



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 1271 OF 2009

IN THE MATTER OF SHANTA JAYANDRALAL CHANDRARIA NATHALAL (DECEASED)

PRADIP JAYANDRALAL CHANDARIA.....OBJECTOR/RESPONDENT

AND

ROHIN JAYANDRALAL CHANDARIA.....PETITIONER/APPLICANT

RULING

PLEADINGS

Before me is a Notice of Motion application under urgency, dated 19th June 2017, filed by Pradip Jayandralal Chandaria, hereafter “the Applicant”, seeking leave for stay of execution of the Ruling by this Court of 13th March 2017. In that Ruling, this Court dismissed the Notice of Preliminary Objection filed on 1st July 2016 by Rohin Jayandralala Chandaria hereafter “the Respondent”. The Court ordered as follows:

- 1. From the above issues this Court finds that the Preliminary Objection of 1st July, 2016 is not upheld.**
- 2. The application for revocation of grant of 26th October, 2015 to be set down for hearing inter partes and a date to be obtained from the registry.**
- 3. Each party to bear its own costs.**

The Applicants sought the following orders in their application:

- 1. That this Honourable Court be pleased to certify this application as urgent and do dispense with service of the same and proceed to hear the application ex-parte in the first instance.**
- 2. That this Honourable Court be pleased to stay the hearing of the Summons for Revocation of Grant dated 26th October 2015 pending the inter-partes hearing of this application.**
- 3. That this Honourable Court be pleased to stay the hearing of the Summons for Revocation of Grant dated 26th October 2015 pending the hearing and determination of this application.**
- 4. That this Honourable Court be pleased to any further proceedings in this matter pending the hearing and determination of the intended appeal.**
- 5. That the Costs of this application be provided for**

The application is premised on the grounds stated on the face of the application and the annexed affidavit of the applicant annexed thereto. The Applicant contends that he is aggrieved by the Ruling delivered on 13th day of March, 2017 and has filed a Notice of Appeal against the same on the 13th day of April; that the Respondent’s Summons for Revocation of Grant is now scheduled for hearing on the 19th of June 2017; that unless the instant matter is stayed pending the filing, hearing and determination of the intended appeal, the Applicant’s appeal will be rendered nugatory, occasion great prejudice to the Applicant will be a waste of judicial time and resources. Finally he states that the issue of limitation is one that goes to the jurisdiction of this Honourable Court, and it is therefore of utmost importance that the appeal be heard first. The Applicant, in addition filed a list of authorities dated 19th June 2017 in support of the application dated 16th June 2017. Three cases were cited namely *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] Eklr, Christopher*

Counsel for the Respondent, Charles Ngugi, opposed the application through his replying affidavit filed on the 3rd of July 2017. The Respondent contended that the hearing stated was not obtained before the ruling was delivered as the applicant deponed and that it was obtained after the ruling was delivered and that his firm had invited the Applicant's firm so as to pick a date that was convenient for both but their representative did not avail themselves and therefore the Respondent's representative fixed a hearing date for 9th May 2017. He also stated that in as much as the Applicant has a right to appeal, the same is aimed at delaying the determination of the Summons of Revocation of Grant and the applicants had also not demonstrated how continuing of these proceedings will prejudice them and finally that granting stay would increase costs for both parties. It was their prayer that if the Court is inclined to allow the application, then the Court in the alternative would give conservatory orders in terms of prayer No.3 of the Summons so as to preserve the estate of the deceased.

DETERMINATION

The issue for determination in this instant case is whether the Applicant made out a case for this Court to grant stay pending appeal.

The conditions to be satisfied by an applicant before the High Court can exercise its discretion in granting stay are as stated under **Order 42 of the Civil Procedure Rules 2010, Rule 6** as follows:

1. **"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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**

a. **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**

b. **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.**

3.

4. **For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given**

As a general rule, an order for stay of execution is a discretionary order and can only issue when the Court has satisfied itself, on the basis of the evidence adduced, that the Applicant stands to suffer irreparable loss, that the application is made without unreasonable delay and that the applicants are willing and able to deposit security.

The first condition that needs to be satisfied is that the applicant will suffer irreparable loss if stay is not granted. None of the grounds in support of the application allege that the Applicant is likely to suffer substantial loss. In the supporting affidavit, the Applicant contends that failure to grant stay will be a waste of judicial time and resources but has not deposed that he is likely to suffer substantial loss.

In the case of **Kenya Shell Limited -V- Kariga 1982-88 1KAR** the Court of Appeal held that, **"if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay"**.

The Applicant ought to prove to the Court that if stay is not granted, he/she will incur losses and in this case the Applicant not sufficiently proved to this Court that he would incur any loss if the stay is not granted.

The Second condition that needs to be satisfied is that the application has been made without unreasonable delay. The Applicant in this case filed a notice of appeal on the 13th of April 2017 and the document is present in the Court's Record after the Ruling of this Court of 13th March 2017. The judgment of the Court of Appeal per Omolo JA in **Safaricom Limited V Ocean View Beach Hotel Limited & 2 Others, Civil Application No. 327 of 2009** provides useful guidance on the procedural and substantive requirements to be considered by this Court when assessing an application for stay of execution pending appeal to the Court of Appeal:

At the stage of determining an application under Rule 5(2)(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging of a Notice of Appeal. If there is no Notice of Appeal lodged, one cannot get an order under Rule 5(2)(b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by the lodgment of the Notice of Appeal, the Court of Appeal would have no business to meddle in the decision of the High Court.

The application was however filed 30 days after the Court delivered its judgment. **Rule 75 of the Court of Appeal Rules** stipulates that the notice should be lodged within 14 days of the date of the decision against which it is desired to appeal. The notice was therefore filed outside

the 14 days allowed in which to file the notice, without leave of the Court. On the 25th of July 2017, Counsel for the respondent opposed the application and further stated that they had not been served with a memorandum of appeal yet. The conduct of the Applicant herein is proof that they intend to delay the Court and the respondent which denies him access to justice and frustrates the Court's overriding objective as stated in **Section 1A and 1B of the Civil Procedure Act**.

Article 159 (2) of the Constitution of Kenya, 2010 provides the principles that the Court shall be guided by and of importance in this instant case is that justice shall not be delayed. Further, in the case of **Tarbo Transporters Ltd vs. Absalom Dova Lumbasi [2012] eKLR**, Gikonyo J held that, stay of execution pending appeal is granted at the discretion of the court upon demonstration by the applicant that the application has been brought without unreasonable delay. The Application seeking stay of execution was filed on the 19th of June 2017 almost three months after this Court delivered its ruling. The Applicant did not advance any reasons for the inordinate delay in filing the Notice of Motion application seeking stay. Equally, no plausible reason had been given for the delay of 15 days before filing the notice of appeal.

On the third condition on offering security, the Applicant herein has not offered any security for the due performance of the order and therefore has failed to demonstrate to this Court his commitment to the intended appeal

DISPOSITION

In light of the above, this Court orders as follows:

- a. The Applicant's application is dismissed**
- b. Parties to obtain a hearing date from registry on priority basis for the Summons for Revocation to be heard in any Court within THE FAMILY DIVISION.**
- c. No order as to costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH DAY OF OCTOBER, 2018.

M.W.MUIGAI

JUDGE OF FAMILY DIVISION OF HIGH COURT

IN THE PRESENCE OF:-

Ms. Betty Rashid holding brief for Mr. Rebiro Ngugi