



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT NYAHURURU

ELCA NO. E009 OF 2021

JOHN NYAIRACHA MWIRIKIA.....APPELLANT

VERSUS

LOICE NYAMBURA KAMAU.....DEFENDANT

RULING

1. By a notice of motion dated 13th May, 2021 brought under **Order 42 Rules 6(1) & (2) of the Civil Procedure Rules (the Rules), Sections 1A & 3A of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the law**, the Appellant sought a stay of execution and implementation of the ruling and order of the trial court in Engineer CMCC No. 11 of 2020 dated 14th April, 2021 pending the hearing and determination of the instant appeal.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on 13th May, 2021 and the exhibits thereto. The Appellant contended that he had already appealed against the ruling and order dated 14th April, 2021 whereby he was found guilty of contempt of court and ordered to be committed to civil jail.
3. The Appellant contended that unless the said order is stayed he shall suffer substantial loss and his appeal shall be rendered nugatory should it finally succeed. He contended that his liberty was at stake since he may be committed to jail for contempt of court in the absence of a stay.
4. The Respondent filed a replying affidavit sworn on 2nd July, 2021 in opposition to the application. It was contended that the Appellant had deliberately disobeyed an injunction order made by the trial court prompting her to initiate contempt of court proceedings against him.
5. The Respondent further stated that even after the Appellant was found guilty of contempt of court on 14th April, 2021 he had continued in flagrant disobedience of the interim injunction by cutting down trees, removing beacons on the suit property, and generally interfering with the suit property. It was thus contended that the Appellant had not approached the court with clean hands hence his application should be dismissed with costs.
6. When the application was listed for *inter partes* hearing, it was directed that the same shall be canvassed through written submissions. The record shows that the Appellant filed his submissions on 27th October, 2021 but the Respondent's submissions were not on record by the time of preparation of the ruling.
7. The court has considered the Appellant's notice of motion dated 13th May, 2021, the Respondent's replying affidavit as well as the submissions on record. The court is of the opinion that the main question for determination is whether or not the Appellant has made out a case for an order of stay pending appeal.
8. It is evident from the material on record that upon the Respondent's application the Appellant was found guilty of contempt of court and ordered to be committed to civil jail. The Appellant has since appealed against the said order. In the case of **Butt v Rent Restriction Tribunal [1979] eKLR**, the court held that the jurisdiction of the court to grant or decline a stay of execution or of proceedings was discretionary. It was further held that the discretion should not be exercised in such manner as to prevent an appeal or to render an appeal nugatory should it ultimately be successful.
9. The court is satisfied from the material on record that should the Appellant serve a jail term now and his appeal is ultimately allowed, then the outcome shall be rendered nugatory. It shall become impossible to undo a jail term once served. The court is thus of the opinion that the risk of substantial loss within the meaning of **Order 42 Rule 6(2) of the Rules** has been demonstrated. Accordingly, the court is inclined to allow the application for stay pending appeal.
10. The upshot of the foregoing is that the court finds merit in the Appellant's application for stay pending appeal. Accordingly, the court makes the following orders for disposal of the notice of motion dated 13th May, 2021:

(a) There shall be a stay of the ruling and order dated 14th April, 2021 of the trial court in Engineer CMCC No. 11 of 2020 pending the hearing and determination of the appeal.

(b) The Appellant shall file and serve his record of appeal within 45 days from the date hereof in default of which the stay shall lapse without further order.

(c) The appeal shall be mentioned on 2nd February, 2022 for directions on the hearing thereof.

(d) Costs of the application shall be in the appeal.

Orders accordingly.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 18TH DAY OF NOVEMBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Okumu for the Respondent (not audible)

No appearance for the Appellant

CA - Carol

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Y. M. ANGIMA

JUDGE