



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL CASE NO 8 OF 2013**

NATHAN CHESANG MOSON.....1<sup>ST</sup> APPLICANT

JOSEPHINE CHELAGAT.....2<sup>ND</sup> APPLICANT

SERVANTHOOD & LIGHT DEVELOPMENT -FOUNDATION....3<sup>RD</sup> APPLICANT

**VERSUS**

COMMUNITY UPLIFT MINISTRIES.....RESPONDENT

**RULING**

1. NATHAN CHESANG MOSON (1<sup>st</sup> APPLICANT), JOSEPHINE CHELAGAT (2<sup>nd</sup> APPLICANT) and SERVANTHOOD & LIGHT DEVELOPMENT FOUNDATION (3<sup>rd</sup> APPLICANT) have by a Notice of Motion dated 25/3/2019, supported by the grounds on the face of it and the supporting affidavit by Nathan Chesang Moson and Josephine Chelangat both sworn on 7/10/2019, made pursuant to the provisions of **Articles 47, 50 ad 159 of the Constitution, Sections IA, 1B, 3 and 75 of the Civil Procedure Act, cap 21 and Order 42 Rules 6(1) 43 and 51 of the Civil Procedure Rules 2010**, sought:

**1. To be granted leave to appeal against the ruling delivered on 25<sup>th</sup> September, 2019**

**2. That there be stay of the mention scheduled for 5<sup>th</sup> November, 2019, any further action in the matter and/or any proceedings and /or further proceedings and/or writing of the judgment in this matter pending the hearing and determination of the Appeal vide Notices of Appeal both dated 7/3/2019 and the Intended Appeal to the Court of Appeal pursuant to the Notice of appeal attached hereto awaiting grant of leave**

**3. Costs of this application be provided for.**

4. The background to the application is that Applicants filed two appeals both dated 7/3/2019 one challenging the court order made on 5/3/2019 allowing the production of the Plaintiffs bundle of documents and the other Notice of Appeal challenging the Court's ruling made on 6/3/2019 declining the applicants' application for adjournment.

5. Following this court's rejection of the Applicant's oral application for stay of proceedings, and proceeding with the matter despite the Applicants' reservation on the Judge's impartiality to handle the matter, the Applicants filed an application dated 8/3/2019 seeking to have me disqualify myself from handling the matter. Consequently, the application was heard and a ruling delivered on 25/9/2019. The Applicants being dissatisfied with the said ruling and with no order preventing the court from proceeding

with the matter filed the present application seeking leave of the court to file an appeal against the ruling delivered on 25/9/2019 and stay of proceedings pending the hearing and determination of the intended appeals to the Court of appeal.

6. The application is case for grant of leave to file an appeal against the ruling delivered on 25/9/2019 and the applicant refers to **Order 43 Rule (I) of the Civil Procedure Rules, 2010** as well as **Order 43 Rule 2 of the Civil Procedure Rules, 2010** goes on to provide that leave has to be sought for any appeal against orders falling outside what is provided for under Order 43 Rule I of the Civil procedure Rules, 2010. The ruling sought to be appealed against stems from the application dated 8/3/2019 by the Applicants seeking that I disqualify myself from handling the matter, which order falls outside the orders which can be appealed against as of right.

7. The Applicants had filed two appeals both dated 7/3/2019 challenging the orders made by the Court on 5<sup>th</sup> and 6<sup>th</sup> March, 2019. They also wish to file an appeal against the orders made on 25/9/2019 once leave to appeal is granted through this application. The application is made on the basis that an appeal does not operate as stay of proceedings. The Applicants contend that they are entitled to the orders sought by dint of the provisions of **Order 42 Rule 6(1) of the Civil Procedure Rules 2010** which provides that:

**"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**  
"

8. It is the applicants' submission that the order of stay being sought is necessary so as not to render the intended appeal nugatory in the event that this matter proceeds and the appeal succeeds. It is pointed out that the appeals seek to challenge the decision of the court to allow production of Plaintiff's bundle of documents, and proceeding with the matter without the Plaintiff's bundle of documents being in the court file; the decision to disallow their application for adjournment on 6/3/2019 and refusal to recuse myself from handling the matter and impartially and independently make a fair determination of the matter.

