



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

MISC APPL NO.7 OF 2020

BENARD PARSALOI TOROME.....1ST APPLICANT

YOGESH KUMAR PATEL.....2ND APPLICANT

VERSUS

CHEDA ALI CHEDA.....RESPONDENT

RULING

The Notice of Motion Application dated 29/7/2020 is seeking the following Orders:-

1. Spent
2. Spent
3. That the Applicant be granted leave to file an appeal out of time against the judgment and consequential orders of Hon.G Wakahiu delivered on 28/2/2020.
4. That subsequent to prayer 3 above this honourable court be pleased to issue an order of stay of execution of the decree issued in CMC ELC 195 OF 2016 pending the hearing and determination of the intended Appeal.
5. That the costs of this Application be provided for.

The Application is premised on the grounds that Judgment was entered in favour of the Respondent herein on 28/2/2020. That no notice was issued to the Applicant or their advocates prior to the delivery of judgment and neither was a Notice of entry of Judgment delivered on 28/2/2020. That an email sent to the honourable court enquiring the status of the matter did not elicit any response and as such they are apprehensive that the Respondent will institute execution proceedings against them.

The Application is further Supported by the Affidavits of the Applicants sworn on even date in which they aver that on the date the matter was to come up for judgment, the same was not ready and the court directed that a Notice would issue once it was ready. That no notice was served either upon them or their Advocate on record. An email written to the court did not elicit any response whatsoever and it was only in the month of July, 2020 when the Counsel for the Applicants visited the Civil Registry and learnt that Judgment had been delivered on 28/2/2020 in favour of the Respondent. The Applicants are apprehensive that the Respondent will institute execution proceedings against them to their detriment. They are optimistic that their intended appeal has high chances of success and on that basis, leave ought to be granted to them to file an appeal out of time.

The Respondent filed grounds of opposition dated 18/9/2020 in opposition to the application on the following grounds:-

1. That the Application is incompetent, misconceived and amenable to of being struck out.
2. That the Applicants have demonstrated good and sufficient cause for not filing the appeal within time stipulated under section 79G of the Civil Procedure Act.
3. That the Application offends the statutory of Order 43 Rules (2) and (3).
4. That the application offends the provisions of section 79G of the Civil Procedure Act.

I have analysed the Application, grounds of Opposition and Submissions filed by parties. Order 42 rule 6 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.

The Court of Appeal in ***Butt v Rent Restriction Tribunal [1982] KLR 417*** provides guidance on how a court should exercise discretion and 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 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 or 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’.

In the instant case, the Applicants aver that no Notice of Judgment was served upon them nor their advocates on record. In a situation where a party seeks stay, it is of importance that a party demonstrates that there is no overwhelming hindrance such that an appeal may not be rendered nugatory. The Applicants have also stated that they will oblige to any conditions set by this honourable court. The court in the instant case can only arrive at a decision in which a party seeking stay is able to demonstrate that substantial loss would occur if the Orders sought are not granted. There is no documentation before this court indicating the kind of decision arrived at by the trial court to show such a danger exists. It would have been prudent if the Advocate on record stated the Orders granted by the trial court since it was privy to the decision made by the trial court to the detriment of its clients. I am of the opinion that the Advocate must have perused the trial court file and advised its clients to file an Appeal and in the meantime also file an application for stay of execution.

Section 79G of the Civil Procedure Act provides, ‘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 been 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’.

Having analysed the averments of the Applicants and taking into account the Covid 19 pandemic which dealt the world a big blow, the courts in our country were also adversely affected in their day-to-day affairs. The Applicants contend that their Advocate wrote an email to the court which did not elicit any response, however, I do also note that the email was not attached as part of their documents in support of their application in which their Advocate proceeded to request for typed proceedings and a copy of the judgment. In the circumstance and taking into account the effect of the covid 19 pandemic in our judicial system and in the interest of justice I allow the Applicants leave to file their Appeal out of time within the next 30 days from today.

Costs of the application be in the cause.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAROK ON THIS 9TH DAY OF JUNE, 2021

Mohammed N. Kullow

Judge

9/6/2021

In the presence of: -

CA:Chuma

Ms Kudate for the applicant

N/A for the respondent