**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIFRONMENT COURT AT KISUMU**

**ELC O.S NO 13 OF 2019**

**HELLEN AUMA OJUOK.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MARY OMOLLO ODONGO.....1ST DEFENDANT/APPLICANT**

**APOLLO ODHIAMBO GUYA.....2ND DEFENDANT/APPLICANT**

**RULING**

**MARY OMOLLO ODONGO** and **APOLLO ODHIAMBO GUYA** hereinafter referred to as the Applicants have filed an application dated and filed on 18/08/20 under certificate of urgency premised on Sections 1A, 1B and 63(c) and (e) of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and prays for orders that pending the hearing and determination of the intended appeal, there be a stay of execution of the judgement and orders issued on the 13th March 2020 by the Honourable Justice A.O Ombwayo. That the Honourable Court be pleased to issue any other order for purposes of maintaining the status quo. That the costs of this application be in the cause.

The application is premised on fact and grounds that on 13/03/20, this Honourable Court delivered judgement in this matter against the applicants herein ordering that the title in respect of title number Kisumu/Karateng/1653 be transferred in the name of HELLEN AUMA OJUOK, the Plaintiff/Respondent herein. That the applicants are dissatisfied with the said judgement and have lodged a notice of appeal on 02/07/20 against the entire judgement and decree. The respondent is desirous of executing the judgement and decree of the environment and land court and in the event the same is executed, the applicants will suffer irreparable loss and damage and the appeal will be rendered nugatory. The applicants have an arguable appeal with overwhelming chances of success. The Respondent shall suffer no prejudice if the stay is granted whereas the applicants stand to suffer prejudice not compensable by award of damages in that the applicants shall lose their home they have known and lived in for a decade. The application is judicious and well timed and should be allowed in the interests of justice.

The respondent has opposed the application vide a replying affidavit dated on 09/12/21 and filed on 11/12/20. The application is opposed on the following grounds; namely that If the applicants desired to appeal the judgement, they ought to have filed the Notice of Appeal to the Court of Appeal and within 14 days of the delivery of judgement and ought to have requested for proceedings in this Court on record time yet they only did so on 08/07/20, 3 months after the judgement.

That the Applicants Notice of Appeal was filed on 02/07/20 which is 3 months and 19 days out of time and without leave of the Court of Appeal for extension of time. There is therefore neither a valid notice of appeal or any appeal to the Court of Appeal which can found a basis for an order of stay of execution pending appeal.

That the defendants/applicants shall suffer no prejudice if stay of execution is not granted as their homestead is not located on the said parcel nor have they been utilizing the farm in any way. On the other hand, the respondent stands to suffer prejudice not compensable by any amount as she will be denied peaceful enjoyment of her only source of livelihood as she depends fully on the parcel for subsistent farming and her general subsistence. The applicants have not demonstrated that there is any need to preserve the subject matter through an order of stay of execution, failure to which the appeal will be rendered nugatory and in effect cause injustice to them.

The application has been made in inordinate delay with no explanation to justify the same. The defendant has not offered to pay any security for due performance of the decree within reasonable time. The applicant has not satisfied the requirements necessary for grant of stay. Applicant had 60 days from

The applicant is required to satisfy the conditions set out under *Order 42 Rule 6(a) and (b) of the Civil Procedure Rules* before he can be granted orders of stay and taxation of bill of costs, which threshold the applicants have failed to satisfy. On this, the petitioner relied on the cases of ***Carter & Sons Ltd v Deposit Protection Fund Board & 2 Others –Civil Appeal No. 291 of 1997 and Butt v Rent Restriction Tribunal [1982] KLR 417***

The 2nd respondent has not alleged that that should it pay the costs as would be taxed, then the money would not be refunded in case the intended appeal would eventually succeed.

The 2nd Respondent has not described what hardship or loss it would suffer if it were to be forced to settle costs before the intended appeal is heard and has therefore not proved the substantial loss it stands to suffer if the application for stay is denied whereas it has recourse to file a reference to the High Court once the taxation is determined. On this, the petitioner relied on the cases of ***James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR.***

The application has been premised on a misapprehension of the law by citing order 22 Rule 22 of the Civil Procedure rules as the basis for seeking stay whereas the said law is not applicable in this case since no decree has been sent to this Court for execution. The application lacks merit for not disclosing any justifiable cause to stop or stay taxation of the party and party bill of costs.

The applicant was granted leave by Court on 27/01/21 to file a further affidavit which was filed on 06/03/21. The only new averment in the further affidavit is that the applicant did not file the notice of appeal on time due to the closure of the court registry for several months and the inconvenience caused by the corona virus pandemic, a fact the plaintiff/respondent is well aware of.

