



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**CHUKA ELC CIVIL APPEAL CASE NO. 10 OF 2017**

**FORMERLY MERU ELC CIVIL APPEAL CASE NO. 6 OF 2014**

**VIRGINIA MUCHANDI MUTHENGI.....APPELLANT**

**VERSUS**

**ELISHA K. NJAGI ..... RESPONDENT**

**RULING**

1. This application states that it has been brought to court under Order 12 Rule 7 and Order 42 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act.

2. The application seeks the following orders:

- a) **THAT** this Application ought to be certified urgent and service thereof be dispensed with at the first instance.
- b) **THAT** this Honourable court be pleased to order that this Application be heard and determined on priority to any other Application hereof.
- c) **THAT** this Honourable court be pleased to grant a **stay of execution** for costs pending the hearing and determination of this Application.
- d) **THAT** this Honourable court be pleased to set aside its orders of 16<sup>th</sup> March, 2017 and reinstate the Appellant's Appeal dated 3<sup>rd</sup> March, 2014 herein.
- e) **THAT** this Honourable court be pleased to give further directions that it deems fit to grant hereof.
- f) **THAT** the costs of this application be in the cause.

3. The application has the following grounds:-

- 1) **THAT** this Application is urgent because the Respondent has applied to have the Applicant committed to civil jail any time from tomorrow for failure to pay a sum of **Kshs. 120,350/=** being costs of the Appeal hereof.
- 2) **THAT** this Appeal was dismissed with costs for want of prosecution on 16<sup>th</sup> March, 2017 by **Hon. Justice P.M. Njoroge**.
- 3) **THAT** the Applicant's current Advocate, **Mr. Henry Kurauka** and who has just been instructed hereof has confirmed that the Appeal was dismissed for want of prosecution on 16<sup>th</sup> March, 2017.
- 4) **THAT** the Applicant's Application was not heard on merits. It was dismissed for want of prosecution. The Applicant is entitled to a fair and just hearing hereof.
- 5) **THAT** the Applicant's had instructed the firm of **M/S Kevin Nyenyire & Company Advocates** to represent her in this Appeal but the said Advocates failed to update and keep her informed of the progress of this Appeal until it was dismissed. The Applicant did not fail to attend Court or take the necessary actions because she did not know the status of her Appeal and she was not given

any notice to appear in Court thereof.

6) **THAT** the error, mistake and or oversight by the former Appellant's advocate, **M/S Kevin Nyenyire & Company Advocates** is excusable and ought not to be visited upon innocent litigant hereof.

7) **THAT** the applicant's case falls squarely in the rule in **PYTHON WAWERU MAINA ~VS~ THUKU MUGIRA (1982-1988) 1 KAR, 171.**

8) **THAT** the Applicant's Appeal has merits. The said Appeal is arguable and has overwhelming chances of success.

9) **THAT** the applicant is elderly and sick. Any action to commit her to civil jail will greatly prejudice her.

10) **THAT** the Respondent will not suffer prejudice if this application is allowed.

11) **THAT** unless this application is immediately heard and determined, the applicant will be committed to civil jail, lose my (sic) right to appeal and will stand to suffer irreparable loss and damage.

4. The court notes that there is some variance between the hard copy of the application filed in court and the soft copy sent to court via e-mail. The court has used the soft-copy version. The variance has not changed in a material way the contents of the application.

5. The application is supported by the affidavit of advocate Henry Kurauka, the applicant's advocate which states as follows:

**I Henry Kurauka Tel: 0740198072** Email:wakilikurauka@gmail.com and of P. O. Box 17586-00100, Nairobi in the Republic of Kenya do make oath and state as follows: \_

1. I am an adult male of sound mind and I am the advocate of the Applicant/Appellant who duly authorized me to swear this affidavit herein.

2. This application is urgent because the Respondent has applied to have the Applicant committed to civil jail any time for failure to pay a sum of Kshs.120,350/= being costs of the Appeal and after the appeal was dismissed hereof.

3. The Applicant seeks for stay in the form of orders for status quo to be maintained be granted pending the said appeal hereof.

