**REPUBLIC OF KENYA**

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

**ELC CASE NO 107 OF 2017**

**SOLOME NALIAKA WABWILE.....PLAINTIFF**

**VERSUS**

**ALFRED OKUMU MUSINAKA.....DEFENDANT**

**R U L I N G**

Judgment in this case was delivered on 27th May 2020 and the plaintiff was ordered to vacate the land parcel **NO BUNGOMA/KABISI/61** (the suit land) within six (6) months or be evicted therefrom. The plaintiff was also restrained from interfering with the defendant's use and occupation of the suit land.

Aggrieved by that Judgment, the plaintiff lodged a Notice of Appeal on 17th June 2020 and on 14th January 2021, she filed a Notice of Motion predicated on the provisions of **Section 3A** of the **Civil Procedure Act** and **Order 46 Rule 6(1)** and **(2)** of the **Civil Procedure Rules**. That Notice of Motion is the subject of this ruling.

The Notice of Motion is wrongly grounded on **Order 46** of the **Civil Procedure Rules**. The correct provision is **Order 42** of the **Civil Procedure Rules** but that is not fatal to the application. The plaintiff seeks the following orders by that application: -

**1. Spent**

**2. Spent**

**3. There be a stay of execution of the Judgment and/ or decree issued by this Court on the 27th May 2020 and all consequential orders thereto pending the hearing and determination of the intended appeal preferred by the Applicant.**

**4. Costs be provided for.**

The application is predicated on the grounds set out therein and is also supported by the plaintiff's affidavit.

The gravamen of the application is that the plaintiff being aggrieved by this Court's Judgment delivered on 27th May 2020 intends to appeal and on 17th June 2020 lodged a Notice of Appeal and requested to be supplied with the proceedings on a priority basis. That the appeal has high chances of success and if the execution proceeds, the plaintiff will suffer great prejudice, hardship and loss should the appeal succeed. That she is willing to abide by any condition that the Court will order and no prejudice shall be occasioned to the defendant. Further, that the application has been made timeously.

Annexed to the application is a Notice of Appeal lodged on 17th June 2020 as well as the decree.

The application is opposed and the defendant by his replying affidavit dated 28th January 2021 has averred, inter alia, that the application is incompetent, an abuse of the Court process and filed by an advocate who was previously not on record in clear breach of the mandatory provision of **Order 9 Rule 9** of the **Civil Procedure Rules**.

The defendant further averred that the Notice to Appeal was not only filed outside the 14 days provided in **Rule 75** of the **Court of Appeal Rules** but was also not served within the 7 days stipulated under **Rule 77 (1)** of the **Court of Appeal Rules**. That there has been inordinate delay in lodging this application and the plaintiff has not bothered to vacate the suit land some eight (8) months from the date of Judgment. Finally, that the plaintiff has not made any offer for security and this application should be dismissed with costs.

The plaintiff filed a further affidavit dated 1st February 2021 in which she averred that the Notice of Appeal was filed on time and that there

has been no ordinate delay in filing this application. That her Counsel **MR WEKESA** is properly on record since he had filed a Notice of Appointment to act alongside **MR WACHANA**. That the plaintiff will suffer irreparable loss and her appeal will be rendered an academic exercise should it succeed after she has been evicted. That this being a land case, she should be allowed to exhaust all the available forums.

The application has been canvassed by way of written submissions. These have been filed by **MR WEKESA** instructed by the firm of **AMANI WEKESA & ASSOCIATES ADVOCATES** for the plaintiff and by **MR MILLIMO** instructed by the firm of **MILLIMO P M & ASSOCIATES** for the defendant.

I have considered the application, the rival affidavits and annextures as well as the submissions by Counsel.

**Order 42 Rule 6(1)** and **(2)** of the **Civil Procedure Rules** provides as follows: -

***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 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;***

***(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."*** Emphasis added.

It is clear from the above that a party seeking the grant of an order of stay of execution pending appeal must satisfy the following conditions: -

**1: Show sufficient cause.**

**2: Demonstrate that he will suffer substantial loss unless the order of stay is granted.**

**3: Offer security.**

**4: Move the Court without unreasonable delay.**

The importance of establishing substantial loss was re – emphasized by **PLATT Ag J.A** (as he then was) in the case of **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410** as follows: -

***"It is usually a good rule to see if Order XL1 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in it's various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money."***

Whether or not to grant the remedy of stay of execution pending appeal is a matter of judicial discretion. Such discretion must therefore be exercised on sound basis, rationally and not capriciously or whimsically. In so doing, the Court must bear in mind the need to balance between the two competing interests of a party who has a Judgment in his favour and another who is desirous of exercising his right of appeal. The onus is however on the party seeking a stay to prove that he has met the threshold set out in **Order 42 of the Civil Procedure Rules**. The duty of this Court while considering an application for stay of execution pending appeal was stated by the Court of appeal in **VISHRAM HALAI .V. THORNTON & TURPIN LTD 1963 (LTD) 1990 KLR 365** as follows: -

***"Thus, the superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly, the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay."***

It is clear from the provisions of **Order 42 Rule 6(1)** and **(2)** of the **Civil Procedure Rules** that a party seeking an order of stay of execution pending appeal must satisfy **all the conditions set out therein**, not only some of them. I am satisfied upon perusal of the plaintiff's supporting affidavit that she has demonstrated that she will suffer substantial loss if the application is not allowed because the suit land is her home. She has also averred in paragraph 14 of the said affidavit that she is willing to abide by any conditions which this Court will impose as a condition for the stay.

