



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

KISUMU ELC MISC APPLICATION NO. E5 OF 2020

MATHEWS ONYANGO & 2 OTHERS.....APPLICANTS

VERSUS

HUMPHREY AORO.....RESPONDENT

RULING

Mathews Anyango, Lucas Youth and Thomas Awika hereinafter referred to as the applicants filed an application dated 16th October 2020 seeking orders that pending the hearing and determination of the appeal to be preferred, this Honourable Court be pleased to grant orders for stay of execution of the decree and judgment in **Tamu ELC No. 29 of 2018 Humphrey Aoro vs Adada Nyakititi (deceased), Matthews Onyango, Lucas Youth and Thomas Awaka** on such terms as deemed appropriate. Costs of this application be provided for.

The appeal is premised on the grounds that judgment in **Tamu ELC No. 29 of 2018 Humphrey Aoro vs Adada Nyakiti (deceased), Matthews Onyango Lucas and Thomas Awaka** was delivered in favour of the Respondent herein who was the Defendant in the lower court, with the effect of reducing the acreage of the property forming part of the deceased's estate the 1st Defendant in the lower Court. That the applicants would be greatly prejudiced if execution is not stayed and that the intended appeal would be rendered nugatory.

The Application is supported by an affidavit by Thomas Awika Adada in which he avers that there is currently no stay of execution in this matter. Further that the judgment if executed would result in intermeddling with the estate of a deceased person. He concluded by saying that the intended appeal had good prospects of appeal and that the application had been made timeously.

Vide a replying affidavit dated 5th November 2020 the Respondent averred that the application is against the principles of equitable remedies for the reason that there must be an end to litigation. He stated that the application had been brought with the view of perpetuating continued trespass on his piece of land. It was his opinion that as it stands there is no appeal pending to warrant the grant of the orders sought. They contended that the applicants have come to court too late in the day when the window for appeal has already lapsed. It was the Respondent's further contention that in the unlikely event that the application is allowed then the applicant should be ordered to deposit security for costs.

It is the Applicants' submission that the application was based on Order 42 Rule 6 and that the court had discretionary powers to determine the same. Counsel for the Respondent relied on the case of **Amal Hauliers Limited vs Abdulnasir Abukar Hassan [2017] Eklr** which gives guidance on how a court should exercise its discretion.

On the issue of the appeal being rendered nugatory counsel submitted that they had annexed a draft copy of the memorandum of appeal which raises pertinent issues with a high likelihood of success. They submitted that the judgment deprives them off their inheritance as the suit property belongs to their late father, and if not challenged on appeal then they will suffer grave injustice. In their submissions counsel for the applicants' touched on the issue of the Respondent not filing a response to the application and stated that the same is uncontroverted and therefore should be allowed as prayed. Counsel relied on Order 2 Rule 11 of the Civil Procedure Rules 2010 and the case of **Joseph Karanja Kangara v Gabriel Jepsang Chirchir & another**. And prayed that the application to be allowed as prayed.

The Respondent on his part only identified one issue for determination, which was whether the order of stay of execution should be granted.

Counsel for the respondent submitted that for an application to succeed the same must meet the threshold set by Order 42 Rule 6(2). He alluded to the case of **Butt vs Rent Restriction Tribunal (1982) KLR 417** on the power of the court to refuse stay of execution pending appeal, stating that the same is dependent on the special circumstances of each case. It was counsel for the Respondent's submission that the applicant will not suffer any substantial damage as the status quo has been maintained. Counsel concluded his submissions by stating that the Applicant is not deserving of the orders sought.

From the foregoing the main issue that comes to the fore is whether the Applicant is deserving of the orders sought. The applicant is basically seeking stay of execution pending hearing and determination of an intended appeal. In support of the intended appeal the applicant has annexed a draft memorandum of appeal. The main question is whether the orders sought can be granted in the absence of a substantive appeal. It is my view that the orders are only tenable in the event that the applicant seeks for extension of time to file the appeal.

In the present case the Applicant is seeking stay pending the hearing and determination of an intended appeal which is yet to be filed. Further the time within which the appeal is supposed to have been filed has since lapsed.

Section 79 G of the Civil Procedure provides for the time for filing appeals from the subordinate courts:

-

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.

From the evidence on record judgment in the lower court was delivered on 11/6/2020. This therefore means that as per the provisions of Section 79G the appeal was supposed to have been filed by 11/7/2020. In the event an appeal is to be filed after the thirty-day period then sufficient reason should be given. As it stands the Applicant is yet to file any appeal almost 10 months after delivery of judgment. They have equally not prayed for extension of time to file the appeal.

If the orders of stay are to be granted herein then the same will be in a vacuum as it is not clear when the appeal will be filed. Even then the appeal cannot be filed without extension of time as the same is long overdue.

The Applicant has not satisfactorily explained the reason why the appeal has not been filed. Counsel has alluded to an application for review which was concluded way back on the 13th October 2020. In any case it is trite law that an Appeal and an Application for review cannot be proffered at the same time.

In the case of *Mary Wambui Njuguna v William Ole Nabala & 9 others [2018] eKLR* the court held that

a party having chosen the avenue of review they had effectively abandoned the option of appeal.

In the above-mentioned case the court alluded to Order 42 Rule 2 of the Civil Procedure which provides that

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

The court then went ahead to state that;-

“We agree with the conclusion by the learned Judge that it was not open for the appellant to pursue an appeal and at the same time a review of the same orders. The appeal could only lie on the outcome of the application for review.”

On the same line the court in **Serephen Nyasani Menge v Rispah Onsase [2018] eKLR** was also of the opinion that where a party opts to apply for review such a party cannot after the review is rejected exercise the option to appeal against the same order he sought review of. The court went ahead to state that:-

“Order 45 rule 1(a) and (b) in addition to setting out the conditions that an applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party. Subrule (2) of Order 45 of the Civil Procedure Rules further makes the matter clearer. It provides: -

Order 45 (2):

A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.

In the circumstances of this case the Applicants have acknowledged that they applied for a review of the judgment which was allowed with respect to the 1st Defendant in the lower court. It is quite evident therefore that having failed to obtain favorable orders from the application for review then the Applicant is seeking a second bite of the cherry by filing an Appeal. For the above reason and also the reason that the appeal has not been filed on time the Application must fail and the same is dismissed with costs.

DATED AT KISUMU THIS 21st DAY OF MAY, 2021

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE