



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 80 OF 2019

PETER MUTUMBI (suing as the legal representative of the estate of

M'RIMBERIA M'MWITHIGA (Deceased).....APPELLANT

VERSUS

M'MUKURIA M'NGONJI A.K.A. KIUGU NGONJI.....RESPONDENT

RULING

1. The application before the court is the one dated 3.8.2021 brought under **Order 42 Rule 6 of Civil Procedure Rules, Sections 1A & 3A of the Civil Procedure Act and Article 159 of the Constitution.**
2. The prayers sought are the court grants the applicant leave to appeal out of time against the judgment of this court delivered on 8.7.2021 and a stay of execution pending the hearing and determination of the intended appeal. The notice of motion is supported by an affidavit of Muyonga Maheli sworn on the even date.
3. The grounds upon which the application is premised are: the applicant's counsel was unable to seek and or obtain instructions to appeal within time; the application was filed without unreasonable delay; the judgment date was unknown to the applicant and his counsel and though delivered on 8.7.2021, it was not sent to his email as indicated before and he only got a hard copy after 8 days: and that unless stay is granted, the respondent will move with speed and implement the judgment hence rendering the appeal nugatory yet it has high chances of success. The applicant also expresses his willingness to comply with any directions given by the court.
4. The application is opposed through the respondents' affidavit sworn on 27.10.2021. The reasons are that: the judgment was actually delivered via email on 8.7.2021 at 11.54 a.m.t both counsels on record and sent to emails belonging to the said law firm and then appearing in all his written submissionsWakili@wmklaw.co.ke but which he has now changed to martinmaheli@gmail.com so as to hoodwink the court.
5. Further, the applicant states the same email appears in the respondent/applicant's letter head. The respondent avers annexures marked **MM "3" and MM "4"** to the supporting affidavit do not show that the applicant ever complained of not receiving the judgment on 8.7.2021.
6. The respondent maintain the applicant cannot blame anyone else except himself for the delay in lodging the appeal on time.
7. Turning to the prayer for stay of execution, it is averred the court only reinstated the lower court suit and there is nowhere the court ordered the respondent to perform any act that can be stayed.
8. Further, to stay the order of the appellate court would mean his suit stands struck off.
9. By consent parties agreed to and filed written submissions dated 11.11.2021 and 16.12.2021 respectively.
10. The applicant submits he has shown sufficient cause why he deserves leave to file the appeal out of time. He relies on ***Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 7 Others [2014] eKLR, Njagi Kanyunguti alias Karingi Kanyunguti & 4 Others –vs- David Njeru Njogu [1997] eKLR, Vishva Stone Suppliers Company Limited –vs- RSR Stone [2006] Limited [2020].***
11. The applicant states he did not file an appeal on time due to the delay in getting a certified copy of the judgment as a result of which by the time his lawyers obtained a copy, time had elapsed.
12. There is no doubt that the judgment was delivered on 8.7.2021 and sent via email to the disclosed emails for the parties' respective

advocates. I have no reason to doubt that the court sent the judgment simultaneously to the emails for the parties.

13. Be that as it may, the applicant also says he took time before instructing his advocates on record. The instant application was filed on 6.8.2021. My finding is that the delay was not inordinate and is sufficiently explained.

14. As regards stay of execution, a party seeking such orders under **Order 42 Rule 6** must demonstrate there would be substantial loss if the stay is not granted; that the application is made without delay; an offer of security is made and lastly that it is in the interest of justice to grant the orders sought.

15. The courts have held that it is not enough to allege a party is in occupation and or he shall suffer substantial loss. There must be demonstration of substantial loss and damage through cogent and tangible evidence. **See Butt –vs- Rent Restriction Tribunal [1079] eKLR.**

16. The affidavit in support of the application herein is sworn by the advocate representing the applicant. There is nowhere the applicant has stated he is in occupation and or is likely to suffer substantial loss if the stay is not granted. There is no demonstration of how the reinstatement of a suit would render the appeal nugatory. In any event, the applicant would have a chance to be heard on merits if the suit as reinstated was to be set down for hearing.

17. Courts have held that to grant a stay or not is a balancing act. In the instant case, the court merely allowed the appeal. There was nothing the court ordered in a nature of a positive order in favour of the respondent which if it was to be implemented, the subject land would be adversely affected. **See Western College of Arts & Applied Sciences –vs- EP Oranga & 3 Others [1976] eKLR, Kenya Commercial Bank Limited –vs- Tamarind Meadows Limited & 7 others [2016] eKLR.**

18. In the premises, I find the applicant has not met the threshold of granting stay of execution under **Order 42 Rule 6** and that it is not in interest of justice to grant any stay orders at this juncture.

19. Consequently, I allow prayer 3 of the application and dismiss the rest of the prayers. The appeal shall be filed within 14 days from the date hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 2ND DAY OF MARCH, 2022

In presence of:

Mwirigi for appellant – present

Appollo for respondent – present

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE