



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 51 OF 2019

SAMUEL THIONG'O JAMES.....1ST APPELLANT

SHADRACK KAMAU.....2ND APPELLANT

=VERSUS=

BENSON NDERITU KAGITI.....RESPONDENT

RULING

1. This Court [Gacheru J] rendered a judgment in this appeal on 8/10/2021. The import of the judgment is that the court found no merit in the appeal and dismissed /disallowed the appeal. Subsequently, on or about 2/2/2022, the appellants brought a notice of motion dated 17/12/2021, seeking orders of stay pending the hearing and determination of an intended appeal against the judgment. The said notice of motion dated 17/12/2021 is the subject of this ruling.
2. The application was supported by the affidavit of **John Muturi Njoroge** sworn on 17/12/2021. He deposed that judgment in this appeal was initially slated for 11/11/2021 but it was delivered on 8/10/2021 without his knowledge. On noticing that the matter was not listed on 11/11/2021, he made a follow up and discovered that the delivery date had been brought forward. He eventually got a copy of the judgment on 8/12/2021. He proceeded to file and serve a notice of appeal dated 15/12/2021, which he exhibited as exhibit number “JMN 2”.
3. Mr. Njoroge further deposed that the intended appeal stood good chances of success and would be rendered nugatory if stay orders were not granted. H added that the appellant stood to suffer substantial loss if the stay orders were declined.
4. The application was canvassed orally in the virtual court today by Ms Mwangi. Counsel reiterated the explanation outlined above. There was no response nor participation by the respondent.
5. I have considered the application. I have also considered the relevant legal framework and jurisprudence on the question falling for determination in the application. The single question to be answered in the application is whether the application has satisfied the criteria upon which this court exercises jurisdiction to grant orders of stay pending appeal.
6. Order 42 rule 6(2) of the Civil Procedure Rules requires that the applicant satisfies the court that substantial loss may result to him unless an order of stay of execution is granted. Secondly, the application for stay should be brought without unreasonable delay. Thirdly, the applicant is required to provide security for the due performance of the decree or order as may ultimately be binding on him.
7. The Court of Appeal in the case of *Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag)* reiterated the above criteria in the following words.

“...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.”
8. Besides the framework in Order 42 rule 6(2) a court exercising jurisdiction to grant an order of stay of execution pending appeal is expected to satisfy itself that in the circumstances of the application, appropriate steps have been taken to actualize the appeal and that a stay order can properly lie against the impugned orders. These additional considerations are necessary because jurisdiction to grant an order of stay of execution is discretionary one and is exercised only in deserving cases.
9. In the application under consideration, no positive orders were made in the impugned judgment. Put differently, there was no positive

order made on 8/10/2021 capable of being stayed. Our courts have umpteen times emphasized that orders of stay of execution pending appeal cannot issue where there are no positive orders to be stayed. Not too long ago, the Court of Appeal emphasized this principle in the case of *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] eKLR* in the following words:

“With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated 30th July 2020, merely dismissed the applicant’s case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay.”

10. Secondly, the impugned judgment was rendered on 8/10/2021. The present application is dated 17/12/2021 and was filed on or about 2/2/2022. Counsel for the applicants indicated that they learnt about the judgment on 11/11/2021. Given the above circumstances, the applicants were expected to demonstrate that appropriate steps, such as obtention of an order enlarging the time for lodging a notice of appeal, had been put in place. That evidence has not been tendered. All that the applicants exhibited is a notice of appeal dated 15/12/2021.

11. The court is, in the circumstances, not satisfied that the applicants have met the criteria upon which our courts exercise jurisdiction to grant orders of stay of execution pending appeal. The result is that the application dated 17/12/2021 is declined.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 8TH DAY OF MARCH 2022

B M EBOSO

JUDGE

Court Assistant: Lucy Muthoni