



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC APPLICATION NO 267 OF 2017

IN THE MATTER OF: ADVOCATES ACT

AND

IN THE MATTER OF: TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

BETWEEN

THOMAS K'BAHATI T/A

K/BAHATI & CO ADVOCATES.....ADVOCATE/RESPONDENT

VERSUS

JANENDRA RAICHAND SHAH.....CLIENT/APPLICANT

ARISING FROM HCCC CASE NO 423 OF 2001

BETWEEN

MISTRY V. NARAN MULJI.....PLAINTIFF

VERSUS

- 1. JANENDRA RAICHARND SHAH**
- 2. VIRCHAND MULJI MALDE**
- 3. RATIALA FHELA SAMAT**
- 4. PREMAC PROPERTIES LTD.....DEFENDANTS**

RULING

(Application for stay pending appeal; notice of appeal filed out of time cannot be a foundation for stay pending appeal; inordinate delay; application being filed 7 months after the ruling; applicant guilty of unreasonable delay; application dismissed)

1. What is before me is an application dated 5th October 2020 and filed on 6 October 2020 by the applicants in this cause who seek orders of stay of execution pending appeal of the ruling delivered on 25 February 2020 “ in Mombasa High Court Miscellaneous Civil Application No. 7 of 2017.” That ruling of 25 February 2020, allowed the Notice of Motion dated 3rd October 2018, which was an application by the advocate/respondent for judgment to be entered against the applicants/clients for the sum of Kshs. 1, 160,001/= as taxed by the taxing officer. In this application, the applicants state that they are aggrieved by the said ruling and have filed a Notice of Appeal as well as applying for certified copies of the proceedings. The applicant states that after court delivered the ruling, it granted a 30 day stay of execution “that is about to lapse”, and now seeks the court’s intervention for stay as there is an imminent threat of the respondent executing before the appeal is heard and determined.

2. The application is supported by the affidavit of Mr. Janendra Raichand Shah. He has annexed a Notice of Appeal dated 12th March 2020.

He has stated that upon delivery of the ruling on 25 February 2020, the court granted a 30 day stay “which period is about to lapse.” He avers that if the court does not issue a stay, the respondent will execute, rendering the intended appeal nugatory. He further pleads that he stands to suffer substantial loss if the respondent proceeds with execution and that the application has been made without unreasonable delay.

3. The application is opposed by the advocate/respondent vide a replying affidavit dated 19th November 2020 sworn by Thomas K’Bahati. He has contended inter alia that the application is defective, incompetent and ought to be dismissed. He deposes that other than the application referring to the wrong suit, the applicant has not satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules regarding stay pending appeal. He has pointed out that the 30 day stay that was granted during delivery of the Ruling lapsed on or about 26th March 2020, and this application has been brought six months later, making the applicant guilty of delay and indolence. Mr. K’Bahati concludes by stating that it is not enough for the applicants to make blanket allegations that they stand to suffer substantial loss without proof. It is his view that this application is only meant to cause delays in the closure of the matter and has asked that the application be dismissed with costs.

4. I directed the application to be disposed of by way of written submissions and I have taken note of the submissions filed by Mr. Kibara, learned counsel for the applicants, and Mr. K’Bahati himself.

5. Counsel for the applicants submitted that if the ruling is executed, the applicants stand to lose, as the respondent has not proved to court that he can refund the decretal sum in the event the appeal succeeds. He referred to the case *Kekeu Muunda vs. Josephine Mulinge Kiluu & another (2019) eKLR* and *Andrew Okoko vs Johnis Waweru Ngatia & Another (2018) eKLR*, to urge that the respondent has the burden to prove that he is in a position to refund the decretal sum in the event the appeal is successful. He thought that this burden has not been discharged. He further submitted that the application has been made without unreasonable delay, and that his clients are ready and willing to furnish any security that the court might deem reasonable.

6. On his part, Mr. K’Bahati more or less reiterated what he raised in his replying affidavit. He started by questioning whether the applicants have preferred any appeal as the notice of appeal filed, in his view, related to another case. On Order 42 Rule 6, counsel submitted that the requirements of sufficient cause, substantive loss, unreasonable delay and security are conjunctive and he referred to the case of *Equity Bank Ltd V Taiga Adams Company Ltd (2006) EKLR*. He argued that the applicant has failed to prove the four requirements to support his request for stay of execution. He submitted that it is for the applicants to prove substantial loss and not him. He also submitted at length on the delay and buttressed the same with various authorities. He concluded by submitting that this application is only meant to delay and create hardship, and keep him from the fruits of judgment.

7. I have considered the substance of the application before me. The application is for stay of execution pending appeal and is premised on Order 42, Rule 6 (2) of the Civil Procedure Rules which provides as follows:-

(2) 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.

8. I think also subrule (4) is material herein and it states as follows :-

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

9. There is an issue raised by Mr. K’Bahati that the Notice of Appeal is not competent as it is for a different matter. I have looked at the Notice of Appeal annexed to the supporting affidavit. It was filed on 20 March 2020 and it quotes the suit Miscellaneous Application No. 7 of 2017. There may be confusion on the case number, because although this file is actually Miscellaneous Application No. 267 of 2017, I see some documents referring to Miscellaneous Application No. 6 of 2017 and others Miscellaneous Application No. 7 of 2017. But to me, that is not what is critical. Even if we are to ignore the confusion in the case numbers, the Notice of Appeal is clearly out of time. The ruling was delivered on 25 February 2020. The Notice of Appeal was filed on 20 March 2020 way outside the 14 day period provided for in Rule 74 of the Court of Appeal Rules. I do not see how it can be said that the Notice of Appeal is competent for it is out of time. Since there is not on record a competent notice of appeal, there can be no basis upon which to issue a stay pending appeal, and on that ground alone, this application must fail.

10. Apart from the incompetent Notice of Appeal, it is apparent to me that the applicants are guilty of inordinate delay. The ruling herein was delivered on 25 February 2020. Upon delivery of the ruling, the applicants asked for a 30 day stay which they were given. No application for stay pending appeal was filed within those 30 days. Instead this application was filed on 6 October 2020, more than 7 months later. No explanation at all has been given for this delay in the supporting affidavit. This delay of more than 7 months is certainly inordinate and unexplained. This application would thus fail the test of unreasonable delay.

11. As was held in the case of *Equity Bank Limited vs Taiga Adams Company Limited*, all the tests in Order 42 Rule 6 must be met for one to be entitled to a stay of execution pending appeal. I have already pointed out that there is not on record a competent notice of appeal, and further, that in the circumstances herein, the delay is unreasonable. It is thus not necessary to consider the question of substantial loss and security.

12. For the above reasons, this application is hereby dismissed with costs.

13. Orders accordingly.

DATED AND DELIVERED THIS 20TH DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA