REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E003 OF 2021

PETER MAOSA NYANG'AU............................APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD ....1ST RESPONDENT

SAHRA HERSI MOGHE........................ 2ND RESPONDENT

R U L I N G

Section 79G of the **Civil Procedure Act** is couched in the following terms:-

> **"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 <u>good and sufficient cause</u> for not filing the appeal in time."** Emphasis mine.

Order 42 Rule 6(1) and **(2)** of the **Civil Procedure Rules** provides that: -

> **6(1)"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appeal from except in as 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 of 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.**
>
> **(2) No order for stay of execution shall be made under sub rule (1) unless –**
>
> > **(a) the Court is satisfied that <u>substantial loss may result</u> to the Applicant unless the order is made and that the <u>application has been made without unreasonable delay</u>;**
> >
> > **and**
> >
> > **(b) <u>such security</u> as the Court orders for the due performance of such decree or order <u>as may ultimately be binding on him has been given by the Applicant</u>."** Emphasis mine.

The provisions of **Section 79G** of the **Civil Procedure Act** are replicated in **Section 16A** of the **Environment and Land Court Act**.

The parties herein litigated in **BUNGOMA CHIEF MAGISTRATE COURT ELC CASE No 6 of 2015** where **PETER MAOSA NYANG'AU** (the Applicant herein) was the plaintiff while the **NATIONAL BANK OF KENYA** and **SAHRA HERSI MOGHE** (the 1st and 2nd Respondents herein) were the 1st and 2nd defendants respectively. The dispute involved the land parcel **NO 1408/18/1** (the suit

property) situated in **MALAKISI TRADING CENTER** and the Applicant was seeking orders that whereas the 1st Respondent had offered to sell him the suit property in 2012, it had gone behind his back and sold it to the 2nd Respondent. The Applicant therefore sought against the Respondents' declarations that the sale of the suit property by the 1st Respondent to the 2nd Respondent was unlawful, illegal, fraudulent null and void and the 2nd Respondent holds it in trust for him. He also sought an order cancelling the un – dated sale agreement between the Respondents, an order of injunction restraining the Respondents from interfering with his ownership and possession of the suit property and the sum of Kshs. 70,000/= being loss of income until Judgment.

The Respondents' pleadings have not been availed but it is clear from the Decree that they filed a Counter – Claim as well as a defence to the Applicant's claim.

It is also clear that when the suit came up for hearing on 8th September 2020, it proceeded ex – parte without the Respondents and by a Judgment delivered on 6th October 2020 by **HON. J. KING'ORI (CHIEF MAGISTRATE)**, the Applicant's claim was dismissed and Judgment was entered in favour of the 2nd defendant as per her Counter – Claim as follows: -

> **1. An order to evict the Applicant, his servants, agents and persons claiming under him from the land known as 1804/30 and 1408/81.**
>
> **2. The 2nd Respondent is entitled to mesne profits from the Applicant at the rate of Kshs. 70,000/= per month starting from November 2014 to August 2021 and currently amounting to Kshs. 560,000/=.**
>
> **3. The Applicant to pay the 2nd Respondent costs assessed at Kshs. 390,005/=.**

Aggrieved by that Judgment, the Applicant first moved the trial Court vide a Notice of Motion dated 26th October 2020 seeking orders of stay of the Judgment and decree dated 6th October 2020 as well as the setting aside of the order dismissing the Applicant's suit for none attendance and the ex – parte Judgment and all consequential orders flowing therefrom. That application was opposed and by a ruling delivered on 9th March 2021, the trial magistrate was not satisfied with the Applicant's explanation a to why he and his Counsel did not attend Court for the hearing of the case on 8th September 2021. He proceeded to dismiss the application with costs.

I now have before me the Applicant's Notice of Motion dated 25th June 2021 in which he seeks the following remedies: -

> **1. Spent**
>
> **2. Spent**
>
> **3. That the Honourable Court be pleased to issue an order for stay of execution of the Decree and Judgment in BUNGOMA CM ELC CASE No 6 of 2015 dated 6th October 2020 and all the consequential orders pending the hearing and determination of the intended appeal against the ruling and decision dated 9th March 2021 in BUNGOMA CM ELC CASE No 6 of 2015.**
>
> **4.That the Honourable Court be pleased to grant leave to the Applicant to file an appeal against the ruling and decision in BUNGOMA CM ELC CASE No 6 of 2015 dated 9th March 2021.**
>
> **5. That costs of this application be in the cause.**

The application is premised by the provisions of **Sections 3A**, **75**, **78** and **79G** of the **Civil Procedure Act** and **Order 42 Rule 1(3)** of the **Civil Procedure Rules**. It is based on the grounds set out therein and also supported by the Applicant's affidavit also dated 25th June 2021.

