



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT MOMBASA
CONSTITUTIONAL PETITION NO. 27 OF 2019

VIKASH KAMALKUMARDEVISHI SHAH.....PETITIONER/APPLICANT

- VERSUS -

ABDALLA ABDULRAMAN.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE LAND REGISTRAR MOMBASA.....3RD RESPONDENT

THE HON ATTORNEY GENERAL.....4TH RESPONDENT

RULING

I. The Preliminaries.

1. Before this honorable court for determination is the Notice of Motion application dated 23rd June 2021. It is brought by the Petitioner/Applicant.

The application is founded under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Sections 1A, 1B & 3A of the Civil Procedure Act Cap. 21 of the Laws of Kenya.

II. The Applicants' case

2. The Petitioner/Applicant seeks the following orders:

a. Spent

b. Spent

c. THAT there be an injunctive restraining the respondent particularly the 1st respondent from interfering with the Petitioners and/or the Estate of Kamalkumar Devshi Shah's occupation, possession and use or howsoever else in dealing in any manner whatsoever with the property known as L.R NO. MN/1/9779 (original No. 891/3), Greenwood Drive Nyali and registered at the Land Titles Registry, Mombasa as C.R. 28688 pending the hearing and determination of the petitioner's intended appeal herein.

d. THAT costs of this application be costs in the cause.

3. The application is premised on the testimonies, grounds and the averments of the Supporting affidavit of VIKASH KAMALKUMAR DEVISH SHAH, the Petitioner/Applicant herein and the annexures marked as "VKDS -). The grounds that sustained this application are inter alia that the Petitioner/Applicant stands to suffer substantial and irreparable loss if the injunction pending appeal is not granted. The applicant being dissatisfied with the judgement of this Court delivered on 1st March 2021 has lodged a Notice to Appeal dated 10th March 2021. The Petitioner/Applicant believes that his intended appeal has high chances of success and prays Court to restrain the 1st Respondent from interfering with the title of the suit property until the appeal is heard by the appellants Court. The Petitioner/Applicant argue this Court bound to preserve the subject matter of the intended appeal, less the appeal be rendered nugatory and prayed Court to allow this application which was filed timeously.

III. The Respondent's case

4. On 4th October, 2021 the 1st Respondent filed a Replying Affidavit in opposition to the application. The affidavit was affirmed by ABDALLA ABDULRAMAN, the 1st Respondent. He castigated the applicant for seeking injunctive orders yet they had not paid the costs as ordered when their petition was dismissed with costs by this Court. He argued that the Court ought not to grant stay since the Notice of the intended appeal was filed out of time, as stipulated by the Court of Appeal rules. He claimed that the irregular Notice of Appeal could not sustain the application for stay and as such it ought to be dismissed with costs. He urged Court to direct the applicant to deposit security for costs of both the petition and the appeal as proof that he is not out to frustrate the applicant's right to the fruits of his judgement.

Directions of Court

5. When the application came up for "*inter parties*" hearing on 16th September 2021, I directed that the application be canvassed by way of written submissions. I granted each party 7 days to file and serve the other party with their submissions and a corresponding time to file and serve after service. On 13th October, 2021 when the application came up for mention to confirm compliance, Mr. Mwanjeje for the 2nd, 3rd and 4th Respondents, informed Court that he would not be participating in this application as the orders sought were not against the 2nd to 4th Respondents.

6. I granted the Petitioner 7 days to file and serve written submissions and to the 1st Respondent another 7 days to file and serve theirs. Despite these very clear directions with strict time frames, neither the Petitioner/Applicant nor the 1st Respondent have bothered to comply with the said directions. In the given circumstances, therefore, I have no alternative but to proceed to provide a ruling without the benefit of their filed written submissions by the parties.

ANALYSIS AND DETERMINATION.

7. I have duly considered the application and the 1st Respondent's response to it. There are two issues to guide this Court for the determination in the instant application.

a. Whether there is a competent appeal on which an order of stay of execution can be granted under Order 42 Rule 6 of the Civil Procedure Rules.

b. Whether the applicant has made a case for the granting of orders of stay of execution pending appeal.

ISSUE NO. Whether there is a competent appeal on which an order of stay of execution can be granted under Order 42 Rule 6 of the Civil Procedure Rules.

8. The 1st Respondent's case is that there was no competent appeal before the Court of Appeal, due to the fact that the Notice of Appeal was lodged outside the 14 day rule stipulated by the Court of Appeal Rules. The 1st respondent argued that since no leave was sought and obtained prior to the filing to the intended appeal, the appeal is not competent and by extension no orders of stay pending appeal can be granted in respect to a defective appeal.

