



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

CONSTITUTIONAL PETITION NO. 1 OF 2012

IN THE MATTER OF ENVIRONMENTAL DAMAGE AND VIOLATION OF THE RIGHT TO CLEAN AND HEALTHY ENVIRONMENT

AND

IN THE MATTER OF A CONSTITUTIONAL PETITION UNDER ARTICLES 42 AND 70 OF THE CONSTITUTION OF KENYA

BETWEEN

MICHAEL KIBUL.....1ST PETITIONER

GEORGE OSUNDWA.....2ND PETITIONER

BALLET MURENGU.....3RD PETITIONER

(Suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County)

AND

IMPRESA COSTRUZIONI GIUSEPPE MALTAURO S.P.A.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY....3RD RESPONDENT

RULING

[1ST RESPONDENT'S NOTICE OF MOTION DATED 20TH MAY, 2019]

1. The 1st Respondent seeks for extension of time to file Notice of Appeal from the judgment and decree of the Court delivered on the 22nd February, 2019 extended and the Notice of Appeal filed on the 13th March, 2019 be deemed as properly filed from the date of making the order. The 1st Respondent also prays for stay of execution of the judgment and decree of this Court delivered on the 22nd February, 2019 pending the hearing and determination of the intended appeal. The application is based on the four (4) grounds on its face and supported by the affidavit sworn by **Sandro Spencer**, the Financial Controller, sworn on the 20th May, 2019. It is the 1st Respondent's case that it was aggrieved by the judgment of the Court and has an arguable appeal. That execution of the decree will cripple its operations. That the petitioners are persons of unknown means and may not refund the decretal sum if execution is done and the intended appeal is successful. That the delay of five days in filing the Notice of Appeal was an inadvertent error that should not be visited upon the 1st Respondent. That the 1st Respondent is ready, able and willing to deposit security as may be ordered by the Court to secure the decretal amount.

2. The application is opposed by the Petitioners through their grounds of opposition dated 29th July, 2019 and replying affidavit sworn by **George Osundwa**, the 2nd Petitioner, on the 15th November, 2019. It is the Petitioners' case that the application is frivolous, vexatious and an abuse of the process of the Court and should be struck out in *limine*. That the 1st Respondent has not demonstrated the conditions for grant of stay of execution as required under **Order 42 Rule 6(2) of Civil Procedure Rules**. That this application was not timeously filed as it was made three months after delivery of judgment, and no explanation has been tendered why the Notice of Appeal was filed outside the

14 days provided under **Rule 59 of the Appellate Jurisdiction Act**. That the 1st Respondent has not shown that it has an arguable appeal, and allowing the application will prejudice the Petitioners who have waited for years to enjoy the fruits of their judgment.

3. The learned Counsel for the 1st Respondent and the Petitioners filed their written submissions dated 4th August, 2020 and 29th January, 2021 respectively. The issues for the Court's determinations are as follows;

(a) Whether the 1st Respondent has made out a reasonable case for extension of time to file the Notice of Appeal, and whether the one filed should be deemed as properly filed.

(b) Whether the 1st Respondent has made a case for stay of execution order pending appeal to be issued.

(c) Who pays the costs?

4. The Court has considered the grounds on the application, affidavit evidence by both sides, grounds of opposition, written submissions by the learned Counsel and come to the following conclusions;

(a) That the record confirms that judgment in this matter was delivered on the 22nd February, 2019 and the Notice of Appeal by the 1st Respondent dated 7th March, 2019 was filed on the 13th March, 2019, obviously outside the 14 days period provided by the law. That this application dated 20th May, 2019 was filed on the 22nd May, 2019 which was after a period of three (3) months from the date the judgment was delivered.

(b) That it is not contested that the Notice of Appeal dated 7th March, 2019 and filed on the 13th March, 2019 was filed five (5) days outside the 14 days' period prescribed. That the period of five (5) days delay is not inordinate in the view of the court. That in the case of *Leo Sila Mutiso Vs Hellen Wangari Mwangi [1999] 2 E.A. 231*, the Court set out the parameters that need to be considered as follows;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are; first the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and finally, the degree of prejudice to the respondent if the application is granted.”