The gravamen of the application is that the hearing date of the main suit on 8th September 2020 was taken ex – parte by the 1st Respondent's Counsel but was wrongly diarized by the Applicant's Counsel as 18th September 2020 and that is why both the Applicant and his Counsel were not present in Court when the Applicant's suit was dismissed for non – attendance and the Respondents' Counter – Claim was allowed. That the Applicant thereafter filed an application dated 26th October 2020 for stay of execution and the setting aside of the ex – parte Judgment dated 6th October 2020. The ruling in that application was due on 23rd December 2020 but was re – scheduled for 2nd March 2021 when the Court was not sitting and should therefore have notified the parties that it would be on notice. That the Applicant and his Counsel did not get any notice of delivery of the ruling but only received a notice of the taxation of the 2nd Respondent's Bill of Costs. It was while filing the submissions on the taxation that the Applicant discovered that the ruling on his application dated 26th October 2020 was infact delivered on 9th March 2021 which date was neither served to the Applicant or his Counsel. That in that ruling, the Court dismissed the Applicant's application seeking the setting aside of the Judgement dated 6th October 2020. That the Applicant was unable to apply for leave to file the appeal out of time because for un – known reasons, the file remained in the Chambers of the trial Magistrate. That unless the orders sought herein are granted, the Applicant is likely to suffer irreparable loss. That this application has been filed without unreasonable delay and the appeal is not frivolous. It is therefore in the interest of justice that the Applicant be allowed to file an appeal against the decision of the Magistrate dated 9th March 2021 out of time and no prejudice shall be caused to any party.

Annexed to the application are the following documents: -

> **1. Handwritten copies of the Judgment delivered on 6th October 2020 and ruling delivered on 9th March 2021.**

2. Decree dated 6th October 2020 issued in BUNGOMA ELC CASE No 6 of 2015.

3. Receipts for land rates.

4. Demand Notice for land rates from County Government of Bungoma dated 18th December 2019.

5. Practising Certificate for MARY WACHUKA GICHOKI QUANTITY SURVEYOR.

6. Bill of Quantities for renovation works on plot NO 1408/1811 MALAKISI TRADING CENTRE.

The application is opposed by the 2nd Respondent vide the replying affidavit dated 20th September 2021 in which the application is described as frivolous, scandalous and an abuse of the Court process full of misinformation, half – truths and non – disclosure of material facts calculated to deceive the Court. That from the time this suit was transferred to the **CHIEF MAGISTRATE'S COURT BUNGOMA** from this Court, the Applicant and his Counsel have used every trick to have it adjourned so that he can continue staying on the suit property and drawing rent. That is is the 2nd Respondent who has been moving the Court by serving notices for mention and hearing dates. That the Applicant's Counsel was served with a notice for hearing on 8th September 2020 but failed or neglected to attend Court and so the Applicant's case was dismissed and the 2nd Respondent testified in support of the Counter – Claim. The case was then listed for mention on 22nd September 2020 for submissions but again both the Applicant and his Counsel did not attend and Judgment was fixed for 6th October 2020. The Judgment was delivered in the presence of **MR MASAI** who appeared on behalf of the Applicant.

Thereafter, the Applicant filed an application dated 29th October 2020 seeking to set aside the ex – parte proceedings and Judgments. The application was opposed and on 17th November 2020, directions were taken that it be canvassed by way of written submissions and a ruling date was set for 2nd March 2021 but it was not delivered and was instead re – scheduled and delivered on 9th March 2021 with both parties being notified.

That the Applicant's Counsel has not annexed an extract of his diary for 8th September 2020 to prove that he did not diarize that date as the date for the hearing of the suit.

