



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC MISC. APP NO. 1 OF 2020**

**WELDON KIPKURGAT RONO.....APPLICANT**

**VERSUS**

**STANLEY KORIR.....1ST RESPONDENT**

**REUBEN MIBEL.....2ND RESPONDENT**

**RULING**

1. Pursuant to a Judgment delivered by the Magistrates' Court on the 21<sup>st</sup> November 2019, the Applicant has now filed the present Application by way of a Notice of Motion dated 9<sup>th</sup> January 2020 brought under the provisions of Section 1A, 1B, 3, 3A, & 79G of the Civil Procedure Rule, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Article 51 of the Constitution where he seeks for orders of stay of execution of the Judgment pending the hearing and determination of an intended Appeal. The Applicant further seeks leave to Appeal out of time.
2. The application is supported on the ground therein as well as on the sworn affidavit of the Applicant dated an equal date.
3. The application was opposed by the Respondents' Grounds of Opposition dated 9<sup>th</sup> March 2020 in which the Respondents deponed that the application was not merited, was frivolous and vexatious as intended Appeal did not disclose any arguable grounds. That the delay in filing the intended Appeal was not excusable and further that the application had been overtaken by events since the Respondents were already in occupation the suit property and had commenced utilizing the same.
4. The application was disposed of by way of written submissions to which the Applicants submitted that the stay of execution of a Judgment is provided for under the provisions of Order 42 rule 6 of the Civil Procedure Rules and that pursuant to a holding in **Kiambu Transporters vs. Kenya Breweries** (sic) the court had set out the conditions that needed to be fulfilled before the court could to grant a stay. That in the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417** the court had held that it was a general principle in granting or refusing to grant a stay that if there was no overwhelming hindrance, a stay must be granted so that an Appeal would not be rendered nugatory should the decision be reversed.
5. That the grant or refusal of a stay of execution was discretionary in circumstances where there was no overwhelming hindrance. That the Applicant herein had demonstrated sufficient cause for the grant of the order by timelessly filing the application without undue delay. That it was in the interest of justice that the same be granted as the threshold for the grant of the orders had been met.
6. On the second application where the Applicant sought for leave to Appeal out of time, they had submitted that for such orders to be granted, he ought to demonstrate that he was not guilty of laches. That from the record it could be demonstrated that he had filed his Memorandum of Appeal on 10<sup>th</sup> January 2020 as well as seeking for orders to file the Appeal out of time. He relied on the decision in the decided case in **Nicholas Kiptoo Korir Arap Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** to seek that the court relies on the principles that were set therein, to grant him the leave to file his Appeal out of time. The Applicant further submitted that the court do find merit in his application and grant him the orders as prayed.
7. In opposition to the Applicant's application, the Respondents herein submitted that the prayers sought in the Applicant's application was time barred. That the lower court Judgment was delivered on 21<sup>st</sup> September 2019 wherein the Applicants did not obtain any stay of the Decree with the result that the Respondents proceeded to take full occupation, use and development of the suit plot and have been in occupation to date, that the orders of stay of execution would therefore serve no purpose.
8. That it was not enough for the Applicant to merely state that he would suffer substantial loss if the stay was not granted, for it was incumbent on him to prove with specific details the kind of loss he would suffer from the refusal of stay. That the mere fact that there were strong grounds of Appeal did not in itself justify for an order for stay. The Applicant ought to have established a sufficient cause in which the court would have been satisfied that substantial loss would ensue from a refusal to grant a stay. The Respondents further submitted that the Applicant did not furnish any security and neither did he file the application without unreasonable delay as per the provisions of order 42 rule

6(2) of the Civil Procedure Rules. They sought for the application to be disallowed.

### **Determination.**

9. I have considered, the Applicant's Application, the supporting affidavit as well as the written submissions of both the Applicants and the Respondents. I find two issues for determination arising therein namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this Court should make.

10. Having said so, I have considered the Judgment and decree sought to be stayed herein. Vide a Judgment delivered by the Magistrates' Chief Magistrate's Court at Kericho in Civil Suit No 51 Of 2013 on the 21<sup>st</sup> November 2019, the Court had held as follows:

*'Looking at the case in totality, the defendants have a better claim to the suit plot in terms of a duly executed sale agreement than the first plaintiff who has a clearly altered copy of the sale agreement which in fact is a forgery. I hereby dismiss the first plaintiff's case with costs to the defendants. I have considered the defendants counter claim and note that prayers were sought against the second defendant who passed on in the course of the trial and this case abated when no representative was appointed to take over his case. The defendants can only pursue those claims against his personal representative but as of now I make no orders. For avoidance of doubt, any orders of injunction or status quo in force are now discharged and the defendants can take full occupation, use and development of the plot.'*

11. These orders were, in my humble opinion, negative orders.

12. In the case of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR** the Court had held that an order for stay cannot be granted where a negative order had been issued.

13. Under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed. It defines a decree holder as:

*'any person in whose favour a decree has been passed or an order capable of execution has been made...'*

14. In the present Judgment, the Court did not order the Applicants to do anything or to abstain from doing anything or to pay any sum of money.

15. In the case of **Western College of Arts and Applied Sciences vs. Oronga (1976) KLR 63 (supra)** the Court of Appeal held that:-

*"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 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 to restrain by injunction."*

16. In the decided case of **Sonalux Limited & Another vs. Barclays Bank of Kenya Limited [2008] eKLR** the Court of Appeal held:

*'As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.'*

17. For the foregoing reasons, the upshot of this Court's Ruling to the Applicant's Application for orders of stay of execution of the Judgement and decree pending the hearing and determination of an Appeal, is that the same is not merited and therefore is dismissed.

18. On the second issue where the Applicants has sought leave to file his Appeal out of time, Section 79G of the Civil Procedure Act which gives an appellate court discretion to extend time for filing an Appeal from the subordinate Court to the High Court.(read Land and Environment Court) stipulates as follows;

*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 good and sufficient cause for not filing the Appeal in time.*

19. In the case of **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** the court held that:

*“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.*

*“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:*

- 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;*
- 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*
- 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*
- 5. whether there will be any prejudice suffered by the Respondent, if extension is granted;*
- 6. whether the application has been brought without undue delay; and*
- 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].*

20. Has the Applicant fulfilled the above requirements so as to be granted leave to file his Appeal out of time?

21. The gist of the matter in question is that Judgment in the trial court was delivered on the 21<sup>st</sup> November 2019, the Applicant has now filed the present application dated 9<sup>th</sup> January 2020 seeking to file the Appeal out of time so as to stay of execution of the decree arising from the Judgment.

22. Having considered the application, the supporting affidavit and the submissions hereto, and further having considered the Respondent’s Grounds of Opposition, to the effect that the application had been overtaken by events since they were already in occupation the suit property and had commenced utilizing the same, I find that the Application herein was not brought without unreasonable/excusable delay the Applicant having had knowledge of the content of the Judgment.

23. The extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court. By the Applicant stating that he was unable to file his Appeal on time because of circumstances beyond his control and that the Respondent would not suffer any prejudice, I find, was not a reasonable cause for the delay, and the explanation was not expressed to the satisfaction of the Court. There being no basis laid for the extension of time to the court’s satisfaction, the upshot is that the application for enlargement of time to enable the Applicant file his Appeal after the expiry of the statutory period is herein denied.

24. In the end, the Applicants’ Notice of Motion dated the 9<sup>th</sup> January 2020 lacks merit and is hereby dismissed in its entirety with costs to the Respondents.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 9TH DAY OF DECEMBER 2021**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**