I have perused the application and I note that Judgement was delivered on 1st March 2021. The Petitioner/Applicant lodged the Notice of Appeal on 16th March 2021. A day beyond the time limit stipulated in Rule 75 (2) of the Court of Appeal Rules. Sub rule 4 gives the Court of Appeal general powers to extend time limited under those rules. In **Cosmas Mutiso Muema – Versus - Kenya Road Transporters Limited & another (2014) eKLR Kasango J** was of the view that "In my view, the purpose of a notice of appeal is to notify the concern party or parties of one's intention to appeal. The purpose of time limitation on when the notice should be lodged and served is to curb uncertainty in the litigation process and ensure that a party is able to face an appeal with more predictability or in case where no appeal is filed, to sit back and enjoy the fruits of litigation without anxiety...It is Rule 74 of the Court of Appeal rules as stated before that limit the period within which a Notice of Appeal should be filed. That notice should be filed within 14 days of the date of the decision being appealed from. If the Notice is filed out of the period provided by that rule, it is only the Court of Appeal which can extend the time of filing the Notice. The plaintiff in my view was right to say that once the defendant filed the Notice of Appeal out of time, it removed itself from the ambits of the High Court. The filing of that Notice ousted the jurisdiction of the High Court. That is the specific position of the law, and that being so the overriding principle in the Civil Procedure Act cannot be applicable."

9. I resonate with the findings of **Ngugi J in Sammy Kuria Ndung'u V Samuel Mbugua Ikumbu (2021) eKLR**, "While the High Court is clothed with the Jurisdiction by Section 7 of the Appellant Jurisdiction Act to extend time for a litigant who is desirous of filing a Notice of Appeal to the Court of Appeal for the first time and before he has taken any action at the Court of Appeal, such authority dissipates once the intended appellant has taken any step at the Court of Appeal. This is so however incompetent the Notice of Appeal filed at the Court of Appeal is. Once a party has filed a Notice of Appeal, the authority to strike it out, extend time, deem it regular or any other action related to it lies with the Court of Appeal and not the High Court. This is not a mere formalistic fetish which can be cured by an appeal to Article 159 (2) of the Constitution which admonishes Courts to eschew undue regard to technicalities in dispensing justice. It makes sense that once a Notice of Appeal has been lodged any further applications related to the appeal should be filed at the Court of Appeal which is then seized of that matter."

10. My understanding of Order 42 Rule 6 (4) of the Civil Procedure Rules is this Court has jurisdiction, only where the Notice of Appeal is given as stipulated by the Court of Appeal Rules. If the Notice is filed outside the time limited by the rules, it is deemed irregular and time can only be extended by the Court of Appeal. As it stands, the Notice of Appeal upon which this application for stay is premised is irregular for being filed out of time without leave of Court.

ISSUE No. b). Whether the applicant has made a case for the granting of orders of stay of execution pending appeal.

11. I hold the view that an application for stay pending appeal, cannot be pegged on a Notice of Appeal lodged out of time. As I have stated above, Order 42 Rule 6 (4) creates a scenario where this Court will only consider a Notice of Appeal that is filed in the manner stipulated by the Court of Appeal Rules. I find that the Notice of Appeal dated 10th March 2021 and lodged on 16th March 2021 was lodged outside the 14 day limit stipulated by Rule 75 of the Court of Appeal rules. As such, this cannot be the basis for an application for stay pending appeal. Asking this Court to grant stay of execution pending appeal, on an irregular Notice of Appeal is asking the Court to make a decision on the competence of a Notice of Appeal. The issue of validating an incompetent Notice of Appeal lies with the Court of Appeal and not the High Court. I therefore have no jurisdiction to make one more step to hear and determine this application.

ISSUE No. c). Who will bear the costs of the said Notice of Motion application.

The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. In this case, as Court finds that the Petitioner/Applicant has failed to fulfill the conditions set out under Order 42 Rule 6 (2) and (6) of the Procedure, this application shall be deemed to have been dismissed with costs awarded to the 1st Respondent.

DETERMINATION

From the foregoing, therefore, and for avoidance of any doubts, I

order:-

1. THAT the notice of motion application dated 23rd June, 2021 by the Petitioner/Applicant is bereft of any merit and the same is and hereby dismissed.

2. THAT the costs of the application to be borne by the Petitioner/Applicant.

IT IS SO ORDERED.

RULING IS DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 9TH DAY OF DECEMBER, 2021

JUSTICE L.L NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT, MOMBASA

In the presence of:-

M/s. Yumna – the Court Assistant

Mr. Ondego Advocate for the Petitioner/Applicant;

Mr. Ondieki holding brief for Mr. Shimaka Advocate for the 1st Respondent

Mr. Mwanjeje for 2nd, 3rd and 4th Respondent