That the notice of appeal was filed immediately the registries were opened and that the applicants' advocate filed an application dated 17th December 2020 (annexed as MOO2) for leave to appeal out of time and seeking that the notice of appeal be deemed to be filed on time. The parties had on 27/01/21 agreed to proceed by way of written submissions.

The applicants filed their submissions on 03/02/21. The appellant relied on the cases of ***Butt v Rent Restriction Tribunal [1982] KLR 417*** on guidance as to how the Court should exercise discretion in granting stay of execution orders.

a) That the application has been made without undue delay as judgement was delivered on 13th March 2020 and application made on 18/08/20 whereas a copy of the typed proceedings was requested for vide the letter dated 2nd July 2020.

b) That the appellant has an arguable appeal against the said judgement with very good chances of success wherein the intended grounds of appeal include the fact that essential elements of adverse possession were not proved and the Judge also failed to appreciate the totality of the evidence before him.

c) The applicant cited the case of ***James Wangalwa & Another v Agnes Naliaka Cheseto (2012) eKLR*** where the Court had emphasized on the centrality of substantial loss and stated that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. It is the applicants' submission that the effect of execution will be to dispossess the applicants of their suit property which is their only source of income.

d) It is the applicants' submission that the respondent failed to substantiate their averments that the Defendants' application was an abuse of the due process of the law and that it was not sufficient to merely allege the same and relied on the case of ***Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR*** . It is the applicants' submission that the application is neither scandalous, frivolous nor vexatious and is also does not amount to abuse of the Court process, that the same is merited an ought to be heard and determined on merit.

The respondent filed her submissions on 26/03/21 whose gravamen is that despite the inherent powers of the Court under Section 3A of the Civil Procedure Act, it would amount to an injustice to deny the Respondent an opportunity to enjoy the rewards of her judgement especially where there are no good grounds shown by the applicant. On this, the respondent relied on the case of ***Machira T/A Machira & Co. Advocates vs East African Standard (No.2) [2002] KLR 63*** and further stated that there are no reasonable explanations that warrant the suspension of the respondent from proceeding with execution.

With regards to the provisions of Order 42 Rule 6(2) on conditions to be satisfied before stay can be granted, it is the Respondents' submission that the application was filed after inordinate delay and no good reasons have been provided for such delay and that there is a huge gap of about 5 months between the date of delivery of judgement on 13/03/20 and filing of the application on 18/08/20.

The Notice of appeal was filed 3 months and 19 days out of time contrary to the mandatory provisions of Rule 75 which places a duty on the intended appellant to file a notice of appeal within 14 days from the date of judgement. The applicants have also not demonstrated that they sought leave to file the notice out of time and as such the applicants cannot say that there is an intended appeal at the Court of Appeal.

That Article 159 of the Constitution is clear that justice shall be administered without undue delay and that the inordinate delay by the applicants disentitles them the discretion of the Court. In this the respondent relied on the cases of ***ET Monks & Company Limited v Evans & 3 Others [1974] eKLR*** and ***Dickson Miriti Kamonde v KCB Ltd [2006] eKLR.***

That the applicants have not attached any evidence in the form of photographs or survey reports to show that their homestead is established on the suit property and as such, there is no proof of irreparable loss and damage to warrant stay of execution. The Respondent relied on the case of ***Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR*** where the Court stated that it is not enough to merely put forward assertions of substantial loss, and there must be empirical or documentary evidence to support such contention. For the above reasons, it is the Respondent's submission that the application should not be allowed,

In this matter, the main issue for determination is whether the applicant has met the conditions required for the grant of stay pending appeal.

***Order 42 Rule 6(2)*** of the Civil Procedure Rules provides for the conditions to be met/satisfied by the applicant before an order for stay pending appeal can be granted. It provides;

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.

The said conditions were discussed by the Court of Appeal in the case of ***Butt v Rent Restriction Tribunal [1982] KLR 417*** (quoted in the case of ***Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR*** and also relied on by the applicant in their submissions) where the Court gave guidance on how the Court should exercise its discretion in deciding whether or not to grant stay pending appeal. The court held that:

***1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***

***3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.***

***4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal***

***5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.***

The judgement subject of this application was delivered on 13/03/20 and the application was filed on 18/08/20, about 5 months after the delivery of the said judgment. The application was also filed about one and half months after the filing of the notice of appeal on 02/07/20. It is my view that the application ought to be filed at least around the same time the notice of appeal was filed which would be around 4 months and 1 week after the delivery of the judgement. This would however still amount to a delay of about 4 months and 1 week.

