



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**MISC. APPLICATION NO. 34 OF 2021**

**MBARAKA HAMADI MUYONGO.....APPLICANT**

**- VERSUS -**

**MARK RADOLI.....1<sup>ST</sup> RESPONDENT**

**ANNE BIBBU RADOLI.....2<sup>ND</sup> RESPONDENT**

**RULING**

**I. PRELIMINARIES**

1. The application before the Honorable Court for its determination is the one dated 24<sup>th</sup> September 2021 by the Applicant. It is brought under the provisions of Section 7 of the Appellant Jurisdiction Act, Order 42 Rule 6, Order 50 Rule 6 Order 51 Rule 1 of the Civil Procedure Rules, 2010.

**II. THE APPLICANT'S CASE.**

2. The Applicant orders sought for the following orders. These are:-

**a) Spent.**

**b) THAT this Honourable court be pleased to stay execution of the judgement/decree and subsequent orders therein pending hearing and determination of this application and appeal.**

**c) THAT this Honourable court be pleased to issue temporary injunction against the Respondents by themselves, agents, employees or any other person claiming through them from interfering with the Applicant's possession, occupation and use of the land and/or title pending the hearing and determination of the instant application and suit.**

**d) THAT this Honourable court is hereby pleased to grant leave to the Applicant to file his memorandum of appeal out of time upon payment of the requisite court fees/charges.**

**e) THAT this Honourable court be pleased to order that the Applicant herein that he has acquired proprietary interest over the subject property being subdivision No. 6424 (Original Plot No. 1279/1 Section 1/MN) and subdivision No. 6425 (Original Plot No. 1279/2 Section 1/MN).**

**f) THAT this Honourable court do make any other it deem fit in the circumstances.**

**g) THAT this Honourable court grants costs of the application.**

3. The Applicant's Notice of Motion application is based on the grounds, testimony and averments of 16 Paragraphed Supported Affidavit of MBARAKA HAMADI MUYONGO sworn and dated on 24<sup>th</sup> September, 2021 together with three (3) annexures marked as "MHM – 1 to 3". The Appellant/Applicant claimed that the lower court did not deliver its judgement on 12<sup>th</sup> March 2021 as expected but on 26<sup>th</sup> March 2021 without issuing a Judgement Notice to the Applicant, hence the delay in filing the Memorandum of Appeal in time. He stated that his Advocate only came to learn of the Judgement upon holding a conversation with the Advocate for the Respondent at the Court's registry. The Applicant who was dissatisfied with the Judgement sought leave to file the Memorandum of Appeal out of time, which he claimed to raise triable issues with high chances of success in appeal. He averred that the time was reasonable.

### **III. THE RESPONDENT'S CASE**

4. On 25<sup>th</sup> October, 2021, the 2<sup>nd</sup> Respondent filed a 13 paragraphed Replying Affidavit sworn and dated on 23<sup>rd</sup> October, 2021. She stated that on 19<sup>th</sup> March 2021, court gave directions that it would deliver its Judgement on 26<sup>th</sup> March 2021. She stated that initially, the Judgement had been slated for delivery on 12<sup>th</sup> March, 2021. On this date, her Counsel and her attended Court but where it was re – scheduled to 19<sup>th</sup> March, 2021. On the 19<sup>th</sup> March, 2021 they attended court and it was further re – scheduled to 26<sup>th</sup> March, 26<sup>th</sup> March, 2021. So at no point, did the court indicate that the judgement would be delivered on notice.

5. She averred that the that the draft Memorandum of Appeal did not raise any triable issues for court to allow its filing out of time. That this application was not made within a reasonable time, six months after the judgement was delivered. The Respondent asked court to dismiss the application with costs.

### **IV. SUBMISSIONS**

6. On 25<sup>th</sup> October 2021, Court directed that the application be disposed by way of written submissions. Pursuant to that on 29<sup>th</sup> November, 2021 they had all complied and a ruling date was reserved.

#### **A. THE APPLICANT'S WRITTEN SUBMISSIONS**

7. The Advocate for the Applicant, the Law firm of Messrs Marende Necheza & Company Advocates filed their written submissions on 29<sup>th</sup> November 2021 in support of the application and relied on the **Supreme Court decision in Nicholas Kiptoo Arap Salat – Versus - IEBC & 7 others (2014)eKLR** where the principles for extension of time for filing an appeal were laid down. Counsel submitted that the Applicant has fulfilled the said conditions, and sought to explain the delay in filing the application on the ground neither the advocate nor the applicant was aware of the judgement date since no notice was issued.

8. The Learned Counsel buttressed his case with the case of **Kenya Alliance Insurance Co. Ltd – Versus - Juliuis Rem Mutabari (2018)eKLR** where it was held that there is no specific measure of what amounts to inordinate delay, court should discern unacceptable delay as that which is prolonged and unexplained. The Learned Counsel contended that the Applicant could explain his delay and that effort was shown in applying for the typed proceedings for the process of fast-tracking the appeal process. Counsel urged court to give the Appellant/Applicant a chance to appeal since the delay was not intentional and that the Respondent would not be prejudiced if leave is extended.

#### **B. THE RESPONDENT'S WRITTEN SUBMISSIONS**

9. The Learned Counsel for the Respondent, the Law firm of Messrs. Kiptoo & Associates filed submissions on 29<sup>th</sup> November 2021, he submitted that extension of time to file appeal is not a right but an equitable remedy that is available to a deserving party at the discretion of the court. The Applicant never deserved to be granted leave to file the appeal out of time. He argued that if the Applicant or his Counsel had attended court on 12<sup>th</sup> March 2021, they would have learnt that court gave 19<sup>th</sup> March 2021, on that day the court directed 26<sup>th</sup> March 2021 as the judgement date. That at no point did court issue a notice for judgement, therefore the reason for not filing their memorandum of appeal in time was not satisfactory. Further to that, the application has been made six (6) months after judgement was delivered. The Learned Counsel submitted and refuted the fact that the Respondents would not be prejudiced by the stay of execution, as by this orders they would be unable to utilize the suit property, which they are currently occupying. The Learned Counsel rejected the prayer that the applicant be found to have proprietary interest over the suit property. They maintained that the prayer could not stand at an interlocutory stage. The Learned Counsel argued that the application is an afterthought and should be dismissed with costs.

