



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 16 OF 2019**

**EWASO NG'IRO NORTH**

**DEVELOPMENT AUTHORITY.....APPLICANT**

**VERSUS**

**GICHOCHO BUILDING CONTRACTORS**

**COMPANY LIMITED.....RESPONDENT**

**RULING**

1. This matter relates to the Motion dated 2/07/2020 brought pursuant to **Sections 1A, 1B, 3A, 6 and 63(e) and 79G of the Civil Procedure Act CAP 21 Laws of Kenya, Order 42 Rules 6,8 and 9 of the Civil Procedure Rules 2010 and Article 159(2) of the Constitution of Kenya, 2010**. The Applicant seeks orders stay of execution of the judgment delivered on 29/05/2020 pending the hearing and determination of the Application and intended appeal at the Court of Appeal. They also seek costs of the application to be provided and any other orders the court deems just and convenient in the circumstances.
2. The application is indicated as being supported by the grounds on its body and the supporting affidavit of Omar Sheikh Mohamed and other grounds to be adduced at the hearing. However, their supporting affidavit annexed to the application is that of Josiah Willie Mulwa the Director of the Applicant sworn on 2/07/2020.
3. It is contended that the intended appeal which raises arguable issues has high chances of success and that it will be rendered null and void and the Applicant will suffer substantial loss if the orders sought are not granted as the Respondent will proceed to execute the decree.
4. The Notice of Appeal filed by the Appellants Applicants shows it was received by the court on 9<sup>th</sup> July 2020.
5. The application was opposed by the Respondent vide its grounds of opposition dated 11/09/2020. It is argued that the application is not merited because the Applicant failed to file a Notice of Appeal against the judgment of this court within fourteen (14) days contrary to the mandatory provisions of **Rule 75 (2) of the Court of Appeal Rules 2010**. Moreover, the Applicant has not sought leave for extension of time to file the notice of appeal out of time as provided for in **Rule 4 of the Court of Appeal Rules 2010**. In addition, the notice of appeal is not substantially in conformity with the law. Thus, the application is incurably defective in that no appeal against the judgment has been instituted. Furthermore, the Applicant has failed to show or even to allege that the Respondent will be unable to refund the decretal sum if the application were to succeed in its ill founded appeal.
6. This matter was canvassed by way of written submissions. The Applicant filed their submissions on 7<sup>th</sup> October 2020 whereas the Respondent filed their submissions on 12<sup>th</sup> October 2020. Both submissions have been considered in coming up with the ruling herein.
7. The Applicant submitted that the application has been filed without undue delay and that the intended appeal is merited and without the orders sought they will be prejudiced. The Applicants submitted that they will suffer substantial loss considering it is a statutory body incorporated for development of the Ewaso Ng'iro North Basin and catchment areas with a fixed budget and accountable to the public. Besides, the Respondent did not disclose any sources of income to ascertain the refund of the decretal amount should the appeal succeed. What's more, being a public body security is not required as per **Order 42 Rule 8 of the Civil Procedure Rules**. They relied on **RWW v EKW [2019] eKLR, Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR**, and **Utalii Transport Company Ltd & 3 others v NIC Bank Ltd & Another [2014] eKLR** among others to support their submissions.
8. The Respondents submitted that the Applicants had failed to file an appeal to date and that the Application should be dismissed as there is nothing to be stayed. It was further submitted that the Applicants had not proved that they will suffer substantial loss and the authorities of **Masisi Mwita vs Damaris Wanjiku Njeri** and **NIC Bank Ltd vs Aquinas Francis Wasike** were relied on in that respect. It was further submitted the deponent of the supporting affidavit sworn on 9<sup>th</sup> July 2020 did not aver that the Respondent will not be able to repay the

decretal amount and therefore proof of substantial loss has not been achieved.

9. The Respondent further submitted that the Applicant was not deserving the exercise of Judicial discretion as it has in the past failed to honour the discretions granted to them. The Respondent relied on the holding in Supreme Court Petition No. 29 of 2018 between Apungu Arthur Kibera vs IBEC & others to argue that the defective Notice of Appeal by the Applicants cannot be cured.

10. The Respondents also submitted that the Deponent of the supporting Affidavit Josiah Willie Mulwa is not the same person who is indicated in the body of the Application as the deponent and thus the application is incurably defective. The Respondent has also brought it to the attention of the court that the Appellant have not served them with the Alleged application in the court of the appeal seeking the court to extend time for the filing of the Notice of Appeal and the Applicant has not attached the alleged notice of appeal and draft memorandum of appeal in the supporting affidavit. The Respondent urged the court to dismiss the Appellants application with costs.

11. **Order 42 Rule 6 (2) of the Civil Procedure Rules** provides that:

***“(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; and***

***(b) 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.”***

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

***“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.***

***3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.***

***4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.***

***5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”***

12. The Applicant seeks stay of execution of a judgment delivered on 29/05/2020 through its application dated 2/07/2020 and filed on 09/07/2020. Thus, they filed their application about a month later. Hence, I am of the view one month may not be considered as unreasonable delay.

13. According to the Applicant they were dissatisfied by the judgment they seek to appeal against the said judgment where they have gone ahead filed their notice of appeal which is dated 2/07/2020. Appeals to the Court of Appeal deem to have been instituted when a valid notice of appeal is filed in accordance with Rule 75 of the Court of Appeal Rules. In the case of **Moroo Polymers Limited v Wilfred Kasyoki Willis [2019] eKLR** the Court of Appeal held as follows:

***“While Rule 75(1) of the CAR on the other hand is the substantive rule making provision for the filing of a notice of appeal which is a core document in the appellate process. In fact it is the corner stone of the appellate process as in law an appeal to this Court is deemed to have been initiated upon the filing of a valid notice of appeal filed in accordance with Rule 75(1) of the CAR. Rule 4 on the other hand is the substantive rule for the exercise of jurisdiction to extend time for transacting any business under the CAR. It provides:***

***“4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”***

14. The notice of appeal that instigates an appeal was not been filed by the Applicant with the fourteen (14) days period. The Applicants submitted that they have filed in the Court of Appeal Civil Application (Nyeri) No. 63 of 2020 UR 52/2020 on 14/07/2002 where they seek an extension of time to file notice of appeal and that the Court of Appeal is yet to provide any directions on the same. This was submitted in the Applicant’s submissions but the same was not evidenced by them. Consequently, there being no order from the court of appeal extending time for filing the notice of appeal this court finds that the Appellants/Applicants have not met the threshold for which a stay of execution is to be granted. Until and unless the order of extension of time to file notice of appeal is issued this court cannot be guaranteed that the same will be granted to enable the Applicant to lodge their appeal. The Appellants will be at liberty to bring the application for stay

of execution once the extension is granted by the court of Appeal.

15. The Applicants had pleaded that the deponent of their supporting affidavit was Omar Sheikh Mohamed but the affidavit annexed the application is sworn by Josiah Willie Mulwa. There is no explanation in the submission of the discrepancy in the application and the affidavit.

16. The Applicant never pleaded the inability of the Respondent to refund the decretal sum in any event their appeal is successful to give a chance to the Respondent to prove themselves. Stating the Respondent's inability to refund in the submission is an after-thought as the Respondent will not have an opportunity to produce evidence of earning towards the submissions.

17. Accordingly, the application is dismissed with costs to the Respondent.

**HON ANNE ADWERA ONG'INJO**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED AT MERU THIS 15<sup>TH</sup> DAY OF OCTOBER 2020.**

**HON ANNE ADWERA ONG'INJO**

**JUDGE**