4. This appeal was dismissed with costs for want of prosecution on 16<sup>th</sup> March, 2017 by Hon. Justice Dr. P. M. Njoroge.

5. The Applicant's application dated 12<sup>th</sup> October, 2020, seeking to have the dismissed appeal reinstated was dismissed with costs on 24<sup>th</sup> February, 2021 by Hon. Justice Dr. P. M. Njoroge.

6. The Applicant's appeal is arguable and has overwhelming chances of success.

7. The Applicant has a right of appeal hereof. The said decision and decree is the subject matter of this appeal.

8. The Applicant is entitled to appeal as a matter of right pursuant to the Civil Procedure Act, Civil Procedure Rules and Article 165 (2)(e) of the Constitution.

9. The Applicant has lodged a Notice of Appeal against the whole of the said Ruling within the stipulated time of 14 days from the date of the said judgment.

10. The Applicant is yet to obtain certified copies of the proceedings, ruling, and order hereof to enable preparation of the record of appeal hereof.

11. Unless this application is urgently heard and determined the Respondent evict the applicant and her family thus rendering them to suffer irreparable loss and damage if she is committed to civil jail.

12. That what is deponed to herein above is true to the best of my knowledge, information and belief.

6. Having failed to receive the applicant's submissions, the respondent nevertheless filed written submissions. They state as follows:

#### **RESPONDENT'S SUBMISSIONS ON THE APPLICATION DATED 4/3/2021**

#### **BACKGROUND**

The applicant moved this court by a Notice of Motion dated 4/3/2021, principally, seeking order of stay of execution for costs pending the hearing and determination of the intended appeal. It is expressed to be brought under Order 12 Rule 7 and Order 42 of the Civil Procedure Rule and Sections 3 & 3A of the Civil Procedure Act. The grounds in support of the application are set out in the body of the application and the supporting affidavit of counsel for the applicant. The respondent opposes the application through the replying affidavit dated 1/4/2021 and filed in court on the 9/4/2021.

## ANALYSIS AND LEGAL PRINCIPLES APPLICABLE

We submit that the application herein is incurably defective, misconceived and untenable and should be unfair to grant. The application is incurably defective since it is brought under the wrong provisions of law. The application is brought under Order 12 Rule 7 of the Civil Procedure Rules which provides;

***Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just***

The provisions of Order 12 Rule 7 relates to “Setting aside judgement or dismissal order” and not stay of execution pending an intended appeal. We submit that Order 12 Rule 7 is irrelevant in the present application since the application seeks stay of execution pending an intended appeal. It does not seek setting aside of the dismissal order herein. This application, having been brought under the wrong provisions of the law is incurably defective and it is only just that the same be dismissed with costs to the respondent

It is our humble view and we so submit that the application is misconceived and untenable since the orders sought therein cannot be granted. The applicant only seeks stay of execution for costs. It is trite law that there cannot be stay for taxed costs. In so submitting, we walk a well beaten path as affirmed in the case of *Ausilio Mungatia v Japhet Mburugu [2015] eKLR* where the court relied on the Court of Appeal decision in *Francis Kabaa v Nancy Wambui & another [1996] eKLR*

***“The application according to the notice of motion is to stay the order of Amin, J. in which he dismissed the applicant’s suit then before him. Before us the applicant says that what he wants is a stay of an order that he should pay costs. But this is not really what the order of Amin, J. was all about. In any case, even if that were so, the appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs. The appellant has also not given any cogent reason why he should be granted stay. In all the circumstances, the order that commends itself to us is that the application be refused and it is hereby so ordered. The applicant will pay the costs of this application.”***

The above sentiments relate to the case under consideration herein. It is clear that the applicant seeks to stay execution of costs taxed. The orders sought cannot be granted and the application must fail.

Be that as it may, we submit that even if the court was minded to consider the question of stay of execution, the applicant has miserably failed to satisfy the court on the required principles. Order 42 rule 6 donates power to the court to issue orders of stay of execution of judgment. However, for a party to be successful in getting an order for stay of execution, certain conditions must be met.

