



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL CASE NO. 21 OF 2020

DOMINIC A. O. MUTULA.....1ST APPELLANT/APPLICANT

DAVID OSTEELE OKOYO (Suing as the Administrator of the Estate of

PERES ATIENO OKOYO).....2ND APPELLANT/APPLICANT

VERSUS

JANE ATIENO OTIENO.....RESPONDENT

RULING

The Applicant seeks orders that the Honorable Court be pleased to stay any further proceedings in Magistrate's Court at Winam ELC Number 113/2018; Dominic A.O. Mutula & Another v. Jane Atieno Otiemo pending the hearing and determination of the Appeal against the Ruling of the Hon. F. M. Rashid, SRM, delivered on 30th April 2020 and that costs of this Application be provided for.

The application is based on grounds that the Applicants have lodged an Appeal against the decision of Hon. F. M. Rashid, SRM, delivered on the 30th April 2020 and has sought typed and certified proceedings which are yet to be supplied.

The applicant laments that the Respondent is likely to proceed to set down her counterclaim for hearing and it is imperative that the Honorable Court stay the intended action and or any further proceedings otherwise the Appeal lodged will be rendered nugatory thereby causing the Appellants/Applicant loss to his irreparable detriment.

The Applicants have an arguable Appeal with a high chance of success as the same intends to raise inter alia the following questions for determination:

- a) The right to a fair trial is cardinal and a court can only dismiss a suit for want of prosecution if no step had been taken to prosecute the same for one year.
- b) Where the failure of an advocate to attend to a hearing was not deliberate, inordinate or intended to obstruct or delay the course of justice, a court cannot dismiss a suit for want of prosecution.
- c) When a party has filed supplementary lists of witness statement and documents together with an application to amend their pleadings, that party cannot be said to have lost interest and has been indolent in prosecuting its suit.
- d) The test to be applied before a suit is dismissed for want of prosecution is whether the delay was prolonged and inexcusable and even if so, whether justice can still be done despite such delay.
- e) Whether a mistake by an advocate should be visited on a client who is willing and ready to prosecute his suit and whether costs ought to have been an alternative remedy to the Respondent.

The applicant contends that the application has been filed timeously without inordinate delay and that it is in the interest of justice that the prayers sought be granted.

In the replying affidavit, the respondent stated that the application is incompetent and abuse of court process. The applicants have never been desirous of prosecuting the case in the lower court and have adjourned 6 times. The applicant's application to reinstate the suit and amend the plaint were dismissed on merit.

The application for stay of proceedings pending Appeal is underpinned on order 42 Rule 6 (2) of the Civil Procedure Rules wherein

provides:

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.

The application of this nature should be commenced expeditiously. The ruling of the Magistrate supposed to be vacated was made on 30/4/2020. The Memorandum of Appeal was filed on 15/5/2020 and the application was filed on the same date approximately 15 days after the ruling. In the circumstances of this case I do find that the application was filed timeously.

The applicant has to demonstrate that substantial loss or hardships shall results if stay is not granted. The applicant has not offered any evidence on any loss or hardship if stay is not granted.

The applicant has not demonstrated that he has an arguable appeal as the proceedings of the lower court have not been annexed to enable the court establish whether the Honourable Magistrate made any error on the face of the matter. The evidence made by the respondent in the replying affidavit filed on the 10/7/2020 demonstrates that the Applicant was conducting his case leisurely.

No security has been offered by the Applicant. In the circumstances of this case the application is dismissed with costs.

DATED AND DELIVERED THIS 28th DAY OF JANUARY, 2021.

A. O. OMBWAYO

ENVIRONMENT & LAND - JUDGE

This RULING has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

A. O. OMBWAYO

ENVIRONMENT & LAND – JUDGE