



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 34 OF 2017

ALI SEIF MOHAMMED.....APPELLANT/APPLICANT

VERSUS

LUCY MALIA KILUNDA (Suing as the Administrator of the Estate

of PETER MUSYOKA KILUNDA (Deceased).....RESPONDENT

RULING

The Appellant/Applicant has moved the court by way of a Notice of Motion dated the 28th September, 2017, seeking a stay of execution of the judgment and/or decree in Milimani CMCC No. 4234 of 2014 pending the hearing and determination of the Appeal. The applicant has also sought orders for enlargement of time within which to comply with the court's directions of 29th June, 2017 for a further 30 days.

The application is made on the grounds that, a stay of execution was granted to the Applicant through a ruling that was delivered on the 29th day of June on condition that the whole decretal sum is deposited in a joint account in the names of both Advocates within a period of 30 days thereof. The applicant depones that he has not complied with the said order because he had no knowledge that the ruling had been delivered as no notice was issued to the parties when the ruling was delivered.

In a supporting affidavit sworn by Carol Wanjiru Kimachia, it is deponed that after the application dated the 6th day of February 2017 was argued, parties filed written submissions and on the 28th March 2017, when the matter was mentioned with a view of confirming filing of submissions by the parties, a ruling date was given for the 25th May 2015 on which date the court was on leave.

It was further deponed that the ruling was eventually delivered on the 28th June 2017 but the Applicant was not aware that the said ruling was delivered and only came to learn about it on the 26th September, 2017 after his advocate's clerk managed to trace the court file and upon perusal of the same. That in the said ruling, the applicant had been ordered to deposit the whole decretal amount in a joint interest earning account in the names of both Advocates within 30 days of the ruling failure to which the stay order would lapse. That stay order that had been issued lapsed on 28th August, 2017.

The Applicant avers that he is desirous of complying with the orders made on 29th June 2017 and that if the orders sought herein are granted, the Respondent stands to suffer no prejudice but if the orders are not granted, the Applicant stands to suffer substantial loss as his Appeal is meritorious and has high chances of success.

The Respondent filed grounds of opposition on the 30th day of October 2017 on the following grounds;

- (1) The Appellant has not given any reasonable justification for failure to comply with the conditions for stay of execution.**
- (2) There has been an inordinate delay in filing the application.**
- (3) The time for making the deposit lapsed on the 29th July, 2017 hence it cannot be extended.**
- (4) The application amounts to an attempt to review the decision of the court through a back door.**

The application was canvassed by way of written submissions. The Appellant in his submissions filed on 4th December 2017 identified two issues for determination as follows;-

- (1) Whether the Appellant is entitled to the extension of time to comply with the court order issued on the 27th June, 2017.**

(2) Whether the Appellant has satisfied the grounds for stay of execution pending Appeal.

On the first issue, the Appellant submitted that the court had awarded a conditional stay only that the Appellant found out about the order on 26th day of September, 2017 when the time within which to comply had already lapsed. He relied on the case of **Nicholas Kiptoo Arap Korir Vs. Independent Electoral and Boundaries Commission & 7 others (2014) eKLR** where the court stated that if a party encounters some delay on the time within which he was to perform an act, if he shows that he had a *bona fide* cause of action and time had lapsed, but was constrained to pursue within time because of some compelling reasons, the court of Chancery Division could intervene and indulge such a person if established that he was not at fault.

From that authority, the court observed that extension of time being a creature of equity, one can only enjoy it if he acts equitably, he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant but he has to lay a basis where he seeks court to grant it.

The Appellant contends that under Order 42 rule (6) the court has discretion to grant an order of stay pending Appeal. He avers that he has an arguable Appeal with high chances of success and has relied on the case of **David Omwenga Vs. John Teleyio, Kisii, HCCC No. 149 of 2005, eKLR** in which the court while quoting the case of Butt V. Rent Restriction Tribunal (1982) KLR 7 stated

“If there is no overwhelming hinderance, a stay ought to be granted so that an appeal is not rendered nugatory should the Appeal succeed.

The Appellant submitted that he has met all the conditions set out in Order 42 rule 6 and urges the court to grant the application.

On their part, Respondents relied on the grounds of opposition as filed and, averred that notices were sent by the court informing the parties of the date and it was on the strength of those notices that the Respondents attended court. It has also been submitted that there has been inordinate delay in filing the application as the same was made three months after the delivery of the ruling. The Respondents relied on the cases of **Edward Kamau & another Vs. Hannah Mukui Gichuki & Another 2015 (eKLR)**, that of **Machira Vs. East African Standard No. 2 (2002) KLR 63** and **West Kenya Sugar Co. Ltd. Vs. Harun Nambale Inzera (2013) eKLR**.

In the case of West Kenya (supra) the Applicant had been ordered to deposit the decretal sum in a joint bank account within 30 days which order he failed to comply with, and since no good explanation was given for the said failure, the court declined to extend the time. The Respondents urge the court to dismiss the application.

The court has considered the material before it and the submissions by the respective parties. I have also perused the court record and as submitted by the Appellant, the ruling with respect to the application dated 6th February 2017 was scheduled to be delivered on the 25th May, 2017 but on the said date, the court was on leave. The record further shows that it was delivered on 29th June 2017 but the Appellant was absent. Unfortunately, there is no evidence on record to show whether the Appellant had been served with a notice of ruling or not.

The Appellant contends that he became aware of the ruling on 26th September 2017 upon perusal of the court file by the clerk to his Advocate. In the circumstances of this case the court shall give the Appellant the benefit of doubt as failure to comply with the conditions for stay was due to circumstances beyond his control. I will therefore grant a stay of execution pending the hearing and determination of the Appeal on condition that the decretal sum as ordered on 29/6/2017 is deposited in a joint account in joint names of both Advocates within 21 days from the date of this ruling failing which the stay orders shall lapse.

Costs of the application shall be in the Appeal.

Dated, Signed and Delivered at Nairobi this 28th day of June, 2018.

.....

L. NJUGUNA

JUDGE

In the Presence of

.....*For the Applicant*

.....*For the Respondent*