That the superior Courts have more or less restated similar parameters in many decisions including *Fakir Mohammed Vs Joseph Mugambi & 2 Others [2005] eKLR*, *Muringa Company Ltd Vs Archdiocese of Nairobi Registered Trustees Civil Application No. 190 of 2019* and *Andrew Kiplagat Chemaringo Vs Paul Kipkorir Kibet [2018] eKLR*. That as Counsel for the 1st Respondent has taken responsibility for the delay of five (5) days in filing the Notice of Appeal from the onset, and in view of the decision in *Owino Ger Vs Marmanet Forest Co-operative Credit Society Ltd [1987] eKLR* and *CFC Stanbic Ltd Vs John Maina Githaiga & Another [2013] eKLR*, it is the Court's view that it would be unjust and unfair to withhold the exercise of discretion in favour of the 1st Respondent as the delay in this matter was excusable.

(c) That the right of appeal is a right guaranteed to every party and the Petitioners shall not be prejudiced by the 1st Respondent exercising that right in accordance with the law. That as to whether the 1st Respondent has an arguable appeal, that is a matter to be determined by the Court of Appeal. That in the case of *Athuman Nusuru Juma Vs Afwa Mohamed Ramadhan C. A. No. 227 of 2015*, the Court of Appeal held that;

“This court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single Judge. That is why in virtually all its decisions on the consideration upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

(d) That **Order 42 Rule 6 of the Civil Procedure Rules** is the provision of the law guiding stay of execution applications pending determination of appeal. That a party seeking for a stay order under that provision is required to satisfy the Court that substantial loss may result unless the order is granted; that there has been no unreasonable delay in making the application and provide security for the due performance of the decree. That these requirements have been dealt with in many superior courts' decisions among them the following; *Masisi Mwita Vs Damaris Wanjiku Njeri [2016] eKLR*, *Stephen Wanjohi Vs Central Glass Industries Ltd – Nairobi Hccc No. 6726 of 1991*, *Mukuma Vs Abuoga (1988) KLR 645*, *Kenya Shell Ltd Vs Kibiru (1986) KLR 410* and *Machira t/a Machira & Company Advocates vs East African Standard (No. 2) (2002) KLR 63*. That it was the responsibility of the 1st Respondent to show the damages that it would suffer if the order for stay of execution is not granted. That if stay is granted, it would mean the parties remaining in the obtaining status quo that was before the date of delivery of the judgment. That would have the effect of denying the Petitioners who are the successful litigants the fruits of their judgment which should not be allowed to happen unless the 1st Respondent presents to the Court sufficient cause.

(e) That the claim by the 1st Respondent that it would suffer substantial loss through crippling of its operations, unless the stay order is granted, has not been particularized and established. That the award in the judgment of 22nd February, 2019 is a money award that can be determined and or ascertained. That the Petitioners have indicated that they are able to refund. That as the 1st Respondent has not shown that the Petitioners are persons of straw, the Court finds that the 1st Respondent has failed to establish that it would suffer substantial loss unless the order is granted. That in the case of *Stephen Wanjohi Vs Central Glass Industries Ltd (supra)*, the

Court held that the financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

(f) That though the Court found the application for extension of time to file the Notice of Appeal was filed without unreasonable delay, on the basis of the explanations tendered, the 1st Respondent has not attempted to explain the three **(3)** months delay in seeking for stay of execution. The Court therefore finds the 1st Respondent unreasonably delayed in seeking for the order of stay of execution.

(g) That although the 1st Respondent has expressed its willingness to furnish security for due execution of the decree if the order of stay of execution is granted, the court finds in view of the finding that there is nothing to show that it would suffer substantial loss and there was unreasonable delay in filing the application for stay, its readiness to provide security will be of no use under the circumstances. That the Court therefore do not find merit in the prayer for stay of execution.

(h) That as the application was occasioned by the delay in filing the Notice of Appeal, the 1st Respondent will pay the Petitioners the costs of the application.

5. That in view of the finding above, the 1st Respondent's Notice of Motion dated the 20th May, 2019 partially succeeds and the following orders are granted;

(a) That the time for filing a Notice of Appeal from the judgment and decree of this court delivered on the 22nd February, 2019 is hereby extended, and the Notice of Appeal dated the 7th March, 2019 and filed on the 13th March, 2019 deemed properly filed.

(b) That the 1st Respondent to pay the Petitioners' costs of the application.

DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 5TH DAY OF MAY, 2021

S. M. KIBUNJA

JUDGE

In the presence of:

Petitioners: Absent.

Respondents: Absent.

Counsel: Mr. Kiprop for Mwangi for Petitioners and Mr. Gatu for the 1st Respondent.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.