



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E012 OF 2021

**REDEMPTOR SIMATI (Suing as the Legal representative of
Estate of LIBORION MASINDE) APPLICANT**

VERSUS

ANERIKO MASIKA SIMIYU.....1ST RESPONDENT

HASSAN SHABRAM.....2ND RESPONDENT

R U L I N G

1. REDEMPTOR SIMATI (the Applicant) has moved to this Court citing the provisions of **Sections 1A, 1B, 3, 3A and 79G** of the **Civil Procedure Act** and all enabling provisions of the law and seeking the following orders: -

i. Spent

ii. Spent

iii. Pending the hearing and determination of the appeal intended to be filed, there be and is hereby granted a stay of execution.

iv. That leave be and is hereby granted to the Applicant to file her appeal out of time.

v. Costs of this application be provided.

The application is based on the grounds set out therein and is also supported by the Applicant's affidavit also dated 19th October 2021.

2. The gist of the application is that the Applicant being aggrieved by the ruling delivered by **HON. C. A. S. MUTAI (SENIOR PRINCIPAL MAGISTRATE)** in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 469 of 1995** on 19th March 2021 intends to appeal the said decision. She therefore applied for proceedings and Judgment on 23rd March 2021 but it was not until 16th July 2021 that the same were applied. That at that time, the Applicant's advocate **MR OCHARO KEBIRA** was transiting to the Bench having been appointed as a Judge and in the process, the matter did not receive the required attention. That it took his new advocate **MR OMAGWA ANGIMA** time to acquaint himself with the matter hence the delay in instituting the appeal. That the intended appeal has good chances of success as per the annexed draft and Memorandum of Appeal and she intends to prosecute it diligently if leave is granted.

3. When the application was placed before me on 1st November 2021, I did not certify it as urgent. I however directed that it be canvassed by way of written submissions with the Applicant serving the Respondent within 14 days and the Respondents filing their responses and submissions within 21 days of service. The matter was set for mention on 8th December 2021 to confirm compliance but only Counsel for the Applicant attended Court. There was no appearance by the Respondents or their Counsel and neither was any replying affidavit or grounds of opposition filed in response to the application which is therefore not opposed.

4. I have considered the application, the grounds therein and the supporting affidavit. Notwithstanding the fact that the application is not opposed. I will consider it's merit or otherwise in accordance with the law and judicial precedents.

5. The Applicant seeks two orders: -

a. Extension of time within which to appeal.

b. Stay of execution pending the intended appeal.

EXTENSION OF TIME TO APPEAL: -

Section 79G of the Civil Procedure Act provides as follows: -

“Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: -

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.” Emphasis mine.

Section 16A (1) and (2) of the Environment and Land Court Act 2011 is couched in similar terms. It reads: -

1. “All appeals from Subordinate Courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in Section 13(2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the Subordinate Court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

2. An appeal may be admitted out of time if the appellant **satisfies the Court that he had a good and sufficient cause for not filing the appeal in time.**” Emphasis mine.

It is clear from the supporting affidavit that the ruling sought to be appealed was delivered by the trial Court on 19th March 2021. The Applicant therefore had upto 19th April 2021 to file the appeal against the said ruling. However, that period can be extended if the Applicant can satisfy the Court that he has **good and sufficient cause** to justify an extension of the thirty-day period within which to file any appeal. In **QURESHI & ANOTHER .V. PATEL & OTHERS 1964 EALR 633**, the Court took the view that there is no difference between the words **sufficient cause and good cause**. In the case of **THE HON ATTORNEY – GENERAL .V. THE LAW SOCIETY OF KENYA & ANOTHER C.A CIVIL APPLICATION No 133 OF 2011 [2013 eKLR] MUSINGA J.A** said: -

“Sufficient cause or good cause in law means: -

“..... the burden placed on a litigant (usually by a Court rule or order) to show why a request should be granted or any action excused” see **BLACK’S LAW DICTIONARY 9TH EDITION** page 251.

