



REPUBLIC OF KENYA

High Court of Kisii

Civil Miscellaneous Application 273 of 2012

NO.39

CLERK GUSII COUNTY COUNCIL.....1ST APPLICANT

THE GUSII COUNTY COUNCIL.....2ND APPLICANT

VERSUS

JOHN KAHANYA GITHURU.....RESPONDENT

RULING

1. The application before me is seeking a stay of execution of the order made by the unnamed Kisii Senior Resident Magistrate, on 12th July, 2011 in Kisii, CMCC NO.155 OF 2007 in which the applicants were found guilty of contempt of court. The learned Senior Resident Magistrate found the applicants guilty of disobeying the court order that was made on 13th July, 2007. The applicants have now moved this court under

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Order 42 Rule 6 of the **Civil Procedure Rules, 2010** for a stay of the said order pending the filing and determination of an appeal to this court. Similar application before the lower court was dismissed on 19th September, 2012. The application is brought on the grounds set out on the face thereof and on the affidavit of the 1st applicant sworn on 22nd October, 2012. The application is opposed by the respondent who filed grounds of opposition dated 26th October, 2012. In summary, the application is brought on the grounds that the applicants are dissatisfied with the order of the senior resident magistrate and have decided to exercise their right of appeal and pending the hearing and determination of the intended appeal, the applicants seek a stay of the said order. The applicants contend that unless an order of stay is granted, the intended appeal would be rendered nugatory as the 1st applicant would be arrested and committed to prison. The applicants claim

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that the intended appeal is arguable and raises substantial points of law. The draft memorandum of appeal is annexed to the 1st applicant's affidavit in support of the application. The applicants are ready and

willing to comply with any order that the court may make with regard to security.

2.The respondent has opposed the applicants' application mainly on points of law. In summary, the application is objected to on the grounds that the same is incompetent, bad in law, lacks merit and is nothing but an abuse of the process of the court. The application was canvassed by way of written submissions. In their submission the applicants contended that they have satisfied the provisions of **Order 42 Rule 6** of the Civil Procedure Rules by;

i. showing that they will suffer substantial loss unless stay is granted,

ii. offering security for the performance of the order and,

iii .bringing the application as soon as it was brought to their attention that a similar application for stay had

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been dismissed by the lower court.

3.In support of their submissions, the applicants relied on two authorities from the Court of Appeal and the book by R,Kuloba on Summary Judgment published by Law Africa. In his submission in reply, the respondent's advocates contended that the applicants are not deserving of the orders sought because the applicants did disobey the order of the court that was served upon them twice and instead of purging their contempt they chose to apply to the same court to stay its order pending an intended appeal. It is not surprising therefore that their application for stay was dismissed by the lower court. The respondent contends further that the applicants have not extracted the order of 12th July, 2011 which is sought to be stayed. According to the respondent, the said order simply found the applicants guilty of contempt and nothing more. It is their contention therefore that the said

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order is not capable of execution and as such cannot be stayed. The respondent has submitted further that the present application does not lie because the applicants have neither filed an appeal nor sought leave of the court to file one out of time. The stay sought is therefore being sought in vacuum. The respondent contends further that the applicants have not shown that they will suffer substantial loss unless the order sought is granted. According to the respondent, the 1st applicant who has not been committed to prison is not bound to suffer any loss if this application is dismissed. The final submission by the respondent is that the application herein is premature. According to the respondent, the applicants should have waited until the 1st applicant is committed to prison before bringing this application. The respondent did not support his submissions by any case law or authority.

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4.I have considered the application herein together with the affidavit in support thereof. I have also looked at the applicants' advocate's submissions in support of the application. I have also considered the grounds of opposition by the respondent and the respondent's advocates' submission in opposition to the stay sought. The issues that present themselves for determination in this application are two fold namely, whether the application filed herein is competent and if it is, whether the applicants have satisfied the conditions for granting the orders sought. On the first issue, my finding is in the affirmative. **Section 79G**

of the **Civil Procedure Act, Cap.21 Laws of Kenya** provides that an appeal from a subordinate Court to the High Court should be made within 30days from the date of the order or decree appealed from provided that the period certified by the lower court to have been required for the preparation and submission of the

