



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**HIGH COURT CIVIL APPEAL NO. 78 OF 2018**

**RISPER KERUBO ONSASE.....APPELLANT**

**VERSUS**

**DR. VIJAY KUMAR SAIDHA.....1<sup>ST</sup> RESPONDENT**

**HARIA RAJESH NACHAD.....2<sup>ND</sup> RESPONDENT**

**HANIF ZULFIKAR AHMED HASHAM.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. On the 21<sup>st</sup> February the Respondents/ applicants filed a Notice of Motion dated 19<sup>th</sup> February 2020 seeking the following orders;
  - i. That the honourable court be pleased to Review, vary, set aside and /or rescind the orders of the honourable court issued on the 6<sup>th</sup> day of May 2019 and particularly the aspect thereof touching o and/or concerning the conditional stay of execution of the decree of this Honourable court (sic) pending the hearing and determination of the intended appeal to the court of appeal.
  - ii. In the alternative and without prejudice to prayer 1 hereof, the Honourable court be pleased to find and hold that the Orders of conditional Stay of Execution granted on the 6<sup>th</sup> day of May 2019, in favour of the Appellant herein have lapsed and/or extinguished.
  - iii. Consequent to prayer hereof, the Honourable court be pleased to vacate the Order of 6<sup>th</sup> day of May 2019 and in lieu thereof, the Honourable court be pleased to Order and/ or direct that the monies which were deposited in Court on account of security for the due performance of the Decree that may ultimately ensue be released to the respondent's counsel.
  - iv. That the honourable court be pleased to grant liberty to the respondents herein, to also proceed with and/or commence execution proceedings with a view to realising and/or recovering the balance of the decretal sum where appropriate.
  - v. That the honourable court be pleased to grant such further and/or other reliefs as the court may deem fit and/or expedient.
  - vi. Costs of the instant application be provided for.
2. The application is supported by the affidavit of Mr. Ochwangi counsel for the respondents. The application was opposed Mr. Masese counsel for the appellant filed the replying affidavit.
3. From the 2 affidavits there is no dispute that an appeal from KISII CMCC No. 417 of 2017 was heard and a judgment rendered on the 11<sup>th</sup> April 2019 whereupon the appeal was dismissed. Thereafter the appellant/ respondent in this application sought an order for stay of execution and the appellant was under the compulsion to deposit with the Court the sum of Kshs. 700,000/- being half the decretal sum pending the hearing and determination of the appeal. This amount was deposited in court in compliance with the court order as security. The appellant then applied for a stay of execution pending the hearing and determination of the intended appeal in the Court of Appeal. A ruling was delivered on the 6<sup>th</sup> of April 2019, the court granted an order of conditional stay and set a time limit, 6 months, within which the intended appeal was to be lodged.
4. The respondent now seeks the orders in the application the subject of this ruling. The respondents argue that the court gave a conditional ruling. That stay order was to subsist for 6 months till October 2019. That the appellant went to slumber and have failed to file an appeal nor has the appellant applied to vary or extend the said timelines(see *Timon Otieno Mboga vs Kenya Forest Service [2016]eKLR*).That the judgment was delivered on the 10<sup>th</sup> August 2018 no appeal has been filed, the respondent should be allowed enjoy the fruits of the judgment.

5. Mr. Masese for the appellant filed a replying affidavit dated the 11<sup>th</sup> March 2020. He deposes as follows; that it is not true that the appellant has undertaken to delay obstruct and or defeat the process of the Court. That the appellant on 8<sup>th</sup> May 2019 applied for typed proceedings which has not been furnished to date. That the appellant is serious to have the appeal determined because for the last 6 years the Respondents have occupied the suit premises without paying rent on the ground. That the appellant has taken all steps required to have the appeal filed.

6. Is the applicant entitled to the orders sought? It is not in dispute that the appellant appeal was dismissed. Upon seeking a stay pending appeal the court noted that the appellant had deposited Kshs. 700,000/- in court pending the appeal and that she wanted to exercise her undoubted right of appeal. The court granted a stay pending appeal to the Court of Appeal on the same terms that is the money deposited in court shall remain pending appeal to the Court of Appeal save that the order shall remain in force for a period of 6 months unless otherwise extended by consent or by order of either court.

7. The ruling gave a conditional stay. The money deposited in court would remain in court and a stay pending appeal was granted for 6 months. The court gave the appellant an option to have the order extended by consent or by order of either court. The appellant has not sought to have the order extended nor is there a consent from the parties or a stay from the Court of Appeal. Being a conditional order it lapsed after the 6 months. My understanding is that the stay order does not exist. It lapsed automatically upon failure to comply with the conditions the court gave. The orders are no longer available to the appellant. The applicant's application has no merit.

8. What order is the applicant entitled to? The appellant claims that she has sought proceedings. There was no letter attached to the affidavit of Mr. Masese addressed to the court seeking the court proceedings. The appellant has not shown that she has taken steps to file an appeal or have the orders extended. One wonders if she is serious and whether she intends to appeal. The stay orders were given in May 2019 over a year ago. The respondent/ applicant seeks various orders considering the circumstances of this case, I grant the following orders;

- i. The order of conditional stay pending appeal granted on the 6<sup>th</sup> May 2019 in favour of the Appellant has lapsed.
- ii. The monies deposited in court on account of security for the due performance of the decree shall be released to the respondent's counsel forthwith.
- iii. Costs of the application to the respondent/ applicant.

**Dated, signed and delivered at KISII this 15<sup>th</sup> day of July 2020.**

**R.E. OUGO**

**JUDGE**

**In the presence;**

**Absent            For the Applicant**

**Absent            For the Respondent**

**Evans             Court Assistant**