



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC MISC APPLICATION NO. 11 OF 2020

FAST LANE DEVELOPERS LIMITEDAPPLICANT

VERSUS

PETER GITAU NJUGUNARESPONDENT

RULING

By a Notice of Motion Application dated **24th February 2020**, bought under **Order 42 Rule 6** of the **Civil Procedure Rules**, Sections **1A,1B, 3A** and **79G** of **Civil Procedure Act** and **Article 159(2)** of the **Constitution**, the Applicant has sought for the following orders;

- 1. That the Applicant be and is hereby granted leave to Appeal out of time***
- 2. That orders of Stay of Execution of the Judgement delivered in Ruiru CMEL No.46 of 2019, be granted pending hearing and determination of the intended appeal***
- 3. Costs of the application be in the cause.***

The Application is supported by an affidavit of **DAVID NJOGU** who averred that being dissatisfied by the Judgment delivered on **16th January 2020**, by **Hon. C A Otieno-Omondi (SPM)** at **Ruiru**, he intends to appeal against the whole of the said judgment.

He further averred that he appointed another advocate on his behalf to file the **Appeal**, but the said Advocate failed to do so without informing him and he annexed a copy of the forwarding letter as **DN2**.

That this application has been made without undue delay and that a mistake of an advocate should not be visited upon a client. He undertook to pay any damages that may occur if the Decree is not executed, pending the hearing and determination of the intended appeal.

The application is opposed vide a Replying Affidavit dated **18th May 2020**, sworn by **PETER GITAU NJUGUNA**, who averred that the intended applicant has not given any instructions for filing of any Appeal and there is therefore no explanation for the delay. He further contended that the applicant has not demonstrated that it will suffer any loss if the application is not allowed and that it does not have an arguable appeal.

On **2nd September 2020**, the Court ordered Stay of Execution of the Judgment delivered in **Ruiru CMEL No.46 of 2019**, pending hearing and determination of this application.

Parties filed their respective written submissions to the instant Application dated **24th February 2020**. The applicant through the Law Firm of **D. NJOGU & CO. ADVOCATES**, filed its submission on **10th December 2020**, while the Respondent filed his submissions dated **12th October 2020**, through the Law Firm of **KANGETHE WAITERE & CO. ADVOCATES**.

The Court has carefully considered the instant Application, the pleadings in general and the rival submissions. The issues for determination are;

- 1. Whether the Applicant has achieved the threshold for grant of leave to file an Appeal out of time.***
- 2. Whether the Applicant has satisfied the Court to grant it Stay of Execution pending Appeal.***
- 3. Whether the draft Memorandum of Appeal is arguable***

1. Whether the Applicant has achieved the threshold for grant of leave to file an Appeal out of time.

This Court has Jurisdiction to allow an Applicant leave to file an Appeal out of time, but in doing so, the Court is to use its discretion and be satisfied that the Applicant has given sufficient reasons to warrant the grant of the said Leave. Section 79G of the Civil Procedure Act, provides that:-

“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 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.”

In the case of Nicholas Kiptoo Arap Korir Salat...Vs....The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR, the Court held that:-

“..... It is clear that the discretion to extend time is indeed unfettered.

The question that must then be answered is whether the Applicant has explained the reason for the delay to the satisfaction of this Court. The applicant avers that he appointed another advocate on his behalf to file the Appeal, but the said advocate failed to do so without informing the Applicant and it annexed a copy of the said forwarding as “DN2”.

The Court keenly notes that the Applicant did a letter dated **22nd January 2020**, to **MS R.M MBURU & ASSOCIATES** and instructed the said **Law Firm** to file an Appeal against the impeached Judgment. **The Applicant had attempted to follow up on the issue of the said Judgment or at the very least to instruct another Firm of Advocates to act. The said letter was made 5 days after delivery of the Judgement of the Lower Court.** The said correspondence bears evidence that service was effected upon **MS R.M MBURU & ASSOCIATES**. In the premises and upon further considering of the efforts taken by the Applicant, the Court finds the explanation of the applicant is reasonable. The Court therefore grants the Applicant leave to file an Appeal out of time.

2. Whether the Applicant has satisfied the Court to grant it Stay of Execution pending Appeal

The guiding principles for Stay of Execution pending appeal is guided by **Order 42 rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provides as follows:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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 other words, an applicant seeking stay of execution pending hearing and determination of an Appeal must demonstrate that substantial loss will result to it if **Stay** is not granted and that the application has been made without **unreasonable delay**. Platt Ag JA (as he then was) stated in Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal.

It is virtually impossible for such an application to succeed if an Applicant fails to demonstrate that he will suffer substantial loss, if stay is not granted. Further, the Applicant is required to give such security as the Court may order for the due performance of the decree.

The applicant must satisfy the court that it will suffer substantial loss. The Court had considered the Judgment delivered by trial Court and notes that prayer **(e)** of the Plaintiff’s Complaint was for a **Permanent Injunction** to restrain the Defendant/Applicant from interfering with **LR RUIRU EAST BLOCK 1/1481** and the same was issued. There was an agreement for sale dated **20th November 2008**, which needs to be considered by this Court, thus it is enough on the face of it that the Applicant may suffer substantial loss if stay is not granted. Having considered all factors herein, it is evident that justice will entail that the applicant be given a chance to be heard.

Further, as the Court also embarks in determination of this application, it will take into account that it is not the practice of the Courts to deprive a successful litigant of the fruits of his/her litigation. The Court will take into account that the purpose of stay of execution pending Appeal is to preserve the subject matter. See the case of Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), where the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered

nugatory".

The Applicant must satisfy the Court that the application was made without **unreasonable delay**. The Court noted that the **Memorandum of Appeal** was filed on **25th February 2020**, and an application for stay was filed on **the even date**. **The lower Court Judgment was delivered on 16th January 2020**. Therefore the Court finds that there was **no inordinate delay** in filing this Application.

Further, the Court finds that the purpose of **Stay pending Appeal** is to preserve the subject property and if the transfer documents to effect the transfer of **LR RUIRU EAST BLOCK 1/6329**, is allowed to be effected, then it would mean that the property will conclusively pass to the Respondent.

3. Whether the draft Memorandum of Appeal is Arguable

A look at the draft Memorandum of Appeal annexed to the Motion, the Court notes that the Appeal essentially seeks to challenge *inter alia*, the decision of the trial court to issue a **Permanent Injunction**, where there was a sale agreement dated **20th November 2008**, in favor of the Respondent, and that the trial Court overlooked some relevant factors in delivering its Judgment. Without going into the merits of the Appeal, the Court is satisfied that the intended Appeal raises arguable grounds which the Applicant ought to be given an opportunity to address on merit.

Therefore, the Court finds and holds that the Applicant has satisfactorily explained to Court why it should exercise its discretion and grant the Stay of Execution.

Having now carefully considered the instant **Notice of Motion Application** dated **24th February 2020**, the Court finds it **merited** and the same is allowed entirely in terms of prayer **no. 1 and 3** with costs being in the cause.

Further the Court directs the Appellant to file the **Substantive Appeal** and **Record of Appeal**, within the next **45 days** from the date hereof. Failure to do so, the Stay Orders will lapse automatically unless otherwise extended by the Order of this Court.

It is so ordered.

Dated, signed and Delivered at Thika this 13th day of May 2021.

L. GACHERU

JUDGE

13/5/2021

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Kinuthia holding brief for Mr. Njogu for the Applicant

M/s Kangethe for the Respondent

L. GACHERU

JUDGE

13/5/2021