



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 483 OF 2008**

**SAMUEL MAINA GICHOHI.....PLAINTIFF**

**- VERSUS -**

**CITY COUNCIL OF NAIROBI.....1ST DEFENDANT**

**CECILIA NGENDO MWANGI.....2ND DEFENDANT**

**RULING**

1. Lady Justice Christine Ochieng heard this suit during the Nairobi ELC Service Week and subsequently rendered a judgment in the suit virtually on 15/3/2021 at Kajiado. She made the following verbatim disposal orders:

**i. A mandatory injunction be and is hereby issued compelling the plaintiff by himself, his agents and servants to remove after ninety (90) days from the date hereof, all the illegal developments on the Plot No R8 part of the Land Reference Number 71/5 Kahawa West Nairobi and to allow the 2nd defendant to access occupation and quiet enjoyment for her private property;**

**ii. A permanent injunction be and is hereby issued restraining the plaintiff from trespassing into, sub-dividing, transferring, wasting, alienating or otherwise dealing with or parting with possession of Plot No R8 part of the Land Reference Number 71/5/ Kahawa West, Nairobi.**

**iii. The 1st defendant (sic) be and is hereby awarded special damages amounting to Kshs 20,500.**

**iv. Costs of the suit and of the counter-claim be and is hereby awarded to defendants.**

2. Subsequent to that, the plaintiff brought a notice of motion dated 15/4/2021 under, among other provisions, **Section 7** of the **Appellate Jurisdiction Act** and **Order 42 rule 6** of the Civil Procedure Rules, seeking leave to file a notice of appeal out of time, and an order of stay of execution pending the filing and determination of the intended appeal in the following verbatim terms:

**1. That this application is certified urgent and service be dispensed with in the first instance.**

**2. That the honourable court grants leave to file notice of appeal out of time**

**3. That the notice of appeal dated 22nd March 2021 be deemed to have been properly filed and on record.**

**4. That there be a stay of execution of the decree and judgment delivered on 15th March 2021**

**5. That the honourable court grants stay of execution of the judgment dated 15th March 2021 pending filing and determination of the intended appeal.**

3. The said notice of motion is the subject of this ruling. It was supported by an affidavit sworn on 15/4/2021 by Mark Gitonga Mathenge. It was premised on the grounds set out on the face of the motion. The application was canvassed through oral submissions in the virtual court on 8/6/2021.

4. In summary, the applicant's case was that the impugned judgment was delivered virtually at Kajiado Environment and Land Court on 15/3/2021. On 22/3/2021, the applicant lodged a notice of appeal at Kajiado Environment and Land Court, within the prescribed period of

14 days. The Deputy Registrar of the Environment and Land Court at Kajiado did not accept the notice of appeal because the case was not registered as a Kajiado Environment and Land Court case. The plaintiff's attempts to lodge a notice of appeal at the Nairobi Environment and Land Court within the prescribed period of 14 days were futile because the court file was still at Kajiado Environment and Land Court. The plaintiff intends to appeal against the whole of the said judgment. Efforts to access the file and the judgment were futile at all material times. One of the disposal orders in the impugned judgment required the plaintiff to demolish his dwelling houses within ninety (90) days. There would be substantial loss if the houses were demolished. The applicant (plaintiff) urged the court to exercise discretion and grant the orders.

5. The 1st defendant opposed the application through grounds of opposition dated 27/4/2021 and oral submissions. They contended that: (i) the application dated 15/4/2021 was incurably incompetent, an abuse of the court process, unprocedural and bad in law; (ii) under **Section 75 (1) & (2) of the Appellate Jurisdiction Act**, only the Court of Appeal was vested with jurisdiction to grant leave to file an appeal out of time and that this court lacked jurisdiction to grant such leave; and (iii) that under **Section 5 of the Appellate Jurisdiction Act**, orders of stay could only be sought in the Court of Appeal. Urging the court to reject the application, Mr Mereka, counsel for the 1st defendant, relied on the decision in the cases of **Presbyterian Foundation v Bernard Ole Mureu & Others (2021) eKLR** and **Josephine Wambui Githinji v Peter Kimuhii**.

6. Counsel for the 1st defendant further submitted that, without looking at the grounds of appeals, the court could not exercise discretion to grant the orders sought. Lastly, counsel submitted that the issue of allotment had not been addressed in the grounds of appeal hence the application was unmerited.

7. The 2nd defendant opposed the application, contending that from the court record, the applicant lost interest in the case and the 2nd defendant progressed the case on account of her counter-claim. Counsel for the 2nd defendant argued that the intention to appeal was an afterthought.