However, she has not surmounted the requirement of filing the application without unreasonable delay notwithstanding the averment in paragraph 16 of her supporting affidavit where she states: -

***16 "That this application is made timeously without any undue delay and in good faith."***

Her Counsel has submitted as follows on the issue of delay: -

> ***"The applicant filed this application without any undue delay having filed it barely four days after Judgment was delivered. This goes a long way to demonstrate good faith on the part of applicant. We humbly submit that all the applicant is seeking is to have status quo maintained pending determination of his (sic) appeal."***

That submission and the averment by the plaintiff cannot be correct. The Judgment sought to be appealed was delivered on 27th May 2020 by way of electronic mail. There is no evidence to suggest that the plaintiff's advocate did not receive it on the date of delivery. If anything, the plaintiff confirms in paragraph 3 of her supporting affidavit that it was indeed received on 27th May 2020. This application was subsequently filed on 14th January 2021, some eight (8) months later and not ***"barely four days after Judgment was delivered"*** as submitted by her Counsel. Whether or not a delay is unreasonable is, of course, a matter to be determined by the circumstances of each case. However, any delay must be explained to the satisfaction of the Court. The plaintiff has not given any explanation, satisfactory or otherwise, as to why it took her a whole eight (8) months to file this application. That delay is clearly unreasonable and as is clear from the record, it is not true that she moved to Court ***"timeously"*** or ***"barely four days after Judgment was delivered."*** The plaintiff has not surmounted the hurdle of moving to Court ***"without unreasonable delay"*** and her application must therefore collapse.

Finally, an application such as this one presupposes that the Applicant has infact already commenced the process of filing an appeal. **Rule 75 (1)** and **(2)** of the **Court of Appeal Rules** requires that: -

> ***75 (1) "Any person who desires to appeal to the Court 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 decision against which it is desired to appeal"*** Emphasis added.
>
> **Rule 77 (1)** of the **Civil Procedure Rules** on the other hand provides as follows: -
>
> ***77 (1) "An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal"*** Emphasis added.

The defendant has averred in paragraphs 11, 12 and 13 of his replying affidavit that the notice of appeal was not only filed outside the 14 days but it was also not served upon him or his advocate. However, in her further affidavit dated 1st February 2021, the plaintiff avers in paragraphs 4 and 7 that infact the notice of appeal was filed on time and with regard to failure to serve, she opines ***"that the failure to serve the respondent is not fatally incurable as no prejudice has been occasioned to them."*** Since the Judgment sought to be appealed was delivered on 27th May 2020, the plaintiff had upto 10th June 2020 to file the Notice of Appeal as time is computed in accordance with the provision of **Order 50 Rule 2** of the **Civil Procedure Rules**. Sundays and Public holidays are only excluded in the computation of time where the time allowed for taking action is less than six days. And even excluding Sunday and Public holidays, the Notice of Appeal filed on 17th June 2020 was still way out of time. It is also conceded by the plaintiff that the Notice of Appeal was not served but she considers that lapse as ***"not fatally incurable as no prejudice has been occasioned."*** No application was filed to extend time within which to file the Notice of Appeal. While considering the import of the provisions of **Rules 75** and **77** of the **Court of Appeal Rules**, the Court of Appeal in **BOY JUMA BOY & OTHERS .V. MWAMLOLE TCHAPPU MBWANA & ANOTHER 2014 eKLR** said thus: -

> ***"These are mandatory provisions which the respondents were under obligation to comply with. Indeed, the jurisdiction of this Court as an appellate Court can only be triggered through the filing of the notice of appeal. In the absence of such notice, the Court has no proper basis upon which its jurisdiction can be anchored."***

It follows therefore that no appeal has been triggered by the plaintiff which can justify the invocation of this Court's powers to order for a stay of execution as provided under **Order 42 Rule 6** of the **Civil Procedure Rules**. Therefore, a party seeking such a remedy must first set in motion the process of filing an appeal. This is because the appeal is the substratum of the remedy of stay. Without it, there can be no basis of any orders for stay of execution. That is the predicament in which the plaintiff herein finds herself.

The up – shot of the above is that the Notice of Motion dated 14th January 2021 is devoid of merit. It is accordingly dismissed with no orders as to costs.

**Boaz N. Olao.**

**J U D G E**

**2nd March 2021.**

Ruling dated, delivered and signed at **BUNGOMA** this 2nd day of March 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

**Boaz N. Olao.**

**J U D G E**

**2nd March 2021.**