Further, that even if the Applicant had diarized 18th September 2020 as the hearing date, he has not explained why it took him upto 29th October 2020 to file the application to set aside the ex – parte Judgment. That the Applicant has not annexed any Memorandum of Appeal and is not being sincere when he alleges that he became aware about the ruling on 23rd April 2021 yet he was served with the Bill of Costs on 8th April 2021 and item No 81 thereof is the Court attendance for delivery of the said ruling. In any event, the 2nd Respondent has already taken possession of the suit property and stay orders cannot be granted. That if the Applicant discovered about the ruling on 23rd April 2021, there is inordinate delay in filing this application on 25th June 2021 and allowing this application will gravely prejudice the 2nd Respondent. That the Applicant is not being truthful, forthright and candid in his dispositions and has failed to disclose material facts. The application is meant to disparage the Court and Counsel and should be dismissed with costs.

Annexed to the replying affidavit are the following documents: -

1. The plaint in BUNGOMA CHIEF MAGISTRATE'S CIVIL CASE No 6 of 2015.

2. Hearing notices dated 22nd June 2020 and 7th July 2020.

3. Affidavits of Service dated 22nd July 2020, 21st September 2020 6th October 2020 and 8th April 2021.

4. Mention notice dated 16th September 2020.

5. Judgment notices dated 30th September 2020 and 2nd March 2021.

6. Certificate of Urgency dated 26th October 2020.

7. Extract of diary for 17th and 18th September 2020.

8. Letter from Applicant's Counsel dated 20th July 2020 addressing him that hearing of the suit was set for 18th September 2020.

9. Submissions and authorities filed in the Subordinate Court.

10. 2nd defendant's Bill of Costs dated 25th March 2021.

The 1st Respondent did not file any response.

The application was first placed before **OMOLLO J** on 1st September 2021 who granted a temporary stay of execution for 30 days and

directed that it be placed before me for directions on mode of hearing on 21st September 2021.

When the application was placed before me on 21st September 2021, it was agreed that it be canvassed by way of written submissions.

The submissions were filed both by **MR MAGETO** instructed by the firm of **M'NJAU & MAGETO ADVOCATES** for the Applicant and by **MR ANWAR** instructed by the firm of **ANWAR & COMPANY ADVOCATES** for the 2nd Respondent.

I have considered the application, the rival affidavits and annextures and the submissions by Counsel.

The Applicant seeks two substantive orders: -

> **1. Leave to appeal out of time against the Judgment delivered on 6th October 2020 and the ruling delivered on 9th March 2021.**
>
> **2. Stay of execution of the Decree and Judgment dated 6th October 2020 and all consequential orders pending the hearing and determination of the intended appeal.**

LEAVE TO APPEAL: -

It is common ground that the Judgment sought to be appealed was delivered by the trial Magistrate on 6th October 2020. That is what the Court will consider with regard to the issue of leave to appeal. The ruling delivered on 9th March 2021 cannot stand on it's own. It is a consequence of that Judgment. Therefore, whether leave to appeal the Judgment is granted or disallowed, a consideration of leave to appeal the ruling delivered on 9th March 2021 will serve no useful purpose.

It is clear from both **Section 16A** of the **Environment and Land Court Act** and **Section 79G** of the **Civil Procedure Act** that the Judgment sought to be appealed having been delivered on 6th October 2020, the Applicant had upto 6th November 2020 to file his appeal against that Judgment i.e. 30 days. The 30 days' period can however be extended by the Court where the Applicant ***"satisfies the Court that he had good and sufficient cause for not filing the appeal in good time."*** The Court of Appeal in the case of **THE HON ATTORNEY – GENERAL .V. THE LAW SOCIETY OF KENYA & ANOTHER C.A CIVIL APPLICATION N0 133 of 2011** said as follows with regard to the meaning of sufficient cause: -

> **"Sufficient cause or good cause in law means –**
>
> **'The burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused' see BLACK'S LAW DICTIONARY 9TH EDITION page 251.' Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge's mind. The explanation should not leave unexplained gaps in the sequence of events"** Emphasis mine.