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certified copy of the decree or order appealed from shall be excluded from that time. The proviso to the said section provides that the limited time of 30 days aforesaid can be extended by the court for good reason. The respondent's contention is that the applicants ought to have filed an appeal to this court before moving the court for a stay. I am not in agreement with the respondent in this submission which is neither supported by case law nor the Civil Procedure Act. Although it is not clear to me why the applicants have to date not filed the intended appeal, I do not think that it is mandatory for a person who wishes to appeal against a decision of the subordinate court to lodge an appeal before he can be granted a stay in the High Court. There is no such requirement even in the Court of appeal. There are so many reasons that may make it impossible to file an appeal within time. That is why there is a provision for extension of

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time limited for filing appeal to the High Court. The best court to determine whether the appeal has been filed within or out of time is the court hearing the appeal. At this stage, it would be premature to determine the competency of the intended appeal. I am of the view that there is no rule or law barring a person dissatisfied with the decision of a subordinate court who for one reason or the other has not filed an appeal from moving the High Court by way of a miscellaneous civil application for a stay of execution pending the filing of the intended appeal. The court dealing with such application will of course address its mind to the fact that an appeal has not be filed by the applicant and will impose such conditions as may be necessary to ensure that the applicant does not end up not filing the appeal at all while enjoying an indefinite stay. Due to the foregoing, the present application is not incompetent for want of an appeal. The competency of this application was

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also challenged on the ground that the order sought to be stayed is not capable of execution and as such there is nothing to stay. Once again, I am not in agreement with this submission. Once a person is found guilty of contempt, the next step is to have him brought to court for punishment. Once they are arrested and either committed to prison, sequestered or fined it may be too late to apply for a stay. The application before the court is seeking to avoid the arrest, committal, sequestration or the fine aforesaid which are consequences of the order that found the applicants to be in contempt. It is my finding that the order of 12th July, 2011 is capable of being executed and as such can be subjected to an application for stay.

5.The next issue is whether the applicant has made out a case to warrant the granting of the orders sought. Under order 42 Rule 6, an applicant for stay of execution must demonstrate

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that unless stay is granted, he will suffer substantial loss and that he is ready and willing to furnish security for the performance of the decree or order sought to be stayed in the event that he loses the

appeal. The application must also be brought without unreasonable delay. The applicants have demonstrated that it is the 1st applicant's personal liberty which is at stake. In punishing for contempt, the court can commit the contemnor to prison, can order the attachment of his goods or can impose a fine. Loss of liberty is therefore one of the punishment that is staring the 1st applicant in the face. I am in agreement with the applicants that loss of liberty is a substantial loss. What of security? The applicants have submitted that they will abide by any order as to security that the court may deem fit to grant. The applicants' application for stay before the lower court was dismissed on 12th September, 2012 and the present application was filed on

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22nd October, 2012. In the circumstances, I don't think that this application was filed after unreasonable delay. The applicants had urged me to also consider the fact that they have an arguable appeal and that the intended appeal would be rendered nugatory. The cases that were cited by the applicants did not relate to a stay sought in the High Court. All concerned stay sought in the court of appeal where the applicable principles differ from those applicable in the High Court. Although the High Court is not barred from considering whether an applicant has an arguable case or not, that is not a principal factor. In the High Court, the court needs only to be satisfied that the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules** have been met. In this particular case, I am satisfied that the said conditions have been met by the applicants. The applicants' application is therefore for granting. The application will however be granted on

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conditions. As I had said earlier in this ruling, the applicants have not filed an appeal although the order complained of was given more than five (5) years ago. No explanation has been given by the applicants for this delay save that they have applied for the proceedings. The other reason why I think that the stay sought should be granted on conditions is that I was not able to appreciate what the case in the lower court was all about. The applicants did not annex copies of the pleadings and the orders complained of. It was therefore difficult to appreciate the merit of the intended appeal. This was not even possible to deduce from the annexed draft memorandum of appeal. The draft memorandum of appeal talks of an appeal against the order made by **Hon. Kimutai** on 20th April, 2012 while the stay herein is sought with respect to the order made on 12th July, 2011. In the circumstances, I hereby grant a stay of execution of the Senior Resident Magistrate's order issued

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on 12th July, 2011 for a period of six(6) months from the date hereof. The stay is granted on condition that the applicants shall deposit with the court as a security a sum of Kenya shillings fifty thousand (Ksh.50,000.00) within thirty(30) days from the date hereof in default of which the stay granted herein will lapse automatically. The cost of this application shall be in the intended appeal. In the event however that the appeal is not filed, the cost of this application shall be to the respondent.

Dated, signed and delivered at Kisii this 8th day of March 2013.

**S. OKONG'O,
JUDGE.**

In the presence of:

.....for the Applicant

.....for the Respondent

.....Court Clerk.

**S. OKONG'O,
JUDGE.**

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