Sufficient cause must therefore be **rational, plausible, logical, convincing, reasonable and truthful**. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation **should not leave unexplained gaps in the sequence of events.**” Emphasis mine.

In the case of **NICHOLAS KIPTOO arap KORIR SALAT .V I.E.B.C & OTHERS 2014 eKLR**, the Supreme Court laid down the following principles to guide a Court while considering an application to extend time. These are: -

a. Extension of time is not a right. It is an **equitable remedy** that is only available to a deserving party at the **discretion of the Court**.

b. A party who seeks for extension of time has the burden of **laying a basis to the satisfaction of the Court**.

c. Whether the Court should exercise its discretion to extend time is a consideration to be **made on case to case basis**.

d. Where there is a **reason for delay**, it should be **explained to the satisfaction of the Court**.

e. Whether there will be **any prejudice suffered by the Respondent** if extension is granted.

f. Whether the application has been brought **without delay**.

g. Whether in certain cases like election Petitions, **public interest** should be a consideration for extending time.

I have considered the reasons put forward by the Applicant as to why she did not file her appeal in time. They include the fact that although she applied for proceedings and Judgment on 23rd March 2021, these were not availed until 16th July 2021. The Applicant has also stated that her previous Counsel **MR OCHARO KEBIRA** was transiting to the Bench and this contributed to the delay. All this has not been rebutted. Indeed, this Court is entitled to take judicial notice under **Section 60(o)** of the **Evidence Act** of the fact that **MR OCHARO KEBIRA** the Applicant’s then Counsel has since transited to the Bench as a Judge in the Employment and Labour Relations Court. It is therefore plausible, convincing, reasonable and truthful that in the excitement which no doubt accompanied that long awaited transition, **MR**

OCHARO KEBIRA (now Justice **OCHARO KEBIRA**) may have over looked to give this matter, as his erstwhile client has deponed in paragraph 5 of her supporting affidavit, **“the required attention”** hence the delay in filing the appeal. That, in my view, is good and sufficient cause to warrant the extension of time to appeal. The delay has been explained to my satisfaction and there is nothing to suggest that the Respondent will suffer any prejudice if time is extended.

6. The prayer for extension of time is well merited. It is for allowing.

STAY OF EXECUTION PENDING APPEAL: -

Order 42 Rule 6(1) and (2) of the Civil Procedure Rules 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 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; 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.” Emphasis mine.

It is clear from those provisions that the Applicant was required to satisfy the following conditions to warrant the grant of an order of stay pending appeal: -

1. Show sufficient cause.

2. Demonstrate that she will suffer substantial loss unless the order for stay is granted.

3. File the application without unreasonable delay.

4. Offer security.

The Applicant herein has already annexed to her application a draft Memorandum of Appeal and leave to extend time has already been granted. There is, in my view, sufficient cause shown.

7. However, substantial loss is the cornerstone of such an application. **PLATT Ag J.A** (as he then was) described it as follows in **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410: -**

“It is usually a good rule to see if Order XLI 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 a 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” Emphasis mine.

In **VISHRAM RAVJI HALAI & ANOTHER .V. THORNTON & TURPIN 1963 LTD 1990 KLR 365**, the Court of Appeal circumscribed the jurisdiction of this Court in such an application and said: -

“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.” Emphasis mine.

Nowhere in the eleven (11) paragraph supporting affidavit has the Applicant alluded to the substantial loss, if any, that she will suffer if the stay order is not granted. All that she has dwelt on is the issue of delay, that her appeal has high chances of success, that the Respondent does not stand to suffer any prejudice and that she will prosecute the appeal diligently if leave is granted. There is no reference to any substantial loss yet, as is now clear, such loss is the cornerstone for the granting of an order of stay of execution.