There is no difference between the words sufficient cause and good cause – **QURESHI & ANOTHER .V. PATEL & OTHERS 1964 EALR 633**. The Supreme Court of Kenya laid down the following principals that should guide a Court considering an application for extensions of time within which to appeal in the case of **NICHOLAS KIPTOO arap KORIR SALAT .V. 1.E.B.C & OTHERS 2014 eKLR**: -

> **a. Extension of time is not a right. It is an equitable remedy that is only available to a deserving party at the discretion of the Court"**
>
> **b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.**
>
> **c. Whether the Court should exercise it's discretion to extend time is a consideration to be made on a case to case basis.**
>
> **d. Where there is a reason for delay, it should be explained to the satisfaction of the Court.**
>
> **e. Whether there will be any prejudice suffered by the Respondent if extension is granted.**
>
> **f. Whether the application has been brought without delay.**
>
> **g. Whether in certain cases like election Petitions, public interest should be a consideration for extending time.**

Therefore, extension of time is never granted as a matter of cause. It is not automatic. It is not served at the pleasure of the Applicant or on the basis of sympathy. And although it is discretionary, it is an equitable remedy to be granted on **good and sufficient cause**. That means that where there is evidence of mala – fides, an attempt to overreach or simply in – action on the part of the Applicant, that remedy will be denied.

What then is the Applicant's explanation for not filing his appeal within the time and is it **good and sufficient cause** to warrant an extension of time? It is not disputed that the hearing of the suit proceeded ex – parte. I am satisfied by the explanation given by the Applicant that his

Counsel wrongly diarized the hearing date as 18th September 2020 rather than the correct date which was 8th September 2020. Indeed, among the documents produced herein is a letter dated 20th July 2020 and addressed to the Applicant by his Counsel notifying him of the hearing date. It reads: -

> **"DATE – 20TH JULY 2020**
>
> **PETER MAOSA**
>
> **P. O. BOX 104**
>
> **MALAKISI**
>
> **Dear Sirs,**
>
> **REF: BUNGOMA CMCC NUMBER 6 OF 2015**
>
> **PETER MAOSA NYANG'AU .V. NATIONAL BANK OF KENYA.**
>
> **Your above mention case has been fixed for hearing on 18th September 2020 when you must attend Court for hearing.**
>
> **Kindly arrange to attend our office two (2) weeks before the hearing date for pre – trial briefing.**
>
> **Yours faithfully,**
>
> **M'NJAU & MAGETO**
>
> **ADVOCATE."**

Counsel could only have addressed the Applicant in those terms because they had wrongly diarized the date for hearing as 18th September 2020 instead of 8th September 2020. However, when the Judgment was eventually delivered on 6th October 2020, the plaintiff was represented by **MR MASAI** who was holding MR **MAGETO**'s brief. The record for that day shows that **MR MASAI** addressed the trial Magistrate as follows soon after delivery of the Judgment: -

> **"MR MASAI**
>
> **I have just been instructed by MR MAGETO for the plaintiff and have heard the Judgment. I seek that the plaintiff be given a stay of 30 days and for copies of the proceedings and the Judgment.**
>
> **HON J. KING'ORI**
>
> **CHIEF MAGISTRATE**
>
> **6.10.20.**
>
> MR KWEYU**: - No objection.**
>
> **HON J KING'ORI**
>
> **CHIEF MAGISTRATE**
>
> **6.10.20.**
>
> COURT**: - The plaintiff has 30 days stay of execution. Plaintiff to be supplied with a copy of the proceedings and Judgment on payment of the requisite charges.**
>
> **HON J KING'ORI**
>
> **CHIEF MAGISTRATE**
>
> **6.10.20."**

The Applicant therefore must have known about delivery of the Judgment as far back as 6th October 2020. Indeed, I have not heard him deny that and there would be no reason to do so because there was Counsel present in Court holding his Counsel's brief. All I have heard the Applicant allege in paragraph (h) of his grounds upon which the application is premised is that it was not until 23rd April 2021 that he

discovered that the ruling on his application dated 26th October 2020 seeking for a stay of execution and the setting aside of the ex – parte Judgment had infact been delivered on 9th March 2021 in his absence. That for some ***"unknown reasons the Court file remained in Chambers of the trial Magistrate"*** thus making it difficult for him to file an appeal against the ruling delivered on 9th March 2021. There is nothing to suggest that the Applicant made enquiries with the Registry about the file and with what results. The fact however is that unless the Judgment delivered on 6th October 2020 is challenged on appeal, there can be no basis upon which this Court can separately address the appeal against the ruling delivered on 9th March 2021 as sought in paragraph (3) of the Notice of Motion dated 25th June 2021. I take the view that that prayer is pegged on the Judgment delivered on 6th October 2020 and cannot be determined independently. To do otherwise would lead to a very untidy situation whereby the Court has to make a determination in the main appeal as well as another determination on an appeal arising out of a decision made within the whole dispute that is the subject of the appeal. That is what the Applicant is inviting this Court to do. I decline that invitation. Once a matter has been heard and a final Judgment delivered by the trial Court as is the position in this matter, there can be only an appeal against the whole Judgment and not bits and pieces of the same.