Order 42 (6) (2), provides

***“No order of 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 unnecessary delay, and***

***(b) Such security as the court order for the due performance of such decree or order as may ultimately be binding on her has been given by the applicant.”***

### On Substantial Loss

The applicant must satisfy the court that a denial of the order for stay, will result in substantial loss. The court can only be so satisfied by the applicant if sufficient evidence is placed before it by the applicant to show what substantial loss shall be suffered. At paragraph 11 of the affidavit sworn by counsel for the applicant, it is only stated that the respondent will evict the applicant and her family thus rendering them to suffer irreparable loss and damage if she is committed to civil jail. The application herein was brought upon the respondent seeking to commit the applicant to civil jail for failure to pay costs. The issue of eviction therefore is unfounded. There is no relationship between committal to civil jail and the alleged eviction. It should be noted, your Lordship, the applicant only seeks stay of execution for costs and any intended eviction, which is denied, would not be affected by an order for stay of execution for costs. Since the applicant only seeks an order for stay of execution for cost, it is our humble view and we so submit, that the allegation that eviction shall render the applicant and her family to suffer irreparable loss and damage is unfounded. The respondent in his replying affidavit explained that the judgement of the trial court was fully executed and the question of issue of eviction is misplaced.

We submit that the applicant has not demonstrated that a denial of the order of stay of execution for costs will result in substantial loss.

In the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR*, the court observed

***“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.”***

We are of the view that a successful litigant must not be denied the fruit as a his judgment must be on just term and tightly secured.

This appeal is against the ruling of the court dismissing an application for setting aside a dismissal order and reinstatement of the appeal for

hearing and determination on merit. The said application was dismissed with costs to the respondent. The applicant herein does not seek stay of execution for costs in the application that is subject of the appeal, but rather in the initial ruling of the court dismissing the appeal for want of prosecution.

The applicant has the onus to prove, by evidence that she stands to suffer substantial loss. From the foregoing and in consideration of the averments of the applicant in the application, the applicant has not discharged the legal burden placed upon her by the court. The application must fail on this ground.

### **On Delay in Filing the Application**

The ruling of the court was delivered on the 30/11/2017 dismissing the applicant's appeal for want of prosecution with costs to the respondent. The ruling dismissing the applicant's application for reinstatement of the appeal was delivered on 24/2/2021 in the presence of both counsels for the applicant and the respondent. The application under consideration was filed on the 8/3/2021 three years after the ruling whose orders for stay are sought and two weeks after the ruling dismissing the application for reinstatement of the appeal. The applicant has not offered any explanation for the long delay in filing the application. No attempt has been made by the applicant to explain the delay. Considering that an order for stay is discretionary, the court must be satisfied that the applicant acted timeously in filing the application. This can only be so, when there is an explanation by the applicant. In the case **Growth Africa (K) Limited v Charles Muange Milu (2018) eKLR**, the court in considering whether to exercise his discretion in favour of an applicant explained;

***“The prayer sought by the Applicants’ is a discretionary one and the Applicants’ were under obligation to give satisfactory explanation for failure to lodge appeal in time. It is for the person seeking the favourable exercise of the discretion of the court to place such material as well as adequately inform the court in the exercise of such discretion...I find the Applicants have not satisfied this court that they have a good and sufficient reason for failing to file the appeal within time...In view of the inordinate delay in bringing the application and coupled by lack of sufficient explanation for the said delay, I find that there is no just cause to warrant this court to exercise its discretion in favour of the Applicants. Consequently the Applicant’s Application dated 16/11/2017 is ordered dismissed with costs to the Respondent.*”**

There was inordinate delay in filing this application which has not been explained and we urge you to find that the application also fails on this ground.

### **On Security**

Order 42 of the Civil Procedure Rules, requires that the applicant provides security for due performance of the decree. The applicant has not offered any security for the due performance of the order for payment of costs or indicated her readiness to offer security or abide by the conditions of the court as required in law. This was well articulated in the case of **John Mwangi Ndiritu v Joseph Ndiritu Wamathai (2016) eKLR**, where the court held;

***“Apart from proof of substantial loss the applicant is enjoined to provide security.[12] The applicant has not offered any security at all...However, the offer for security must come from the applicant as a price for stay...In the above cited case of Equity Bank Ltd vs Taiga Adams Company Ltd[15]it was held that:-*”**

***“.....of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought.....let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...”***

***...the applicant has correctly listed the conditions for granting applications of this nature among them furnishing security, yet there is no offer of security by the applicant either in the grounds or in the supporting affidavit...The upshot is that the application before me has no merits. I hereby dismiss it with costs to the Respondent.”***

The applicant has not offered any security for the payment of costs to the respondent in the event that her intended appeal does not succeed. The nature and the extent of the security offered by the applicant must be fully disclosed.

