the application. The issue of whether an appeal exists or sought to be filed has not been disclosed by the applicant. It is not for this court to delve into the mind of the applicant to get to know what exactly he intended to convey to the court. As no prayer for leave to lodge appeal out of time has been made I find that there is no need to delve into the question whether the applicant has met the threshold under Order 42 Rule 6 of the Civil Procedure Rules.

13. In the result I find the application dated 13th November 2018 and filed on 15.11.2018 lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 24th day of October, 2019.

D. K. Kemei

Judge