



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 557 OF 2017

(formerly NAIROBI ELC No. 742 of 2015)

**MINTINA ENE KETON KOPONI (Suing as a legal representative of the estate of
KETON OLE KOPONI PARSENA(DECEASED)).....PLAINTIFF**

VERSUS

FRANCIS NJAKWE GATHIARI.....1ST DEFENDANT

THE LAND REGISTRAR NGONG.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

What is before me for determination is the 1st Defendant's Notice of Motion application dated the 14th August, 2019 brought pursuant to Order 43 Rule 1 (u); Order 42 Rule 6; Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules as well as section 3A including 65 of the Civil Procedure Act. The Applicant seeks the following Orders:

1. That the Applicant be granted leave to appeal against the whole Ruling and Orders of the Hon. Lady Justice Christine Ochieng delivered on 29th July, 2019 at Kajiado, out of time.
2. That there be a stay of any further proceedings in this case pending the hearing and determination of this application.
3. That there be a stay of any further proceedings in this case pending the hearing and determination of the intended appeal.
4. That there be a stay of the orders made on 29th July, 2019 pending the hearing and determination of this application.
5. That there be a stay of the orders made on 29th July, 2019 pending the hearing and determination of the intended appeal.
6. The costs of this application be provided for.

The application is premised on various grounds and the supporting affidavit of MAKABA WINFRED who is the Advocate having conduct of the matter. She avers that the Applicant was aggrieved by the Ruling delivered on 29th July, 2019 and intends to appeal against the whole of it including the resultant order therefrom. She contends that the intended Appeal raises serious questions of law to be determined as the learned Judge misdirected herself in finding that the consent entered into by the parties was not a valid one and had it set aside. She explains that the intended appeal further raises serious questions of law to be determined as the learned Judge misdirected herself in issuing an order against a parcel of land (Ngong/ Ngong/ 13500) which was no longer in existence at the time the Respondent herein was filing her application dated the 11th October, 2018. She reiterates that the Applicant will suffer substantial and irreparable loss if the orders of leave to appeal are not granted as he has already paid the Respondent herein a substantial amount of money as part of the terms of the consent dated the 18th July, 2019. Further, that no prejudice will be suffered by the Respondent if leave to appeal out of time is granted to the Applicant.

The application is further supported by the affidavit of DOREEN KAWIRA a pupil in the firm of Paul Mwangi & Company Advocates who explains that on 13th August, 2019 she was instructed to proceed to Kajiado to file an application for leave to appeal at the Environment and Land Court. She confirms that she was handed over the signed copies of the Notice of Motion application and supporting affidavit which she

placed in her handbag. Further, that she was robbed her handbag at the bus stage situated at Cabanas. She explains that she was unable to contact the firm and reported the incident to Richfield Police Post where she was issued with a Police Abstract.

The Plaintiff/ Respondent filed Grounds of Opposition dated the 15th October, 2019 where she stated thus:

1. That it was imperative for the Applicant to annex the impugned Decree to this application.
2. That an appeal from the decision of the Honourable Lady Justice C. Ochieng presiding over the Environment and Land Court at Kajiado lies with the Court of Appeal which is the only Court that can grant leave to file an appeal, before it, out of time.
3. The remedy of stay as sought by the 1st Defendant/ Applicant is unavailable in law and moreso in the circumstances of this case.

The 1st Defendant/ Applicant and the Plaintiff/ Respondent filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the 1st Defendant's Notice of Motion application dated the 14th August, 2019 including the supporting affidavit, Grounds of Opposition and parties' submissions, the following are the issues for determination:

- Whether the 1st Defendant should be granted leave to appeal out of time from this Court's Ruling delivered on 29th July, 2019.
- Whether the Court should grant an order of stay pending the intended Appeal.

As to whether the 1st Defendant should be granted leave to appeal out of time from this Court's Ruling delivered on 29th July, 2019. The 1st Defendant sought for leave to appeal out of time and in his submissions relied on the cases of **First American Bank of Kenya Ltd V Gulab P Shah & 2 others Nairobi (Milimani) HCCC No. 2255 of 2000 (2002) I EA 65 J; Nicholas Kiptoo Arap Korir Salat Vs the Independent Electoral and Boundaries Commission & 7 others (2014) eKLR** and **Edward Kamau & Another V Hannah Mukui Gichuki & Another (2015) eKLR** to buttress his argument.

The Plaintiff/Respondent opposed the application and in her submission stated that procedures to be adhered to if any party is dissatisfied with the decision of an Environment and Land Court are regulated by the Court of Appeal Rules, 2010. She referred to Rules 2, 4 and 75 of the Court of Appeal Rules to support these arguments.

I note the Applicant seeks leave to lodge an Appeal against a decision of this Court. Section 16 of the Environment and Land Court Act provides as follows: 'Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.'

Rule 75 of the Court of Appeal Rules stipulates the time lines to be adhered to for an aggrieved party who seeks to Appeal to the said Court while Rule 4 makes provisions for extension of time. From a reading of the two Rules, it is evident that the same can only be granted by the Court of Appeal and not this Court. Based on this analysis, I find that the application for extension of time to lodge the Appeal against this Court's Ruling actually lies to the Court of Appeal and not in this Court. In the circumstance, I decline to allow the said prayer for extension of time as this Court is devoid of jurisdiction to do so.

As to whether the Court should grant an order of stay pending the intended Appeal.

Order 42 Rule 6 (2) (1) (a) of the Civil Procedure Rules provides that: '**(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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. (2) No order for stay of execution shall be made under subrule (1) unless—**

(a) 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;'

In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** Ringera J (as he then was) when dealing with an application for stay of proceedings pending appeal, had this to say:

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously" (emphasis added)

From the evidence before me, I note the Applicant seeks to stay the proceedings herein pending the determination of the Appeal. I note in the instant application, the Applicant has not filed a Notice of Appeal nor a Memorandum of Appeal indicating whether the Appeal against this Court's decision is arguable or not. Further, except for the Court arresting the Consent, there is already an inhibition Order in place to preserve the substratum of the suit pending determination of the dispute herein. It is my considered view that the Applicant will hence not be prejudiced as no one will interfere with the suit land.

I further opine that the stay sought would actually hamper the expeditious disposal of the instant case. In the circumstance and associating myself with the decision cited above, I am unable to grant an order of stay of proceedings as requested.

It is against the foregoing that I find the instant application unmerited and will disallow it.

Costs are awarded to the Plaintiff.

Dated signed and delivered in open court at Kajiado this 24th day of February, 2020

CHRISTINE OCHIENG

JUDGE