



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC NO. 149 OF 2016**

**KARWITHA SELLA ISAAC.....1<sup>ST</sup> PLAINTIF/RESPONDENT**

**FRANCIS MARETE M'IBUL.....2<sup>ND</sup> PLAINTIF/RESPONDENT**

**VERSUS**

**FAMILY DEBTORS CHOICE AGENCIES.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**OIKO CREDIT ECUMENICAL DEVELOPMENT**

**COOPERATIVE SOCIETY.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before me is a notice of motion dated 11<sup>th</sup> February 2021 brought pursuant to the provisions of Section 1, 1A, 3, 3A, 63 (e) & 79G of the Civil Procedure Act, Order 51 rule 1 and Order 42 Rule 6 of the Civil Procedure Rules, and all other enabling provisions of the law. The applicants/defendants are seeking leave to file a notice of appeal out of time, that the draft notice of appeal be deemed as properly filed, and that there be a stay of execution of the judgment/decree and all the consequential orders delivered on 18/11/2020 pending the hearing and determination of the application inter-parties and the intended appeal.

2. The application is based on the grounds on the face of it and on the supporting affidavit of one **Ignatius Gitonga Kinge** dated 11/02/2021 the 1<sup>st</sup> defendant's director who avers that he was aggrieved by this court's judgment and he intends to file a notice of appeal against the said judgment. He contends that judgment was delivered on 18/11/2020 via teams in the absence of the parties and after perusal of the judgment he communicated its contents to his advocates who instructed him the need to move with speed and file an application to seek leave to file a notice of appeal out of time and prepare a memorandum of appeal. That efforts to get the judgment were futile until 21/01/2021.

3. The applicant further avers that if the stay of execution against the said judgment decree is not issued, he will be rendered homeless, destitute and a squatter suffering irreparable loss and damages not compensable by way of damages and it is in the interest of justice that the application be allowed.

4. It was submitted for the applicant that by virtue of Section 7 of the Appellate Jurisdiction Act Cap 9 and Rule 41 of the Court of Appeal Rules, an applicant can either approach the High Court or the Court of Appeal for enlargement of time for the ends of justice to be served. The applicant contends that the court has unfettered discretion to order a stay of execution as the intended appeal is arguable and would render the appeal nugatory if not allowed.

5. The application is opposed by the 1<sup>st</sup> plaintiff/respondent who avers that the application lacks merit, is frivolous, an abuse of the court process, bad in law, incurably defective and an afterthought since it does not meet the required threshold as no memorandum of appeal has been annexed to demonstrate that the applicant has an arguable appeal. Further that the applicant filed the application 4 months from the date of delivery of the judgment, and this is an inordinate delay meant to deprive him from enjoying the fruits of his judgment. That this court is functus officio as it has performed all its duties as required by law and any challenge the applicant might have with the said judgment should be taken to the appropriate forum.

6. The respondent submitted that the delay in filing the application has not been sufficiently explained, and the court must guard itself against the danger of being led away by sympathy. The respondents have relied on the cases of; **Alibhai Musajee V Shariff Mohammed Al-Bet Civil Appeal NO. 283 of 1998**, **Berber Alibhai Mawji V Sultan Hasham Lalji & 2 others [1990-1994] EA 337**, **Dilpack Kenya Limited V William Muthama Kitonyi [2018]eKLR** and **Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others**.

7. I have considered the application, affidavits and submissions by both parties. The issues for determination are whether this court has jurisdiction to extend time for the filing of the notice of appeal and whether, the prayer for stay of execution is merited.

8. Section 7 of the Appellate Jurisdiction Act Cap 9 provides that;

***“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired...”***

9. The above section is self-explanatory and I need not say anything more on the same.

10. On the issue of stay, the Supreme Court of Kenya in the case of **Mohamed Ali Sheikh v Abdiwahab Sheikh Osman Hathe & 3 others [2019] eKLR** explained the purpose of stay orders as follows;

***“It is therefore the law that stay orders are generally temporary measures meant to preserve the subject matter of an appeal, pending the final determination of the case before the Court”.***

11. In the case of **Faisal Amin Jan Mohammed T/A Dunyia Forwarders vs Shami Trading Co. Ltd (2014) eKLR**, the court stated that;

***“It is trite law therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated that substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security”.***

12. The court in **Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR**, had this to say on the issue of stay of execution;

***“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-***

***“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay...”***

13. The applicant contends that he was not aware of the judgment as the same was delivered via teams in absence of the parties and that he will be rendered homeless. Contrary to the averments made by the applicants, the judgment was not delivered via teams. It was delivered electronically through the email addresses provided by the parties on 18.11.2020 as captured on the last page of the judgment. The court only commenced the delivery of judgments via Microsoft teams platform on 15.4.2021 after issuance of a notice to that effect. Thus the delay in filing the notice of appeal has not been satisfactorily explained.

14. The applicant avers that he shall be rendered homeless, destitute and a squatter, however a close perusal at the pleadings reveals that the respondents were in possession of the suit lands and at the time of filing the suit, they feared being evicted by the 2<sup>nd</sup> defendant. Then how come the applicant is now claiming to be in possession of the same? I am not at all persuaded to find that the applicant shall be rendered homeless if the stay orders are not granted.

15. On the issue of security of costs, I note that the respondent did not make any averments with regard to provision of the same.

16. In **Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, the court observed:

***“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.”***

17. The issue of security is however discretionary and it is upon the court to determine the same.

18. In the final analysis, I find that the application dated 11.2.2021 is not merited. The same is hereby dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a notice issued on 3.9.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the

Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to 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.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**

**Ruling delivered electronically. File closed**