



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.120 OF 2019

FRANCIS NGUMBI1ST APPELLANT/APPLICANT

TINEKE UNDUSU MAKANGU.....2ND APPELLANT/APPLICANT

-VERSUS-

SELLAH OYIKO AGUVASU.....RESPONDENT

RULING

1. This is a ruling on application dated **18th September, 2020**. This application seeks the following orders: -

1. Spent.

2. Spent.

3. THAT the court be pleased to extend time for the appellants/ applicants to comply with stay conditions by 45 days.

4. THAT this Honourable Court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.

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

2. This appeal arises from claim filed by the respondent against the appellants in **Nakuru CMCC No. 583 of 2012** where the trial court delivered judgment on **28th June, 2019** in favor of the respondent.

3. The appellants filed appeal against the said judgment and subsequently applied for stay of execution in the trial court. On **13th December 2019** the trial court allowed stay of execution on condition that half the decretal amount is deposited in a joint interest earning account within 30 days. Following failure to comply with the court order, the applicant sought for extension of time to comply and the trial court extended time to comply by 5 days from **15th September, 2020**.

4. Grounds on the face of the application are that the appellants/applicants had approached the respondent to sign the account opening forms to enable them comply with the stay conditions but the respondent declined to sign.

5. Further that the trial court delivered its ruling and directed the appellants/applicants to deposit half of the judgement sum Kshs. 1,101,292/= in a joint interest earning account within five (5) days which amount is substantial and process of opening joint account and depositing the said sum in the account would take substantial amount of time.

6. The application is supported by the annexed affidavit sworn **by Isabella Nyambura** sworn on **15th September 2020**. She averred that the ruling dated **13th December, 2019** was delivered in the absence of the appellants/applicants and no stay order was issued and by the time they learnt about the ruling, the time to comply had already lapsed thus necessitating the filing of this application.

7. She further averred that the five (5) days to comply as ordered by the trial court is a very short period to enable them comply as the process of opening a joint interest earning account take considerable time as the amount to be deposited is substantial and owing to current economic status that has been shaken by Covid-19 pandemic, the appellants/applicants requires to make arrangements to deposit and the respondent may proceed with execution in the event stay orders are not granted yet the appellants/applicants are in the process complying with the ruling

of the court.

8. The parties herein agreed to proceed by way of written submissions.

APPELLANTS/APPLICANTS SUBMISSIONS

9. The appellants/applicants in their submissions filed on 9th February, 2021 urged this court to exercise its unfettered discretion under **Section 1A, 1B, 3A and 95 of the Civil Procedure Act** and allow the application. They submitted that their application has been made without unreasonable delay and the same will not occasion any prejudice to the respondent; and further that they are willing to abide by any orders which will be made by this court.

RESPONDENT'S SUBMISSION

10. The respondent in her submissions filed on 8th March 2021 submitted that the issue before this court is whether this application has satisfied the principles for granting stay of execution orders and urged this court to be guided by the principles for granting stay of execution set out in **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules** and the cases of **Butt vs Rent Restriction [1979] eKLR**, **Global Tours & Travel Limited vs Five Continents Travel [2015] eKLR** and **Tabro Transporters Ltd vs Absalom Dova Lubasis 2012 eKLR**.

11. The applicant submitted that from **order 42 rule 6 of the civil procedure rules** and the cited authorities this court has to consider whether or not substantial loss may result if stay is not granted and submitted that there is reason to preserve the subject matter failure to which the same will render the appeal nugatory.

12. The applicant further submitted that the court to ensure that no party suffers prejudice that cannot be compensated by an award of costs. She relied on the cases of **Silverstein vs Chesoni [2002] 1 KLR 867** and **Shell Limited vs Kibiru & Another, Civil Appeal No. 97 of 1986, Nairobi**.

13. On whether or not there was delay in filing the application, the applicant submitted that the formal application before this court was made on 26th July, 2019 almost a month from the date of the court's judgment delivered on 28th June, 2019 and that no explanation has been given for the said delay. She submitted that the appellants/applicant made no effort to comply within the five (5) days granted by the court in its ruling on 13th December, 2019. She submitted further that the application is inordinately delayed and the same offends the rule or the doctrine of *res judicata* which serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra of being vexed by issues that have been determined by a court of competent jurisdiction.

14. On whether the applicants have tendered any security as compensation in the event the appeal does not succeed. She submitted that under **Order 42 rule 6(1) (2) of the Civil Procedure Rules**, a party seeking stay must offer a security for the due performance of the orders as may ultimately be binding on the appellant. That the appellants/applicants in the instant matter ought to have provided the actual security for consideration by the court. She relied on the cases of **Equity Bank Limited vs Taiga Adams Company Limited [2006] eKLR** and **Congress Rental South Africa v Kenyatta International Convention Center; Co-operative Bank OF Kenya Limited & Another (Ganishee) [2019] eKLR**. She urged the court to dismiss the application with costs to the respondent.

ANALYSIS AND DETERMINATION

15. I have considered arguments by both parties herein and wish to consider whether the applicant has demonstrated sufficient reason to extent of orders issued on 15th September, 2020 requiring deposit of half of the decretal amount; that is kshs. 1,101,292 in a joint interest earning account within 5 days.

16. In the case of **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, the court stated thus: -

“..... 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: -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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

17. The court granted the applicant herein conditional stay of execution on 15th September, 2020 directing the appellants/applicants to deposit half the decretal amount being a sum Kshs. 1,101,292 in a joint interest earning account within five (5) days, failure which stay orders shall stand vacated and execution shall issue forthwith.

18. The appellants/applicants have argued that the amount that the amount is substantial, and Covid 19 pandemic has contributed to the difficulty in complying with the court order within the time granted by the court.

19. There is no doubt that extension of time is an equitable remedy which the court has discretion of the court to grant depending on case to case basis. I note that this application was filed without undue delay considering the date when it was filed which is 21st September 2020 following ruling delivered on 15th September 2020.

20. I also note that it is almost 8 months now when the applicant sought extension of time to deposit half the decretal amount as ordered. I am however of the view that the respondent will not suffer any prejudice if the applicant is granted additional time to comply with the court order in view of the difficulties attributed to the delay in complying with conditions given by court.

21. **FINAL ORDERS**

1. The applicant is granted an extension of 21 days from today's date to comply with an order to deposit issued on 13th December, 2019.

2. Costs of the application to abide by the outcome of the appeal.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 1ST DAY OF JULY, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Ms. Mwangi holding brief for Mureithi for respondent

Ms. Baraza holding brief for Mrs. Oliech for applicant.