8. I have considered the plaintiff's application dated 15/4/2021, the response thereto, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the key questions falling for determination in the application. The following are the four key questions that fall for determination in the application: (i) Whether the court has jurisdiction under **Section 7 of the Appellate Jurisdiction Act** to enlarge the time within which a party is to file and serve a notice of appeal out of time; (ii) Whether this court has jurisdiction to grant an order of stay of execution pending the filing and determination of an intended appeal; (iii) Whether the applicant has satisfied the criteria upon which jurisdiction to enlarge time is exercised; and (iv) Whether the applicant has satisfied the criteria upon which an order of stay of execution is granted under **Order 42 rule 6** of the Civil Procedure Rules. I will make brief pronouncements on the four issues sequentially in the order in which they are itemized.

9. The first question is whether this court has jurisdiction under **Section 7** of the Appellate Jurisdiction Act to enlarge the time within which an aggrieved party is to file a notice of appeal. **Section 7 of the Appellate Jurisdiction Act (Cap 9)** provides as follows:

**"7 . Power of High Court to extend time**

**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:**

**Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.**

10. It is clear from the above framework that the High Court is granted power to extend the time within which to give notice of intention to appeal. Giving of notice of intention to appeal entails lodging of a notice in the relevant court registry and serving the said notice on all the concerned parties. Secondly under **Article 259 (3) (d)** of the **Constitution of Kenya 2010**, a reference to the High Court is to be construed as a reference to the relevant court of equal status with the High Court, vested with and exercising jurisdiction under **Article 162(2)** of the Constitution. In the application under consideration, the relevant court of equal status with the High Court is the Environment and Land Court.

11. Githinji JA was confronted with the same question as the one under consideration in **Kenya Airports Authority & another v Timothy Mduvi Mutungi, Court Of Appeal Civil Application No NAI 165 of 2013 (UR 113/2013) (2014 eKLR)**. The Learned Judge of the Court of Appeal was categorical that the High Court had jurisdiction under Section 7 of the Court of Appeal Rules (read "**Appellate Jurisdiction Act**") to enlarge time. The third tier superior courts of Kenya have equally been categorical in their restatement of the above legal position.

12. In his second ground of opposition, the 1st defendant invoked "**Section 75 (1) and (2)**" of the **Appellate Jurisdiction Act** and contended that only the Court of Appeal was vested with jurisdiction to enlarge time. I have looked at the **Appellate Jurisdiction Act** and I am unable to find the "**Section 75 (1) and (2)**" which the 1st defendant invoked in opposing the application.

13. It is therefore clear, and I so find, that this court has jurisdiction under **Section 7** of the Appellate Jurisdiction Act to enlarge the time within which an aggrieved party may give notice of intention to appeal.

14. The second question is whether this court has jurisdiction to grant an order of stay of execution pending the filing and determination of an appeal to the Court of Appeal. Mr Mereka, counsel for the 1st defendant, did not focus on this question in his submissions despite raising it as an issue in the grounds of opposition. My answer to the question is in the affirmative and is informed by the legal framework in **Order 42 rule 6 (1) of the Civil Procedure Rules** which provides as follows:

**(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

15. It is clear from the above legal framework that the court appealed from is vested with jurisdiction to receive, consider and if found merited, grant a plea for stay of execution. Because counsel who raised the issue in the grounds of opposition did not focus on it in his oral submissions, I will not say more on the issue.

16. The third question is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to enlarge time. The following guiding principles on this subject were outlined by the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR:**

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- iv. Whether there is a reasonable reason for delay. The delay should be explained to the satisfaction of the court;**
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- vi. Whether the application has been brought without undue delay; and**
- vii. Whether in certain cases, such as election petitions, public interest should be a consideration for extending time.”**

17. In the present application, the applicant has explained that the impugned judgment was delivered virtually at Kajiado Environment and Land Court on 15/3/2021. The relevant court file was not promptly returned to Nairobi Environment and Land Court to enable the applicant peruse the judgment and lodge a notice of appeal. Further, the Court Registry at Kajiado Environment and Land Court declined to accept his notice of appeal because this was a Nairobi Environment and Land Court file. The Court Registry at Nairobi Environment and Land Court declined to accept his notice of appeal because they did not have the relevant court file. This explanation has not been controverted. In my view, this is a reasonable and satisfactory explanation.