The requirement for security is designed to ensure that the respondent does not carry a barren judgment after the appeal is concluded. It is intended to safeguard the rights of the respondent who is a judgment holder. In the absence of any such security, we urge the court to find that the applicant has also failed on this ground.

### **CONCLUSION**

Your Lordship, we have established that the applicant has not the conditions laid down in law for grant of orders of stay of execution. She has not demonstrated that she stands to suffer substantial loss. There was also a delay in filing this application, which delay was not explained. The applicant has also not offered any security for the due payment of the costs in the event that her intended appeal does not succeed.

The respondent has in his replying affidavit demonstrated a clear picture of the applicant's indolence in proceeding with matters since the matter was filed in the subordinate court at Marimanti. The applicant has all along blamed her advocates on record for her indolence. It is our considered view and opinion that the applicant is unfairly and without justification delaying the conclusion of the matter and denying the respondent fruits of his judgement. The delay has occasioned the respondent great injustice and he will be greatly prejudiced if the application is allowed since the applicant continues to unnecessarily dragged the respondent in court; it is over four (4) years and the respondent has never been paid costs of the dismissed appeal awarded to him on 16/3/2017. He who comes to equity must come with clean

hands and delay defeats equity. The applicant is not deserving of equitable reliefs and discretionary orders sought. In *Evangeline Kanyua Mwiandi v Gilbert Kinyua (2020) eKLR*, the Court of Appeal had this to say regarding this kind of conduct;

***“Furthermore, the applicant in seeking the order of stay of execution is seeking an equitable relief. However, the applicant’s conduct at the hearing of the suit lacked candor. She seems to have engaged in tactics that were meant to frustrate the respondent’s case by ensuring that the case fails to come to an end. The case took more than twenty years to be completed by the ELC due to the back handed antics of the applicant. For this reason, the applicant is undeserving of the exercise of the Court’s discretion. While the applicant is at liberty to pursue her appeal, we come to the conclusion that it would not be appropriate, nor fair, nor just to exercise our discretion in the applicant’s favour by staying execution of the decree issued by the ELC. The application is accordingly dismissed with no orders as to costs”***

The above sentiments, Your Lordship, relate well to the case under consideration herein and we urge this Honourable Court to be guided by the same. The same is good law. It is clear that the law does not support exercise of discretion where the conduct of a party lacks candor.

We urge your Lordship to be guided by the above stated authorities which are good law for the litigants of this country and for proper administration of justice, and find in favour of the respondent herein. We urge this court to find that the application dated 4/3/2021 is misconceived, unmeritorious, brought in bad faith, an afterthought, an abuse of the due process of the court, a waste of valuable judicial time and a delay tactic by the applicant to shield herself from performance of the order issued on 16/3/2017 directing her to pay costs of the appeal to the respondent. We ask that the application be dismissed with the contempt it deserves with costs to the respondent.

We have attached the following for the court’s consideration;

1. *Ausilio Mungatia v Japhet Mburugu [2015] eKLR*
2. *Francis Kabaa v Nancy Wambui & another [1996] eKLR*
3. *James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR*
4. *Growth Africa (K) Limited v Charles Muange Milu (2018) eKLR*
5. *Evangeline Kanyua Mwiandi v Gilbert Kinyua (2020) eKLR*

DATED AT MERU THIS...17<sup>TH</sup> .....DAY OF...MAY,.....2021

FOR: MURANGO MWENDA & CO

ADVOCATES FOR THE RESPONDENT

7. On **20<sup>th</sup> April, 2021**, the parties through their advocates, agreed to have the application canvassed by way of written submissions with each party getting 14 days to do so. The parties were to come back on **14<sup>th</sup> May, 2021** to confirm filing of their submissions.

