



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 161 OF 1998

JAMES KIPRONO TINEGO PLAINTIFF/RESPONDENT

VERSUS

VIRGINIA NASAMBU KHISA 1ST DEFENDANT/APPLICANT

PETER KHISA MUSUNGU 2ND DEFENDANT/APPLICANT

RULING

The application before me for determination is the Notice of Motion dated 18th February, 2013, brought under Order 42 Rule 6 of Civil Procedure Rules and Section 3A of the Civil Procedure Act. The main prayer sought is for an order of stay of execution of the decree and an order herein pending the hearing and determination of Eldoret Court of Appeal Civil Application No. 2 of 2013.

The application is premised on the following grounds:-

- (a) **The Defendants are aggrieved by the Judgment of this Honourable Court.**
- (b) **The Defendants were not aware that Judgment had been delivered herein until when they were served with an eviction notice.**
- (c) **The Defendants have accordingly filed an application to be allowed to file a notice of appeal and record of appeal out of time.**
- (d) **The said application has high chances of success.**
- (e) **The intended appeal also has overwhelming chances of success.**
- (f) **The Plaintiff has obtained an order of eviction and is likely to execute the order any time now.**
- (g) **Unless stay of execution is granted, the Applicants will suffer irreparable loss and the intended appeal will be rendered nugatory.**
- (h) **The Applicants are ready to abide by any conditions of stay that may be granted by the Honourable Court.**

The application is further supported by the affidavit of the second Defendant Tom Wekesa Musungu sworn on 4th February, 2013. In summary he depones that Judgment of the court was delivered on 19th February, 2012. That previously he was represented by Mr. Machio Advocate

who died in the year 2011 and that after his (advocate) death he did not instruct another advocate. That he was not notified of the date the Judgment was delivered. That he has filed an application in the Court of Appeal to appeal out of time. That the application and the entire appeal have high chances of success. That if the orders sought are not granted his mother and the entire family are likely to be evicted from the suit land. That further, if the orders sought are not granted, the appeal shall be rendered nugatory.

The application is opposed vide a Replying Affidavit sworn by Plaintiff/Respondent, James Kiprono Tinego on 26th February, 2013. He depones that all matters previously handled by M/s. Machio & Company Advocates were handed over to the law firm of M/s. Nyaundi Tuiyott & Co. Advocates upon whom the notice of delivery of Judgment was served. He argues that no Notice of Appeal has been filed and so this court has no jurisdiction to entertain the application.

The Respondent further depones that the Applicant has not demonstrated that he would suffer any substantial loss if the application is not granted, that he has not offered any security in due performance of the decree and that the application has been filed after inordinate delay. He further contends that he is entitled to the fruits of the Judgment.

The application was canvassed before me on 5th June, 2013. Mr. Kitiwa Advocate appeared for the Applicant and Miss Ngelechei for the Respondents. Both counsel made oral submissions in support of, and opposition to the application respectively. The said submissions only emphasize the contents deponed to in the Supporting and Replying Affidavits.

In addition, Mr. Kitiwa for the Applicant submitted that the Applicant could not file a Notice of Appeal as he learnt of the Judgment more than fourteen (14) days after it had been delivered. He submitted that this necessitated the Applicant to file an application in the Court of Appeal seeking leave to file the appeal out of time. The said application is annexed to the Supporting Affidavit as Annexure 'TWM.1'.

He also submitted that the Applicant is ready and willing to deposit any form of security as may be ordered by the court. He submitted that the order of stay sought is one pending the hearing of the application before the Court of Appeal seeking orders to file the appeal out of time as opposed to a stay of execution pending the hearing of the appeal.

I have accordingly considered the submissions made by the respective counsel and I take the following view.

The application is basically brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:-

"6. (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 subrule (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) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(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.

(5) An application for stay of execution may be made informally immediately following the delivery of Judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

Rule 6 of Order 42 is wide and counsel for the Applicant ought to have specified the sub-rule which he intended to rely on. For purposes of this application I will refer to the sub-rule(s) I think is/are relevant.

Under sub-Rule (1) an application of stay lies with the court appealed from. In this case therefore, the High Court may entertain an application seeking an order of stay of execution pending the hearing and determination of an appeal filed in the Court of Appeal. Sub-Rule (2) gives the conditions which the party seeking a stay must satisfy before the order of stay of execution is granted.

Sub-Rule (4) defines what an appeal before the Court of Appeal is in the following words:-

"For 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."

Therefore, a party seeking a stay of execution before the High Court wherein the appeal lies with the Court of Appeal must demonstrate that indeed there exists an appeal before that court. The sub-rule (4) is framed in mandatory terms and no amount of decorative words can twist its interpretation to suit the circumstances of a case.

In the instant case, Judgment was delivered on 19th September, 2012.

Under Rule 75 of the Court of Appeal Rules, 2010, a Notice of Appeal shall be lodged within fourteen (14) days of the date of the decision which it is desired to appeal. It provides as follows:-

"75. (1) Any person who desires to appeal to the Court shall give notice in writing, which shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

(4) When an appeal lies only with leave or on a certificate that a point of law

of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

(5) Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.

(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant."

Therefore, the Notice of Appeal ought to have been filed by 3rd October, 2012. None was filed for reasons canvassed in the application.

Rule 75 (2) of the Court of Appeal Rules is also framed in mandatory terms and is subject only to Rules 84 and 97 thereof. It may not serve any purpose for me to enunciate what these rules provide as, in any event, no appeal so far exists. And as I have already said, Order 42 Rule 6 of the Civil Procedure Rules is only applicable where an appeal exists.

In my view therefore, a consideration of the merits as to why the stay order is merited lies with the court the appeal lies and not this court. I would, in the circumstances be acting in vain in attempting to consider whether the Applicant has satisfied the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules.

I am further persuaded by the finding of a ruling in the case of **OMAR MAKUNDO MUTURI - VS- BENSON MWADZOMBO HANGA HCCC. NO. 285 OF 1995 (MOMBASA)** in which the Applicant filed the Notice of Appeal out of time. The court held that as far as it was concerned, there was no Notice of Appeal filed as required by Order 4 Rule 4 of the old Civil Procedure Rules and that the application had no merit. A Notice of Appeal under sub-rule (4) of Rule 6 of the current Civil Procedure Rules is defined so as to mean the existence of an appeal.

In the instant case and in view of the foregoing, no appeal before the Court of Appeal exists on record and this application must therefore fail. I dismiss it with costs to the Respondent.

DATED and DELIVERED at ELDORET this 24th day of September, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Miss Nasimiyu for the Applicants

Mr. Mokuu holding brief for Magare for the Respondent