Though the applicant has not given any reasons for the delay, the applicant has alluded at paragraph 5 of their further affidavit sworn on 31st March 2021 that there was closure of the Court registries for several months due to the covid-19 pandemic.

I have noted that the judgement herein was delivered on 13/03/2020 whereas a declaration restricting Court operations due to the worldwide Covid-19 pandemic was made by the Chief Justice on 15/03/20, two days later. It is my belief that this probably contributed to the applicant's delay in filing the notice of appeal and the application. The Court in ***Kenya Power & Lighting Company Ltd v Rose Anyango & another [2020] eKLR*** allowed an application to file an appeal out of time on the basis that the 30 days' period within which the appeal ought to have been filed fell in the Covid 19 pandemic situation. The Court noted that the downscaling of court services owing to Covid 19 pandemic threw all persons in a spin of uncertainty as to how services were to be rendered. In the circumstances, I find that the delay is excusable.

The applicant has at paragraph 8 of the supporting affidavit and in their submissions that if stay is not granted, they stand to suffer irreparable loss in that they will be dispossessed of their suit property which is their only source of income and that their appeal will be rendered nugatory. The respondent on the other hand has argued that the applicants have not attached any evidence in the form of photographs or survey reports to show that their homestead is established on the suit property and as such, there is no proof of irreparable loss and damage to warrant stay of execution. On the issue of appeal, it is the respondent's case that there is no valid appeal as the notice of appeal was filed out of time and without leave of Court.

The centrality of substantial loss was discussed in the case of ***James Wangalwa & Another V Agnes Naliaka Cheseto[2012]eKLR*** in the following terms;

**The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus: "…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."**

This court agrees with the Respondent that there is no evidence by the applicants to show that the suit property forms part of their homestead. Further, ths Court found that the Respondent has been in occupation of the Suit property for 47 years, since the year 1973. I therefore don't think that proceeding with the execution will affect the applicants in any way since they have not been in occupation of the suit property. The applicants have also not averred that if they pay the applicant the costs then they be unable to recover from the respondent in the event the appeal succeeds.

The Court in the case of ***James Wangalwa(supra)*** indicated that;

> **'a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6of the CPR only on the chances of the success of the appeal.'**

My understanding of the above is that it calls for this Court to examine whether the applicants' intended appeal is frivolous or one that is arguable. In of the case of ***Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR*****,** the Court in finding that the applicant had an arguable appeal stated that:

> **"…It is important to point out that an arguable appeal is not one that will necessarily succeed but one which raises triable issues'**

The Court is not able to evaluate whether the appeal is arguable or not as the applicant has not attached a memorandum of appeal or a draft thereof to the application. The Court does not therefore know the grounds upon which the applicant intends to appeal against the said ruling. Further and as submitted by the respondent, the applicants' notice of appeal was not lodged within the statutory timelines provided by ***Rules 74 and 75 of the of the Court of Appeal Rules, 2010*** which require that a notice of appeal be filed within fourteen days after the date of the decision against which it is desired to appeal.

The judgement subject matter of this application was delivered on 13/03/20. The notice of appeal is filed on 02/07/20. It has been filed about 3 months and 2 weeks from the date of judgement. It is my view that the delay is inordinate. The delay has not been denied by the applicant who deposed in their further affidavit that the same was caused by the closure of the Court registry for several months due to the Covid-19 Pandemic. It is my view that this would have formed grounds for an application for leave to file the appeal out of time.

The applicant further deposed at paragraph 7 of the further affidavit that that they filed an application dated 17/12/2020 for leave to appeal out of time and to have the said notice of appeal be deemed as filed on time. I have not seen the alleged attachment of the application marked 'M002' to the further affidavit. Further, the applicant has not indicated to the Court and/or annexed an Order to the effect that the application was allowed. It also beats logic that the applicant did not allude to this very crucial allegation that goes to the core of the appeal in their supporting affidavit and had to wait for the respondent to bring it up for them to respond. In the circumstances, I do find that the applicants have not demonstrated that leave was granted to file the notice of appeal out of time. The effect of this is essentially that there is no valid appeal upon which to grant stay pending appeal as sought by the applicants. Further, the Applicants have not offered or proposed any security for the due performance of the decree arising out of the judgement of the Court. The upshot of the above is that the application lacks merit and is dismissed with costs to the respondent.

**DATED AT KISUMU THIS 3rd 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**