



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 282 OF 2010**

1. WILLIAM T.ABIRA
2. WILLIS M. MURIGU
3. PAUL NGAO MAKALU
4. KENNETH MUKHAYA
5. PETER N. MWANGELA
6. NYAPINDA DAVID
7. JEFF GUANTAI
8. LAZARUS OBUNGU
9. MATHENDU KAVITA
10. MUHANGANI JOEL
11. RICHARD M. NJUGUNA
12. WILSON KARANJA
13. MARTIN K'OBONYO.....PLAINTIFFS/APPLICANTS

**VERSUS**

**KENYA CIVIL AVIATION AUTHORITY.....DEFENDANT**

**RULING**

1. The Applicants filed this application on **26<sup>th</sup> January, 2021** seeking the following orders:-

***a) Spent;***

***b) That leave be granted to the Applicant to lodge and file an appeal against the Respondent out of time and the filed Notice of Appeal dated 18<sup>th</sup> January, 2021 be deemed to have been filed & served within the time prescribed by the law;***

***c) That this Honourable Court be pleased to stay execution of the ruling delivered on 20/5/2020 and all consequent proceedings and subsequent execution proceedings thereto, together with all consequential orders pending hearing and determination of this application and the intended appeal;***

***d) That costs of this application be provided for.***

2. In the grounds supporting the application on the face of the application it was argued that this Court delivered a Ruling dated **20<sup>th</sup> May, 2020** in respect of an application dated **26<sup>th</sup> June, 2016** and dismissed the same. It is argued that the Respondent had failed to prove

ownership of the subject suit properties and this court then failed to consider that the Applicants had legitimate expectations that they would be staying on those premises without any disturbance for they had considered the said properties to be their matrimonial homes.

3. The Applicants aver that the intended Appeal is arguable and risks to be rendered nugatory if the orders sought are not granted for the reason that the Respondent has begun the eviction process despite the applicants having had invested a great deal of time and money in the said premises. It is also averred that it is unknown how the Respondent will utilize the premises and actions by the Respondent will occasion the Applicants substantial loss.

4. It is further averred that the delay in filing the appeal was occasioned by the fact that this court failed to issue a notice to the Applicants and/or their advocate of the delivery of the Ruling and the Applicants only learnt of the same through the Kenya Law Reports website. According to the applicants, this court has unfettered discretion in granting leave to lodge the appeal out of time.

5. The application is supported by an **affidavit** deposed by **KENNETH MUKHAYA**, the 4<sup>th</sup> Plaintiff/Applicant herein, in which he buttresses the grounds in support of the application.

6. The application was however opposed by the Respondent who in so doing filed Grounds of Oppositions on the **8<sup>th</sup> of February, 2021** which are dated an even date. The Respondent term the application frivolous, vexatious and an abuse of the court process since similar applications have been raised by the Applicants and dismissed. It is averred that the Applicants have filed a notice of appeal against the Ruling of **Justice Mureithi** delivered on the **31<sup>st</sup> of October, 2012**, but took no further steps, and thus they cannot purport to file yet another Appeal.

7. According to the Respondent, the Applicant had opted for a review of the Ruling delivered on **8<sup>th</sup> June, 2016** and they cannot seek to appeal against the same order. In view of the Respondent, the intended Appeal is not arguable but it is an attempt by the Applicants to deny the Respondent possession of the suit properties despite the fact that the Applicants ceased to be the Respondent's employees.

8. The application came up for inter parties hearing on **9<sup>th</sup> February, 2021** with the Plaintiffs/Applicants being represented by **M/s Memia** whereas the Respondent was represented by **M/s Jadi**. The submissions by both counsels reflected on the grounds set out by the parties as captured above.

9. Nonetheless, **M/s Jadi's** Counsel for the Respondent sought the court to dismiss the application for the reason that no plausible explanation for the delay had been tendered by the Applicants. **M/s Memia** on the other hand and while responding to concerns raised in the grounds of opposition and further reiterated by **M/s Jadi**, submitted that the Applicants chose not to prosecute the appeal against the ruling delivered by the Honourable Justice Mureithi for the reasons that the Applicants later preferred to pursue review of the same Ruling.

10. In my view, it is agreed that it is within a party's discretion to elect for a review or an appeal and within the meaning of **Order 45** of the **Civil Procedure Rules**, a party may file a Notice of Appeal and later elect to prosecute an application for review.

11. In answer to the contention that the Applicant cannot pursue review and later file an Appeal, **M/s Memia** cleared the air in submitting that the Applicants were intending to appeal against the Ruling delivered by this court on **20<sup>th</sup> May, 2020** and not the Ruling of delivered on **8<sup>th</sup> June, 2016**. She also suggested that parties be allowed to dispose of the application by filing written submissions.

12. Consequently, the court directed that the application be dispensed with by way of written submissions and directions were issued that the Plaintiffs/Applicants do file written submissions within seven days as from **9<sup>th</sup> February, 2021** while the Respondent files their submissions within 7 days of being served. The record shows that only the Applicants filed their submissions on **2<sup>nd</sup> March, 2021** which I have read through. However, the material presented before this court as well as the submissions made by the advocates on behalf of the parties is ample and extensive enough to guide the court in making an equitable decision.