18. It is noted that the impugned judgement was rendered on 15/3/2021 and the application for extension of time was filed on 15/4/2021. The notice of appeal which the Nairobi Environment and Land Court Registry declined to accept has been exhibited and is dated 22/3/2021. There is no evidence of inordinate delay on part of the applicant. There is similarly no evidence of prejudice which would be suffered by the defendants if the extension is granted and the plaintiff is given the opportunity to ventilate his grievances in the Court of Appeal.

19. The totality of the foregoing is that the court finds that the applicant has met the criteria upon which the discretionary jurisdiction to enlarge time is exercised.

20. The fourth question is whether the applicant has satisfied the criteria

upon which our courts exercise jurisdiction to grant or refuse to grant an order of stay of execution pending appeal. **Order 42 rule 6 (2)** provides the general guiding principle that an applicant is to satisfy when making a plea for an order of stay pending an appeal. It provides thus:

**42(6)(2) No order for stay of execution shall be made under subrule (1) unless—**

- (2) (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.**

21. The Court of Appeal in **Butt v Rent Restriction Tribunal** summarized the general principles that guide our courts when exercising jurisdiction to grant or decline to grant an order of stay of execution pending appeal. First, the jurisdiction to grant or refuse to grant an application for an order of stay of execution is a discretionary one and the discretion is to be exercised in such a way as not to prevent an appeal. Secondly, the general applicable principle is that, if there is no other overwhelming hindrances, a stay should be granted so that an appeal may not be rendered nugatory should the appellate court reverse the impugned decision. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy would become available to the applicant at the end of the proceedings. Lastly, the court seized of the application for stay of execution should consider the special circumstances of the case and its unique requirements.

22. On substantial loss, the applicant is under duty to demonstrate to the court that he stands to suffer something and that he may not be put back to the original position he was in prior to execution, hence he deserves the exercise of the court's discretion in his favour [ See (i) **Kenya National Highways Authority v Ahmendnasir Maalim Abdullah [2020] eKLR** and (ii) **Kenya Shell Ltd v Benjamin Karuya Kibiru (1986) eKLR** among other decisions].

23. I have considered the unique circumstances of the application under determination in the context of the relevant principles and guidelines against which the jurisdiction to grant or decline to grant an order of stay of execution is exercised. One of the disposal orders in the impugned judgment required the applicant to remove certain developments from the suit property and allow the 2nd defendant access to the suit property. The applicant contends, without contestation from the defendants, that the said developments consist of among other structures, the plaintiff's dwelling houses, and that he stands to suffer substantial loss if the said dwelling houses were to be demolished and subsequently his intended appeal succeeds. Because of the above uncontroverted unique circumstances, the court is satisfied that the applicant has demonstrated the likelihood of substantial loss.

24. The court is, however, alive to the fact that the appeal itself has not been filed. Secondly, the court appreciates that the 2nd defendant was awarded the suit property in the impugned Judgment and should by now be ordinarily enjoying the fruits of the Judgment. A stay order will deny him the benefits appurtenant to the suit property. In the circumstances, the court will grant a stay order for a limited period of only twelve months. Further, as security, the plaintiff will deposit in court a sum of Kshs 13,000 on the 5th day of every month, with effect from the date of this ruling. The said money will be security and will be released to the successful party in the Court of Appeal.

#### **Disposal Orders**

25. In the end, the plaintiff's application dated 15/4/2021 is disposed in the following terms:

**a. The plaintiff is granted an extension of 14 days within which to file and serve a notice of appeal relating to the Judgment rendered by Justice Christine Ochieng on 15/3/2021**

**b. Because the proceedings in this file have been typed, the plaintiff shall prepare, file, and serve his record of appeal within 30 days from today.**

**c. The plaintiff shall deposit in this court Kshs 13,000 on or before the 5th day of every month, effective from today, as security. Unless otherwise directed by the Court of Appeal, all the deposited money shall be released to the successful party in the intended appeal, as between the plaintiff and the 2nd defendant.**

**d. Subject to the plaintiff's compliance with the terms set out in orders (a), (b) and (c) above, there shall be stay of execution of the judgment rendered on 15/3/2021 for a period of twelve (12) months effective from today. In default of compliance by the plaintiff, the order of stay shall stand vacated.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF SEPTEMBER, 2021**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Gitonga for the Plaintiff/Applicant

Ms Njoroge holding brief for Mr Mereka for the 1st Defendants

Mr Kimathi for the 2nd defendant

Court Assistant: Lucy Muthoni

**NOTE:**

The relevant application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually from Thika.

**B M EBOSO**

**JUDGE**