



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 161 OF 2008

CONSOLIDATED WITH

CIVIL SUIT NO. 162 OF 2008

CHARLES SING'OEL..... 1ST PLAINTIFF

BEATRICE CHELIMO2ND PLAINTIFF

JENIFFER MUMBI KIILU.....3RD PLAINTIFF/APPLICANT

VERSUS

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES..... DEFENDANT

RULING

1. This is a ruling on two applications by the applicant dated 31/8/2020, respectively. They were brought under **section 7 of the Appellate Jurisdiction Act, sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules.**
2. The applicant sought the extension of time within which to lodge an appeal in the Court of Appeal against the judgment of this Court (Odero J) delivered on 30/7/2020 and a stay of execution of the said judgment.
3. The grounds upon which both applications were based were set out in the body of the applications and the supporting affidavits of the applicant sworn on 31/8/2020, respectively. These were that the judgment was delivered on 30/7/2020 without notice to the parties; that the applicant only knew of the same on 11/8/2020 when the defendant served its Notice of Appeal upon her advocates; that the applications were filed timeously; that the applicant will suffer substantial loss if the stay is not granted and that she was willing to offer such security as shall be ordered by the Court.
4. The application for extension of time was not opposed while the one for stay was opposed vide Grounds of Opposition dated 15/9/2020.
5. The Court has considered the depositions on record, the Grounds of Opposition and the submissions on record. The applicant's submissions are dated 27/10/2020 while those of the defendant are dated 3/11/2020.
6. As already stated, the application for extension of time was not opposed. That notwithstanding, it is upon this Court to satisfy itself that the application is merited. The principles applicable are well settled. These are; the length of the delay, the reason for the delay and the prejudice, if any, to be suffered by the opposite party. See **Leo Sila Mutiso v. Helen Wangari [199] 2EA 231.**
7. As for the length of delay, the Notice of Appeal was supposed to be filed by 14/8/2020. The application was lodged on 31/8/2020. The delay was for 17 days. The Court considers that the length of the delay was not unreasonable.
8. On the reason for the delay, this was satisfactorily explained by the applicant. She averred on oath, and it was not denied, that the judgment was delivered on 30/7/2020 without notice. That due to the Covid – 19 pandemic at the time and the just introduced Judiciary e-filing system, neither the Notice of Appeal nor the present application could be filed on time. The case of **Hajar Services Limited v. Peter Nyangi Mwita [2020] Eklr** was relied on, which the Court agrees with, that where a decision is delivered without notice, that constitutes sufficient reason to extend time.

9. On prejudice, I see none that will be suffered by the defendant. In any event, none was alluded to. That application is therefore allowed.
10. On the other hand, the application for stay was opposed vide Grounds of Opposition dated 15/9/2020. It was contended that the application was misconceived, frivolous, vexatious and devoid of merit. That there was nothing to stay as the order dismissing the suit was a negative order not capable of execution.
11. The principles applicable in an application for stay are well settled. The application should be made timeously, an applicant must demonstrate that he will suffer substantial loss unless the stay sought is granted and security should be given for the due performance of the decree or order that may be ultimately binding on the applicant.
12. On whether the application was made timeously, the judgment was delivered on 30/7/2020. The applicant knew of the judgment on 11/8/2020. She lodged the current application 20 days later, on 31/8/2020. This Court considers the delay of 20 days not to be unreasonable.
13. On substantial loss, the applicant averred that she is and has been in occupation of the suit premises, **Unit No. 57 on LR. No. Nairobi/Block 69/117**, for over 20 years. That she continues to be occupation thereof together with her family. That with the dismissal of her suit, the defendant may proceed to dispose of the same thereby adversely exposing her and her family to eviction.
14. On the part of the defendant, it was submitted that the suit was dismissed with no order as to costs. That there was nothing to be executed. The decisions of **Western College of Arts & Applied Sciences v. Oranga & Others [1976] KLR 63** and **Kanwal Sarjit Singh Dhiman v. Keshavji Jivraj Shah [2008] Eklr** were relied on in support of that proposition.
15. It is true that the applicant and her family may have been in possession of the suit premises for a long time. She may have developed the same substantially as she contended. With the dismissal of the suit, the defendant is at liberty to take possession thereof or alienate the same to a 3rd party. That indeed may expose her to a possibility of an eviction.
16. However, the Court has seen the judgment. The same was dismissed with no order as to costs. The same does not require the applicant to do anything. I have always known that an order of stay is only meant to prevent or stop a party from doing an act that has been sanctioned. In the present case, neither the plaintiff nor the defendant was directed to do anything.
17. In **Western College of Arts & Applied Sciences v. Oranga & Others (supra)**, it was held: -
- “I do not know what were the relevant laws and regulations on the point in England in 1879, but I am not prepared to dissent from the proposition that, under rule 5(1) of the Rules of this Court, this Court may have power, in a proper case to order a temporary injunction to issue if the Court ‘thinks just’ to do so in the exercise of its jurisdiction to order a stay of execution. 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. Any execution can only be in respect of costs. ...**
- In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, ...”.**
18. In the present case, there was no order for any party to do or refrain from doing anything. There was no even an order for payment of costs. There is absolutely nothing to stay.
19. Were the applicant minded, the jurisdiction of this Court in such a situation is to order an injunction pending appeal. That jurisdiction can only be exercised when properly invoked and in deserving cases. It was not invoked in the present case and none can issue.
20. Accordingly, I find that the application for stay has no merit and dismiss the same with costs. As regards the application for extension of time, the same is allowed. The applicant is granted leave to lodge a requisite Notice of Appeal against the impugned judgment within 14 days of this ruling. The costs of that application will be in the appeal.

It is so ordered.

DATED AND DELIVERED THIS 8TH DAY OF APRIL, 2021

A. MABEYA, FCIArb

JUDGE