



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 440 OF 2017**

**(Formerly Machakos ELC Case No. 146 of 2015 – OS)**

**IN THE MATTER OF AN APPLICATION BY KAAKAI ENE NANKOO MOSIANY**

**UNDER ORDER 37 RULE 1 (g) OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**KAAKAI ENE NANKOO MOSIANY.....APPLICANT**

**AND**

**KATETO OLE KIRONKI MIISIA.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR, KAJIADO.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

What is before court for determination is the 1<sup>st</sup> Respondent' Notice of Motion Application dated the 25<sup>th</sup> June, 2020 brought pursuant to section 1A, 1B, 3A and 95 of the Civil Procedure Act and Section 7 of the Appellate Jurisdiction Act including Order 50 Rule 1 of the Civil Procedure. The 1<sup>st</sup> Respondent seeks the following orders:

1. Spent.
2. That the Court be pleased to grant a stay of execution of Judgement dated 29<sup>th</sup> April, 2020 pending hearing of the intended Appeal at the Court of Appeal.
3. That the Court do extend the time to the 1<sup>st</sup> Respondent to file a Notice of Appeal from the Judgement of the High Court delivered on 29<sup>th</sup> April, 2020.
4. That costs be in the cause.
5. That such further or other order be made as may deem just to this Honourable Court.

The application is premised on the grounds on the face of it and the supporting affidavit of KELVIN MOGENI where he avers that he prepared a Notice of Appeal against the Judgement delivered on 29<sup>th</sup> April, 2020 but inadvertently failed to file the same. He explains that the delay in filing the Notice of Appeal is not intentional and prays for an extension of time to do so. He reiterates that no prejudice will be caused if the Application is allowed, however the intended Appeal will be greatly prejudiced because he has an arguable Appeal with high chances of success. Further, it is in the interest of justice that the orders sought are granted.

The application is opposed by the Applicant ( now Respondent) who filed a replying affidavit sworn by IVAN KIPKOECH RONO where he avers that the application is scandalous, frivolous and vexatious. He insists the application has been filed after a long delay. Further, no email has been furnished in court to prove the Notice of Appeal was ever prepared and sent to Court for filing. He reiterates that the application has been filed as an afterthought as it was filed after the lapse of 90 days stay of execution period. He contends that no draft Notice of Appeal has

been annexed and the 1<sup>st</sup> Respondent should file the application for stay in the Appellate court. Further, that the application is not merited.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 25<sup>th</sup> June, 2020 including the rivalling affidavits and submissions, the following are the issues for determination:

- Whether the 1<sup>st</sup> Respondent should be granted an extension of time to lodge the Notice of Appeal.
- Whether the Court should grant a stay of execution pending lodging and the determination of the intended Appeal.

The 1<sup>st</sup> Respondent/ Applicant in his submissions reiterated his claim and contended that he will suffer substantial loss. Further, the application has been brought without unreasonable delay. To buttress his averments, he relied on the decisions of **James Wangalwa & Another Vs Agnes Maliaka Cheseto (2012) eKLR; Housing Finance Company of Kenya V Sharok Kher Mohammed Ali Hirji & Another (2015) eKLR and John Gachanja Mundia V Francis Murira Alias Francis Muthika & Another (2016) eKLR**. The Applicant (now Respondent) in her submissions insisted the 1<sup>st</sup> Respondent/ Applicant had not pleaded the likely substantial loss he stands to suffer. She contended that the 1<sup>st</sup> Respondent should have filed a Notice of Appeal within requisite fourteen (14) days once judgement was delivered and only moved court after the lapse of the 90 days stay of execution which the court had granted *suo motu*. She reiterated that she is of advanced age and should be allowed to enjoy the fruits of her judgement. To support her averments, she relied on the following decisions: **Victory Construction v BM (a minor suing through next friend one PMM) (2019) eKLR; Century Oil Trading Company Limited v Kenya Shell Limited Nairobi ( Milimani ) HCMCA No. 1561 of 2007 and Machira t/a Machira & Co. Advocates V East African Standard ( 2002) KLR 63.**

As to whether the 1<sup>st</sup> Respondent should be granted an extension of time to lodge the Notice of Appeal.