8. Secondly, the applicant has neither offered any security nor pleaded that she is willing to abide by any conditions that this Court may impose for the due performance of such decree or order as may ultimately be binding on her. As was held in **WYCLIFF SIKUKU WALUSAKA .V. PHILIP KAITA WEKESA 2020 eKLR: -**

“The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the

application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent's right to enjoy the fruits of his Judgment."

The Applicant was required to meet **all** the conditions set out in **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules** and not only some of them. She has failed to do so and is therefore not deserving of the order for stay of execution pending appeal.

9. Finally, and most important, although the Applicant did not avail a copy of the ruling which she seeks to appeal, it is obvious from ground No 3 of the annexed Memorandum of Appeal and the submissions filed that the Applicant's suit in the Subordinate Court was struck out for being res – judicata. I say so because not much information was placed before this Court to enable it understand what the dispute in the Subordinate Court was all about. It is surprising that Counsel for the Applicant did not find it prudent to annexe the ruling and Judgment subject of the intended appeal yet the same were provided on 16th July 2021. It should not be the business of the Court to determine a matter on the basis of conjecture. A party seeking the Court's indulgence should make available all the relevant evidence to enable the Court arrive at an informed decision. In this case, I am afraid the Applicant has been very economical with information. However, in paragraph 9 of his submissions, Counsel has stated thus: -

"Your Lordship, this appeal will largely turn on one point and that is that contrary to finding of the trial Magistrate, this suit is not res – judicata at all. Unfortunately, the case is said to be res – judicata High Court Civil Appeal number 94 of 1999 and Court of Appeal number 227 of 2002. But this suit simply cannot be res – judicata the said two appeals."

The only conclusion that the Court can arrive at from a reading of ground No 3 of the Memorandum of Appeal and paragraph 9 of the submissions is that the Applicant's suit was dismissed for being res – judicata. That being the case, it is obvious that the trial Court made a negative order and the only execution pending is on the issue of costs. The case law on stay of execution pending appeal are clear that for an order of stay of execution to be granted, there must be a positive order. In **WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES .V. ORANGA & OTHERS 1976 – 80 1 KLR** the Court of Appeal for East Africa stated thus: -

"But what is there to be executed under the Judgment the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In WILSON .V. CHURCH, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything or to refrain from doing anything or to pay any sum."

In **CO – OPERATIVE BANK OF KENYA LTD .V. BANKING INSURANCE & FINANCE UNION KENYA (2015 eKLR)**, the Court of appeal held: -

"An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of Judgment."

10. Finally, in **KANWAL SARJIT SINGH DHIMAN .V. KESHAVJI JIVRAJ SHAH 2008 eKLR**, the Court of Appeal while dealing with an application for stay of a negative order held: -

"The 2nd prayer in the application for stay (of execution) of the order of the superior Court made on 18th December 2006 merely dismissed the application for setting aside the Judgment with costs. By the order, the superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only."

If, as I have already found on the available evidence, all that the trial Court did was to dismiss the Applicant's claim for being res – judicata, then it follows that the order was a negative one which cannot be stayed.

11. Therefore, for reasons that the Applicant has not met the threshold under **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules** and further, that the decree sought to be appealed was a negative one, that order for grant of stay of execution pending appeal is not available to the Applicant. That prayer is for dismissal.

12. The up – shot of all the above is that upon consideration of the Notice of Motion dated 19th October 2021, this Court makes the following orders: -

1. **Leave is granted to file the appeal out of time.**
2. **The Applicant to file and serve the Memorandum of Appeal within 14 days from the date of this ruling.**
3. **The Record of Appeal be filed and served within 45 days of this ruling.**
4. **The appeal shall thereafter be placed before me for further orders on 21st March 2022.**
5. **Costs shall abide the results of the appeal.**
6. **The prayer for stay of execution pending appeal is declined.**

BOAZ N. OLAO.

J U D G E

2ND FEBRUARY 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 2ND DAY OF FEBRUARY 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO.

J U D G E

2ND FEBRUARY 2022