### **V. ANALYSIS AND DETERMINATION**

10. I have considered the application, its response and the submissions made. The application is omnibus, seeking different orders from court that require different set of facts and supporting evidence for them to be granted by court. The issues for determination are:-

*a) Whether the applicant has met the threshold for a grant of the order of stay of execution of the lower court judgement pending the determination of the appeal.*

*b) Whether leave ought to be granted to the applicant to file and serve the Memorandum of Appeal out of time.*

**ISSUE No. a).Whether the applicant has met the threshold for a grant of the order of stay of execution of the lower court judgement pending the determination of the appeal.**

11. The order for Stay of execution is provided under Order 42, rule 6 which provides 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 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—

(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.

12. The Applicant need to satisfy the court the following conditions before they can be granted the stay orders:-

a) Substantial loss may result to the applicant unless the order is made,

b) The applicant has been made without unreasonable delay, and

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

13. These three conditions must all be present, in “**Tabro Transporters Limited – Versus - Absalom Dova Lumbasi (2012)eKLR** it was held that **“These conditions are the essence of Order 42 Rule 6 of the Civil Procedure Rules, 2010. They however share an inextricable bond such that, it one is absent, it will affect the exercise of the discretion of the court in granting stay of execution.”** The Applicant herein has not tabled any empirical documentary evidence or otherwise before this court to demonstrate that they were likely to incur any substantial loss if the execution proceeded on. Staying execution, is delaying a legal process that ought to follow a successful party in a suit, and court will not grant it unless it’s proven that the applicant stands to suffer substantial loss. This court will thus take, the condition of substantial loss has been unsuccessfully proven. At all costs, the successful party must be allowed to enjoy the fruits of the Judgement delivered to their favour.

**ISSUE No. b). Whether leave ought to be granted to the applicant to file and serve the Memorandum of Appeal out of time.**

14. Under this sub – heading, the application by the Applicant was filed on 24<sup>th</sup> September 2021, six months after the learned magistrate entered judgement on 26<sup>th</sup> March 2021. The Applicant has sought to explain the delay was occasioned by the trial court’s failure to issue a Judgement Notice. However, I beg to differ with the Applicant and agree with the Respondent. Judgement was to be delivered on 12<sup>th</sup> March 2021, but the learned magistrate deferred the date to 19<sup>th</sup> March 2021. On the 19<sup>th</sup> the judgement was not ready and court indicated it will deliver it on 26<sup>th</sup> March 2021, which the Applicant and his counsel did not attend. The Applicant and his Counsel became aware of the judgement months later, as seen in the letter dated 23<sup>rd</sup> September 2021, where the applicant’s counsel was requesting for typed proceedings. This delay is inordinate, unreasonable and unacceptable, if the applicant failed to attend court on 12<sup>th</sup> March, 19<sup>th</sup> March and 26<sup>th</sup> March when the judgement was delivered, what stopped the counsel from regularly inquiring from the court’s registry whether judgement had been delivered or not?

15. Both stay of execution and extension of time to file an appeal out of time, are pegged on making the application within reasonable time or better still with no delay. The court’s discretion ought to be exercised judicially in the interest of justice. In both cases, the court is called to find a balance between the rights of a successful party at trial who is anxious to enjoy the fruits of judgments and the rights of a losing party who is eager to be heard on appeal. Time is a constant factor, parties must come to court in good time. In the case of **Aviation Cargo Support Limited - Versus - St. Mark Freight Services Limited (2014)eKLR**, it was held that, **“For the court to exercise its discretion in favour of an applicant, the latter must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactory including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time.”**

16. The Applicant has not explained the delay to the satisfaction of the court. The Six months of delay, for an explanation that judgement was delivered in the absence of the applicant and his counsel cannot be a reason enough to grant leave to file out of time. It is the responsibility of a party to a suit to follow up on his case, more so with legal counsel the advocate on record ought to have taken the necessary steps like perusing the file regularly to know its status. This Honorable Court, finds that the explanation given by the applicant is inexcusable.

17. Additionally, an important legal requirement for granting stay of execution is such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant. In the instant case, the Applicant has not even mentioned the issue from their pleadings nor submissions. This is a major lapse and by this stand alone ground, the Notice of Motion application should not succeed.

## **V. DETERMINATION**

18. In the long run, I find that the Appellant/Applicant has failed to avail to this Honorable Court with such sufficient material to enable it make a determination on the request for stay of execution. The Honorable Court disregards the casual explanation provided by the Learned Counsel for the Applicant/Appellant on the inordinate delay in moving this Court for the said application. It unacceptable as it is unreasonable. Clearly, this application is an afterthought and is therefore dismissed with costs to the Respondents.

**IT IS ORDERED ACCORDINGLY.**

DATED, SIGNED AND DELIVERED AT MOMBASA THIS .....22<sup>nd</sup> .....DAY OF .....FEBRUARY .....2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

**MOMBASA**

19.

**In the presence of:-**

- a) M/s. Yumnah Court Assistant.
- b) Mr. Ondieki holding brief for Mr. Shimaka Advocate for the Appellant/Applicant.
- c) No Appearance Advocate for the Respondent