9. It is submitted that these are issues which directly impact on the current proceedings, and will be rendered nugatory should the matter proceeds to conclusion especially because it is already due for submissions before judgment is rendered. That it is in the interest of justice and good order for the application for stay of proceedings pending the hearing and determination of the appeal to be allowed given that if the matter were to proceed as it is and judgment is entered, it would be difficult for the Applicants to undo the damage or loss that may arise, and prevent wastage of judicial time to have the matter go back for retrial in the event that the appeals to the Court of Appeal succeed.

10. In support of their submissions, the applicants cite the case of **EASY COACH LIMITED VERSUS PATRICK WATANI MAENDE AM) 2 OTHERS 120181 cK1.R**

***" I however, consider that the appeal in this case could be rendered nugatory if the proceedings trial court proceeded to conclusion and determination before the appeal is heard. The appellant may have been compelled to satisfy a decree of the trial court without indemnity or contribution by the intended parties..."***

It is further contended that it will be impossible to reset the parties to the original positions and restart the hearing with the Parties enjoined.

That it is not just a question of setting aside the testimonies of the two or three witnesses who have testified as there is nothing to stop the trial court from proceeding to full hearing and determination in the

matter which may then be executed to the detriment of the appellant who seeks to bring in 3<sup>rd</sup> Parties in accordance with the Civil Procedure Rules. The applicants lament that a retrial occasioned in the event of a successful appeal after the trial has closed and judgment **rendered would only escalates costs.**

**11. Also cited is the decision in MATTER OF GLOBAL TOURS AND TRAVELS LIMITED - NAIROBI HCCC NO 43 of 2002 which stated that**

*“... if the applicant succeeds on its appeal, most unsavoury situation will result ... To undo what would have been done in the meantime would be impossible or impossible without further litigation. That is not the kind of damage which can be compensated by an award of costs and it would not be optimum utilisation of judicial time to proceed with the trial of the petition at the risk of such prospects. In those premises it would be in the interest of justice to grant an order of stay of proceedings in this case pending appeal.”*

12. In opposing the application, the respondents by an affidavit sworn by **JAMES LANDON KARINS** argue that the court already made a decision on the issue regarding stay of proceedings as well as the matter regarding recusal vide the ruling dated 8<sup>th</sup> March 2019, both of which were dismissed, so they are precluded from seeking similar orders. Further, that the applicants have not demonstrated any substantial loss they will suffer that cannot be remedied by damages. That in any event, there is no decree pending execution, so the applicants will not suffer any prejudice if the orders sought are not granted.

13. I take note that the replying affidavit has largely dwelt on the merits of the intended appeal which is not within the province of this court to determine but the Court of Appeal. Whereas the application dated 8/3/2019 sought stay of proceedings which the court in its ruling of 25/9/2019 refused, it is correct that the only substantive prayer sought in the application dated 8/3/2019 was the prayer for recusal in the matter. Indeed, the prayer for stay of proceedings was interim in nature, pending the hearing and determination of the application for recusal.

14. **Order 42 rule 2 of the Civil Procedure Rules** provides:

**No order for stay of executi01! shall be made under sub-rule (I) unless—**

- 1. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- 2. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

15. I concur with the applicant’s submissions that it is Order 42 Rule I of the Civil Procedure Rules, 2010 and NOT Order 42 Rule 6(2) which deals with conditions to be fulfilled for grant of orders of stay of execution pending appeal only, and not stay of proceedings pending appeal. This position is supported by the case of **IN MATTER OF GLOBAL TOURS AND TRAVEL S LIMITED- NAIROBI HCCC NO. 43 OF 2002** where the court held as follows:

*“From a textual analysis of Order 41 rule 4 of the Civil Procedure Rules (Old Civil Procedure Rules), it appears that the court has a discretion to order stay of proceedings pending appeal from its order or decree and that such discretion is unfettered. The strictures that sufficient cause shown and that no order of stay should be made unless the court is satisfied that substantial loss map result to the applicant (In that the application has been made without unreasonable delay and further that such security as may be ordered for the due performance of the order or decree has been given are on a plain reading of the rule applicable only to applications for stay of execution only,”*

16. It is also argued that an appeal against an order can be as of right or with leave of the court, and the respondent's argument that the appeal will not be rendered nugatory as a final decree is yet to be issued is misplaced as the appeal is on interlocutory issues which ought to be dealt with before the matter is

concluded as the success of the appeal will most likely impact directly on the proceedings now before this court.

17. **Order 43 Rule (3) of the Civil Procedure Rules, 2010** further provides that:

**An application for leave to appeal under section 75 of the Civil Procedure Act shall in the first instance be made to the court making the orders sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.**

I find that the application for leave to appeal is properly made.

18. The respondent's depositions that it is in a position to satisfy any orders against it, is described as a misapplication of the law with regard to the grant of stay of proceedings pending appeal given that the governing rules with regard to an application of this nature is **Order 42 Rule I of the Civil Procedure Rules, 2010 and NOT Order 42 Rule 6 (2)** which deals with conditions to be fulfilled for grant of orders of stay of execution pending appeal. As such the strictures applied in considering an application for stay of execution pending appeal such as offering security are not applicable to an application for stay of proceedings pending appeal.

19. As regards the case of **Kenya Power and Lighting company, limited versus Esther Wanjiru Wokabi [20141 eKLR** also relied upon by the Respondent, the applicants distinguish it saying that what the court was dealing with was an application for stay of execution pending appeal and not stay of proceedings as in the instant case. Secondly, that it was the Courts' opinion that the appeal would not be rendered nugatory if the proceedings were not stayed given that the applicant's application to set aside judgment had been allowed and which order the applicant was not seeking to challenge on appeal. That the only issue which the applicant in the above case sought to challenge was the award of costs for the application which in the court's opinion would not affect the subject matter of the proceedings regardless of the outcome of the appeal. It is argued that the position in this instance is different the Applicants are challenging the conduct of the proceedings on 5/3/2019 and 6/3/2019 as well the judges' impartiality in handling the matter all of which have a direct bearing on the case and the judgment that will eventually be rendered. I cannot fault that line of reasoning.

20. The applicants dispute the respondent's assertion that the application is meant to delay the conclusion of the matter. Whereas the issue of delay in this matter due to various actions by the applicants cannot be overstated, in this particular instance I recognise that when the court made its orders of 5<sup>th</sup> and 6<sup>th</sup> March, 2019 the Applicants moved with speed to file Notices of appeal on 7/3/2019 and an application to disqualify the judge on 8/3/2019. It is only upon the delivery of the ruling on 25/9/2019 that they got an opportunity to file the instant application which is within their right having been aggrieved with the court's decisions. I agree with these sentiments that the Applicants have in all instances moved with speed to ensure that there is no delay occasioned even as they pursue their appeals and considering that the appeals touch on the substratum of the case before this court and on a balance of probabilities granting the orders of stay of proceedings at this stage would serve the greater ends of justice.

21. Consequently, the application is merited in the following term and is granted as follows

1. **Leave be and is hereby granted to the applicants to appeal**
2. **There be stay of proceedings including writing of the judgement and any other antecedent actions, pending hearing of the appeal**
3. **Costs of the application are awarded to the applicants**

**Delivered online with consent of:**

**LILAN KOECH & ASSOCIATES..... for the Plaintiffs**

***NYAIRO & CO. ADVOCATES*..... for Defendants**

**Further order:**

A soft copy to be availed to the parties through their email addresses.

**Delivered, Signed and Dated this 8th day of April 2020 at Eldoret**

**H. A. OMONDI**

**JUDGE**