### **ANALYSIS AND DETERMINATION**

13. Having considered the pleadings and the submissions by Counsel for the parties in this matter, I believe that two issues arise for determination, beng:-

***i. Whether the court should exercise its discretion to grant the applicants/appellants leave to file their appeal out of time.***

***ii. Whether an order of stay of execution pending appeal should issue.***

***i. Whether leave to file the appeal out of time should be granted.***

14. Under Section 79G of the Civil Procedure Act, a party may be granted leave to file an appeal out of time if he satisfies the court that he has good reason for not filing the appeal within the time provided for by law. The conditions set out under Section 79G and which should be considered in deciding whether or not to grant extension of time to file an Appeal are; *the length of the delay, the reason for the delay, possibly, the chances of success of the appeal if the application is granted, and finally, the degree of prejudice to the respondent if the application is granted.* See also the court of appeal decision in the case of **Thuita Mwangi..Vs..Kenya Airways Ltd [2003]eKLR.**

15. In this case, the decision that the Applicants seek to Appeal against was delivered on **20<sup>th</sup> May, 2020** whilst the application seeking leave to appeal out of time was filed on **26<sup>th</sup> January, 2021**. The Applicants allege that the court never served them any notice on delivery of the Ruling and that they learnt of the delivery of the Ruling from the Kenya Law Report Website, by which time the period within which the

Appeal should have been filed had lapsed.

16. The period between the delivery of the Ruling and the filing of the instant application is about 8 months. This means that the Applicants are about seven (7) months out of time for filing an Appeal. My take is that a litigant has the duty to follow up on his/her case after it has been filed and seven months without following the status of the suit would be unreasonable delay in the circumstances for a litigant seeking justice.

17. However, bearing in mind that the decision sought to be appealed from was delivered in the absence of the parties, I believe the interests of justice demand that the applicants be granted leave to appeal out of time. I have reached this decision upon considering that the Applicants' right to appeal is a constitutional right and the delay can be explained in the failure of the court issuing a notice on when the ruling was to be delivered.

18.. The dictates of justice demand that they get an opportunity to exercise their constitutional right of appeal, and I accordingly grant the Applicants Leave to file an Appeal out of time as prayed. The Applicants' Appeal should be filed in court within the next 30 days from the date hereof.

**ii. Whether orders of stay of execution should issue.**

19. Should the Applicants be granted stay pending appeal? The Applicants argue that the Respondent has commenced the eviction process notwithstanding that the Applicants had legitimate expectation to have the suit premises as their matrimonial homes and eventually made great investments in the premises so that if the eviction is not stopped and/or the orders sought granted, and the intended appeal may be rendered nugatory.

20. I have considered the submissions by the parties on this issue and the authorities relied on by the applicants. The duty of the court is, as far as possible, to balance the interests of the parties. Nonetheless, **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** specifies the circumstances under which the court may Order Stay of Execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following:-

***(a) That Substantial loss may result to the applicant unless the order was made;***

***(b) That the application was made without unreasonable delay; and***

***(c) That such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.***

21. From the above provision, it is clear that the court must be satisfied that there is "sufficient cause" to grant a Stay. Evidently, the three (3) prerequisite conditions set out in the said **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** cannot be severed.

22. The above finding notwithstanding, I cannot lose sight of the fact that the Ruling that the Applicants seek to Stay is the Ruling delivered by this court on **20<sup>th</sup> May, 2020** dismissing the Applicant's application dated **27<sup>th</sup> June, 2016**. The said application sought for orders of review and Stay of Execution of earlier orders granted by the Honourable Justice Emukule. My humble view is that the Ruling issued by this court on **20<sup>th</sup> May, 2020** dismissing the Applicants' application was a negative order as opposed to a positive order which imposes a certain obligation on either of the parties. It follows that a negative order is incapable of being Stayed as the Applicants seek.

23. A similar finding was reached by the Court of Appeal in the case of **Kaushik Panchamatia & 3 Others..Vs..Prime Bank Limited & Another [2020] eKLR**, where the said Court observed that;

***"...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants."***

24. Similarly, in the case of **Western College Arts and Applied Sciences..Vs... Oranga & Others [1976]KLR 63**, the Court of Appeal whilst considering whether an order of Stay can be granted in respect of a negative order and which I fully adopt stated *inter alia* as follows:-

***"But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs....."***

***The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction."***

25. Accordingly, there is nothing to Stay with regard to the Ruling delivered on **20<sup>th</sup> May, 2020** for the reasons that the said Ruling merely dismissed the Applicants' application with costs. If any execution would follow from the said Ruling, it would be in respect to cost having pointed out this court did not order any of the parties to do anything or refrain from doing anything. It therefore, follows that in light of the foregoing discussion, this court has no mandate to grant a stay order in the manner prayed for by the Applicants. Accordingly the prayer for stay of execution as contained in Prayer no.3 of the application is hereby denied.

**DISPOSITION**

26. For the reasons foregoing, the upshot of this court's Ruling is that the Plaintiffs'/Applicants' **Notice of Motion** dated **20<sup>th</sup> January, 2021** and filed on **26<sup>th</sup> January, 2021** is hereby allowed in terms of Prayer No.2 and the Applicants are hereby directed to file their Appeal in court within the next 30 days from the date hereof.

27. Prayer No.(3) of the application is hereby denied and for avoidance of doubt, the order seeking Stay of Execution of the Ruling dated **20<sup>th</sup> May, 2020** is hereby dismissed.

28. Each party shall bear its own costs of this application.

It is hereby so ordered.

**DELIVERED, DATED and SIGNED VIRTUALLY at MOMBASA this 16<sup>th</sup> day of MARCH, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**16/3/2021**