Rule 4 of the Appellate Jurisdiction Act (Court of Appeal Rules) provides that :

**‘The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.’**

While Rule 75 (1) & (2) of the Appellate Jurisdiction Act (Court of Appeal Rules) stipulates thus:’ **(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 date of the decision against which it is desired to appeal.**

The Court of Appeal in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi, (1999) 2 EA 231**, laid down the parameters in extension of time to lodge a Notice of Appeal and stated thus;

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.**

See also the case of **Hannah Muthii Kibindu V Stephen Njine Kibindu & Another ( 2020) eKLR**, where the Court of Appeal extended time to lodge a Notice of Appeal.

In the current scenario, judgement was entered on 29<sup>th</sup> April, 2020 in favour of the Applicant (now Respondent) and the Court declared that land parcel number KAJIADO/ DALALEKUTUK/ 3134 belongs exclusively to the Applicant (now Respondent) KAAKAI ENE NANKOO MOSIANY as the bona fide registered proprietor and the Land Registrar, Kajiado was directed to rectify the registration of one Kironki Ole Misiia (1<sup>st</sup> Respondent) as the alleged proprietor of all that parcel of land known as KAJIADO/ DALALEKUTUK/ 3134 and the resultant Certificate of Title issued to that effect be cancelled forthwith. The 1<sup>st</sup> Respondent seeks to appeal against the whole of the judgement and his lawyer who swore the supporting affidavit explained that he inadvertently failed to lodge the Notice of Appeal on time. I note the 1<sup>st</sup> Respondent has relied on the decision cited above from the Environment and Land Court contending that this Court has jurisdiction to grant an extension of time to lodge the Notice of Appeal which I opine that are persuasive and not binding on this court. From a reading of Rules 4 and 75 cited above while associating myself with the cited decisions I have quoted, I note it is the Court of Appeal that has the jurisdiction to grant leave to the 1<sup>st</sup> Respondent to file his Notice of Appeal out of time as this Court is devoid of the same. In the circumstance, I will decline to grant the prayer sought for extension of time to lodge the Notice of Appeal.

As to whether there should be a stay of execution of the Judgement delivered on the 29<sup>th</sup> April, 2020. The 1<sup>st</sup> Respondent has sought for a stay of execution of the Judgment pending the intended appeal, which application is opposed by the Applicant(now Respondent). In his submissions he contends that he will suffer substantial loss and that the application has been brought without unreasonable delay. The Applicant(now Respondent) in her submissions insists the 1<sup>st</sup> Respondent was granted stay of execution for 90 days and only filed the instant application when the same lapsed. She insisted that the 1<sup>st</sup> Respondent had not pleaded the likely substantial loss he stands to suffer. Further, that a Notice of Appeal should have been filed within requisite fourteen (14) days once judgement and that she is of advanced age

and should be allowed to enjoy the fruits of her judgement.

Order 42 Rule 6(2) provides that: ' **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.** '

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:'

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.**’

While in **Bungoma HC Misc Application No. 42 of 2011 Wangalwa & Another Vs Agnes Maliaka Cheseto** the Court of Appeal held that: ‘ **an Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party.**

Further, **Rule 5 (b) of the Appellate Jurisdiction Act ( Court of Appeal Rules) provides that’ ..... in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.**’

In this instance, a Notice of Appeal is yet to be lodged. From the averments in the supporting affidavit, the 1<sup>st</sup> Respondent does not indicate what loss he stands to suffer. Further, I opine that he has not fully demonstrated what prejudice he stands to suffer if the stay sought is not granted as the Applicant (now respondent) is registered as owner of land by virtue of being the administrator as well as beneficiary of the deceased owner. Based on the facts as presented while relying on Rule 5 (b) of the Appellate Jurisdiction Act cited above and associating myself with the decisions quoted, I find that the 1<sup>st</sup> Respondent has failed to meet the **threshold set for granting stay of execution and will decline to grant the said orders.**

**It is against the foregoing that I find the 1<sup>st</sup> Respondent’ Notice of Motion Application dated the 25<sup>th</sup> June, 2020 unmerited and will proceed to dismiss it with costs.**

**Dated signed and Delivered at Kajiado virtually this 31<sup>st</sup> Day of May 2020**

**CHRISTINE OCHIENG**

**JUDGE**