



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO 412 OF 2013**

**JAMES TONGI MIRUKA .....PLAINTIFF**

**VERSUS**

**JAMES MAUTI OMBACHO.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. What is before me is the Applicant's Notice of Motion dated 12<sup>th</sup> October, 2021 seeking a stay of execution of the decree and order issued on 27<sup>th</sup> September, 2021 pending the hearing and determination of the intended appeal to the Court of Appeal. The application is premised on the Applicant's grounds outlined on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 12<sup>th</sup> October, 2021.

2. The main grounds advanced by the Applicant both in the Notice of Motion and his Supporting Affidavit are that he intends to appeal against the judgment of this court and he has filed a Notice of Appeal before this Court indicating that he intends to file an appeal in the Court of Appeal. He has annexed a copy of an undated and unstamped Notice of Appeal as annexure "GMO1". The Applicant also contends that he has applied for a certified copy of the proceedings and judgment and he has applied for extension of time within which to file his appeal. It is the Applicant's contention that he was not served with the application for eviction which gave rise to the orders issued on 21<sup>st</sup> September, 2021. He fears that if eviction is carried out the appeal shall be rendered nugatory and he shall suffer loss of business if his structures are demolished.

3. In response to the application, the Respondent filed a Replying Affidavit sworn on the 18<sup>th</sup> November, 2021 in which he depones that judgment was delivered in his favour on 7<sup>th</sup> November, 2019 and the Applicant was ordered to vacate the suit property within 30 days from the date of the judgment, which he failed to do. He depones that he is aware that the Applicant filed an application in the Court of Appeal for leave to appeal out of time but he has never prosecuted the said appeal.

4. The Respondent further depones that the application for eviction was served upon the Applicant's advocates, but they failed to attend court for the hearing of the said application. He therefore prays that the Applicant's application be dismissed with costs.

5. The court directed that the application be canvassed by way of written submissions but only the Respondent filed his submissions, which I have considered.

**ISSUES FOR DETERMINATION**

6. The only issue for determination is whether a stay of execution of the decree herein should be granted pending the intended appeal.

**ANALYSIS AND DETERMINATION**

7. It has been submitted on behalf of the Respondent that the Applicant's former advocate was served with the application for eviction but he failed to attend court. The Applicant also failed to file a Replying Affidavit and the court proceeded to issue an eviction order. Counsel contends that the Applicant cannot use the advocate's mistake as an excuse as it is the duty of the litigant to constantly follow up on the progress of his case with his advocate. He relied on the case of **Ruga Distributors Limited v Nairobi Brothers Limited (2015) eKLR**, where the court cited the decision of Kimaru J in **Savings and Loans Limited v Susan Wanjiru Muritu Nbi HCCC No. 397 of 2002** for the proposition that a case belongs to a litigant and not his advocate and that a litigant has a duty to pursue the prosecution of his or her case.

8. Counsel submitted that the Applicant filed an application for extension of time in the Court of Appeal way back in 2020, but he has never fixed the said application for hearing. It is his contention that the said application was merely filed to delay the application's eviction from the suit property.

9. Counsel took issue with the fact that the instant application was filed by the firm of Monari & Co. Advocates who came on record for the Applicant after delivery of judgment in place of the firm of Sagwe & Co. Advocates without complying with the provisions of Order 9 rule 9 of the Civil Procedure Rules.

The said rule provides that:

Order 9 Rule 9: “When there is a change of Advocate or when a party decides to act in person, having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court\_

a) Upon an application with notice to all the parties: or

b) Upon a consent filed between the outgoing and Advocated and the proposed incoming Advocate or party intending to act in person as the case may be”

10. I have perused the court file and I have not seen any consent between the firm of Monari & Co. Advocates and the firm of Sagwe & Co. Advocates consenting to the firm of Monari & Co Advocates to come on record after judgment. I have also not seen any application by the firm of Monari & Co. Advocates seeking leave to come on record in place of the firm of Sagwe & Co. Advocates after judgment. It is therefore clear that the Applicant’s current advocates have not complied with Order 9 rule 9 of the Civil Procedure Rules and are therefore not properly on record.

11. Be that as it may, even if I was to assume that the said rule is a procedural technicality, which I do not think it is, an Applicant seeking a stay pending appeal must satisfy the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules.

12. In the case of **M.O.M Amin Transporters Limited & another v Alexander Ndung’u Mbugua & 2 others [2017] eKLR** Kamau J was of the opinion that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows: -

*“In the cases of Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR and Kenya Shell Limited vs Kibiru (supra), the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.*

*Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -*

**1. Substantial loss may result to the applicant unless the order was made;**

**2. The application was made without unreasonable delay; and**

**3. 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.**

*Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. “*

13. Having set out the conditions for grant of stay, I shall proceed to consider whether the three conditions have been satisfied by the Applicant.

#### **Substantial Loss**

14. The Applicant has stated that if his structures on plot No. 34 Riosiri Market are demolished, he will suffer loss of business without stating the magnitude of the loss. It is not for the court to speculate whether loss of business equals to substantial loss.

#### **Whether application was made without delay**

15. The judgment in respect of which the stay of execution is sought was delivered on 7<sup>th</sup> November, 2019 and the application for stay was filed in October, 2021. There is no satisfactory explanation for the delay of almost 2 years which I find inordinate.

#### **Security for costs**

16. The Applicant has not offered to furnish security for costs as required by Order 42 Rule 6.

17. All in all, the Applicant has not satisfied the conditions for stay pending appeal. It is also not lost to me that there is no appeal pending as the Notice of Appeal attached to the Applicant’s application bears no date or Court stamp and that if filed, the same was filed out of time without leave of the Court. I must also point out that the Applicant has demonstrated a lot of laxity in the manner in which he has conducted his case and he only has himself to blame.

18. The upshot is that I find no merit in the application and I dismiss it with costs to the Respondent. The Plaintiff is at liberty to proceed with execution of the decree issued on 9<sup>th</sup> July, 2020 and the eviction order issued on 27<sup>th</sup> September, 2021.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16TH DAY OF MARCH, 2022.**

**J.M ONYANGO**

**JUDGE**