8. On **14<sup>th</sup> May, 2021** advocate Murango Mwenda told the court that the applicant had not filed submissions. He told the court that when he did not receive the applicant’s submissions, he nevertheless filed the respondent’s submissions.

9. Advocate Wanyanga who was holding brief for advocate Kurauka told the court that the applicant had not filed his submissions because he had intended to amend his application. He sought 7 days to file his amended application.

10. Advocate Murango Mwenda described the statement by Mr. Wanyanga as a joke. He complained that there was no indication by Mr. Kurauka that he was unhappy with his own motion and that he intended to amend it. He lamented that he had not even intimated to the opposite counsel of a such proposal. He also pointed out that Mr. Kurauka had not filed any application for leave to amend. He concluded by saying that the applicant and his advocate were on a fishing expedition.

11. In the greater interest of justice, this court issued the following orders:

- i) The applicant’s advocate is granted 7 days to file his application and to serve that application upon the respondent.
- ii) By consent of counsels, directions on **31.5.2021**.

12. On **31<sup>st</sup> May, 2021**, the applicant’s advocate had not filed his application to amend the original motion as he had been given leave to do.

13. Advocate Kirimi Muturi who was holding brief for Mr. Kurauka for the applicant told the court that Mr. Kurauka had due to unexplained unavoidable reasons been unable to file his submissions. He asked for time to file his submissions.

14. M/s. Mbogo for the respondent reminded the court that Mr. Kurauka was given 7 days to file an application but he did not do so. She told the court that the applicant was unnecessarily abusing the court process by keeping on giving unfulfilled promises regarding filing of submissions and filing a new application.

15. Noting that the appeal had been dismissed for want of prosecution, the conduct of the applicant and her advocate had demonstrated that she was an indolent litigant who was now seeking stay of execution for costs awarded in an appeal dismissed way back in 2017 while at the same time the respondent continued to be prejudiced in terms of time and further expenses.

16. M/s Mbogo told the court that the fact that Mr. Kurauka now sought time to file submissions in respect of an application he had intimated that he would abandon is indicative of the fact that the applicant/litigant is not a serious litigant. M/s Mbogo also observed that Mr. Kurauka was only seeking stay of execution of costs and not the ruling which dismissed the appeal on **16<sup>th</sup> March, 2017**, over 4 years ago. She wondered how a stay of costs would stand without a stay of the impugned judgment or ruling.

17. Without doubt, the applicant has ignored at least 2 court orders. The first one was issued on **20<sup>th</sup> April, 2021** when the parties were each given **14 days** to file their respective submissions. The other one was issued on **18<sup>th</sup> May, 2021** when the applicant's advocate requested leave to file an application to amend his original application. Instead of filing the new application, the applicant's advocate sought an extension of time to file submissions on an application he had told the court that he would abandon.

18. Having wanted to file a new application after the respondent had filed his written submissions, I agree with advocate Murango Mwenda, the respondent's advocate that the applicant's advocate was on a fishing expedition. I also wholly agree with the submissions filed by the respondent.

19. As pointed out by M/s Mbogo, the respondent's advocate, the applicant never appealed this court's ruling delivered on **16<sup>th</sup> day of March, 2017**. She cannot claim that she was not aware of the ruling because advocate Nyenyire, her advocate was present when the ruling was delivered.

20. I find that this application merits dismissal for disobedience of court orders by the applicant and/or her advocate. I also note that the ruling delivered on **16<sup>th</sup> March, 2017** has never been appealed against. The application therefore stands in the air because it is not buttressed upon a known judgment or ruling.

21. In view of the fact that as recently as on **24<sup>th</sup> February, 2021**, I dismissed another application for stay of execution of costs, I hereby declare myself functus officio.

22. The following orders are issued:

a) This application is hereby dismissed.

b) Costs shall follow the event and are awarded to the respondent, Elisha K. Njagi.

Delivered in open Court at Chuka this **16<sup>th</sup> day of June, 2021** in the presence of:

CA: Ndegwa

Parties not in court.

**P. M. NJOROGE,**

**JUDGE.**