Having said so and as is now clear, the Applicant and his Counsel were both aware about the delivery of the Judgment by the trial Court on 6th October 2020 because **MR MASAI**, Counsel holding brief for the Applicant's Counsel **MR MAGETO**, was present. However, and for reasons best known to themselves, both the Applicant and his Counsel have maintained a deafening silence on why no appeal was filed within 30 days from 6th October 2020. Indeed, even some 8 months from the date of delivery of that Judgment upto 25th June 2021 when this application was filed, no attempt has been made to avail a draft Memorandum of Appeal. The result is that this Court is starved of any evidence upon which it can exercise its discretion in the Applicant's favour. This is not actually a case where the applicant has failed to show **good and sufficient cause**. This is a case where the Applicant has not bothered to **show any cause at all sufficient or otherwise**. This Court cannot exercise its discretionary jurisdiction in a vacuum.

The result of all the above is that the application for leave to appeal is without merit. It is for dismissal.

STAY OF EXECUTION: -

This Court having dismissed the prayer for leave to appeal, there can be no justification for making any orders for stay of execution pending appeal. The substratum for this prayer is no longer in existence. Nonetheless, for purposes of completeness, I will address that prayer albeit briefly.

At the commencement of this ruling, I cited the provision of the law that guides the Court in determining an application for stay of execution pending appeal. It is clear from **Order 42 Rule 6(1)** and **(2)** that the Applicant was required to satisfy the following conditions: -

1. **Show sufficient cause.**
2. **Demonstrate that he will suffer substantial loss unless the order for stay is granted.**
3. **Offer security.**
4. **File the application without unreasonable time.**

As there is no appeal, there can be no sufficient cause.

Substantial loss, as **PLATT Ag J.A** (as he then was) stated in the case of **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410**, is the ***"cornerstone"*** for the jurisdiction for granting stay.

And as **GACHUHI Ag J.A** (as he then was) stated in the same case: -

> **"It is not sufficient by merely stating that the sum of Kshs. 20,380/= is a lot of money and the applicant would suffer loss if the money is paid ……… In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted."**

In **MACHIRA T/A MACHIRA & COMPANY ADVOCATES .V. EAST AFRICAN STANDARD (No 2) 2002 KLR**, the Court added thus: -

> **"If the Applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given …….. Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay ……..**
>
> **Indeed, remote contingencies would not warrant the Court's interference with the ordinary course of justice and the process of the law."**

In paragraph (m) of the Notice of Motion, the Applicant states that unless the order for stay is granted, he ***"is likely to suffer irreparable loss."*** And in paragraph (5) of his supporting affidavit, he refers to the fact that the trial Court dismissed his claim and entered Judgment in favour of the 2nd defendant ***"in the sum of a whooping Kshs 6,720,000/= in addition to an eviction order, costs and interest ……………."*** However, other than plead that he will suffer ***"irreparable loss,"*** no evidence has been placed before this Court to show the nature of that ***"irreparable loss"*** or that the 2nd Respondent will not be in a position to refund the ***"whooping Kshs. 6,720,000/="*** should the appeal be up –

held. In paragraph (27) of the replying affidavit, the 2nd Respondent has deponed that he has already ***"taken possession of the premises and thus stay orders cannot be granted."*** That averment was not rebutted and so the fear of eviction is no longer a threat. The Court cannot stay what has already occurred.

Further, the Applicant moved to this Court 8 months after the Judgment herein. That is clearly unreasonable delay which has not been explained. Finally, the Applicant has not offered any security. The totality of all the above is that even if leave to appeal would have been granted, the Applicant would not have met the threshold for the grant of an order of stay of execution of the Judgment pending appeal. That prayer is also for dismissal.

The up – shot of all the above is that the Notice of Motion dated 25th June 2021 is devoid of merit. It is dismissed with costs to the 2nd Respondent.

BOAZ N. OLAO.

J U D G E

20TH DECEMBER 2021

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF DECEMBER 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO.

J U D G E

20TH DECEMBER 2021