REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 519 OF 2018

HAGOS BIRIKIRTI TEWOLDENREHEN

DE LA TORRE RAMIREZ NELLY VICTORIA (Suing as the administrators of the estate

of MENDOZA LOPEZ AQUELINA(Deceased).....APPELLANT/RESPONDENT

-VERSUS-

EVANS IHURA.....1ST RESPONDENT/APPLICANT

EVANS IHURA NJOROGE .....2ND RESPONDENT/APPLICANT

RULING

1. The 1st and 2nd respondents/applicants took out the motion dated 16th October 2020 whereof they sought for the following orders *interalia*:

> **i. THAT this application be and is hereby certified urgent and heard ex-parte on a priority basis and service of the same be dispensed with in the first instance.**
>
> **ii. THAT the honourable court be pleased to grant leave to the firm of KIMONDO GACHOKA AND COMPANY ADVOCATES to come on record as advocates for the appellants herein in place of the firm of KAIRU AND McCOURT ADVOCATES.**
>
> **iii. THAT this honourable court be pleased to grant the applicants leave to file the notice of appeal out of time.**
>
> **iv. THAT the period of fifteen (15) days fixed and/or provided for filing the notice of appeal be and is hereby enlarged and/or extended.**
>
> **v. THAT pending the hearing and determination of this application inter-partes, there be an order of stay of execution of the judgment and/or decree of the honourable Justice J. K. Sergon dated 10th July 2020 and any other incidental and/or consequential orders thereto.**
>
> **vi. THAT there be an interim order of stay of execution of the judgment and/or decree of the honorable Justice J. K. Sergon dated 10th July 2020 pending the filing of the application for stay of execution pending appeal in the Court of Appeal.**
>
> **vi. THAT this honorable court be pleased to make any such further Order(s) and issue any other relief it may deem just to grant in the interest of justice.**
>
> **vii. THAT the costs of this application be borne by the respondents.**

2. The motion is supported by the affidavit sworn by Daniel Muthee. The appellants filed the replying affidavit sworn by Onsando Osiemo to oppose the motion.

3. When the motion came up for interpartes hearing, learned counsels appearing in the matter were invited to make oral submissions.

4. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting and opposing affidavit. I have further taken into account the rival oral submissions. The record shows that the applicants have annexed to the supporting affidavit a copy of the letter of consent allowing the firm of Kimondo Gachoka & Co. Advocates to came on record as appearing for the respondents/applicant in place of the firm of Kairu & McCourt Advocates. Therefore, prayer (ii) of the aforesaid was compromised.

5. It is the submission of Mr. Kariuki, learned advocate holding brief for Miss Kabute for the respondents/applicants that the respondents/applicants should be granted an extension of time to file a notice of appeal out of time because the time prescribed to appeal had lapsed due to reasons beyond their control.

6. It is stated that the applicants were not aware of the date for delivery of judgement since judgment was delivered in their absence. The respondents/applicants further averred that they only became aware of the judgment in October 2020. They have urged this court to also grant an order for stay pending appeal to avoid the appeal being rendered nugatory. The applicants offered a bank guarantee as security for the due performance of the decree.

7. The appellants/respondents submit that the respondents/ applicants have always been notified of the proceedings of court until the date of judgement. It is averred by the appellants that the information on various dates, directions and orders given in this appeal are always in the Judiciary E-filing portal for each case.

8. It is pointed out that the respondents/applicants were awoken up by the taxation notice. It is also argued that the applicants and their advocates have not been keen on this matter by squandering their right to be heard by not participating in the hearing of this appeal.

9. It is further argued that the applicants did not timeously file the current motion. The appellants/respondents submitted that should this court be inclined to allow the motion then the respondents/ applicants should be ordered to deposit the entire decretal sum as security for the due performance of the decree.

10. The record shows that this court delivered its judgment online on 10th July 2020. The judgment date was fixed by this court on 12th June 2020 in the absence of both parties. This court directed the Deputy Registrar to issue a judgment notice for 10th July 2020. The record shows that the matter was listed in the online cause list for 10th July 2020 for delivery of judgments/ rulings.

11. It is not clear whether the respondents/applicants were physically and electronically served with a judgment notice. They aver that they only came to know of the existence of judgment when they were served with a notice of taxation. In the absence of credible evidence to show that the respondents/ applicants were served with a judgment notice, I will give the respondents the benefit of doubt. I am therefore convinced that they have given sufficient reason to benefit from this court's discretion. Consequently, time to file a notice of appeal is extended by 14 days from the hereof.

12. The second prayer which the respondents/applicants have sought is for an order for stay pending appeal. It is averred in the supporting affidavit of Daniel Muthee that unless the order for stay is granted the respondents/applicants appeal will be rendered nugatory and that the applicants will suffer irreparable loss and damage by being exposed to execution.

13. The principles to be considered in determining an application for stay of execution pending appeal are provided for under the provisions of Order 42 rule 6 of the Civil Procedure Rules as follows:

First, an applicant must show that the application for stay was filed without unreasonable delay.

Secondly, the applicant must show that it would suffer substantial loss if the order for stay of execution is denied.

Thirdly, that there should be provision for security for the due performance of the decree.

14. On the first principle, the respondents/applicants have stated that they came to be aware of this court's judgment in the month of October 2020 when they were served with a taxation notice and they immediately filed the current application. With respect, I agree with the averments of the respondents that the instant motion was timeously filed.

15. In response of the second principle, the respondents/applicants have stated that unless the order for stay is granted they would suffer irreparable loss and that their appeal would be rendered nugatory since execution may be done against them.

16. It is apparent that the respondents/applicants have not shown the substantial loss they would suffer if the order of stay is denied. It is trite law that execution process is a lawful process and therefore it cannot be said that the process can cause substantial loss to the respondents/applicants.

17. The third principle is dependent on the second principle. If the applicant fails to show the substantial loss they would suffer if denied the order, then the order for stay will be denied hence making the consideration for the provision of security for the due performance of the decree to be untenable. The prayer for stay of execution is therefore denied.

18. In the end, the motion partially succeeds. Consequently, the following orders are issued:

i. The firm of Kimondo Gachoka & Co. Advocates is allowed to come on record in place of the firm of Kairu & McCourt Advocates for the respondents/applicants.

ii. The application for stay of execution pending appeal is dismissed for want of merit.

iii. The period of 15 days fixed for lodging and or filing a notice of appeal is hereby enlarged and or extended by 10 days from the date hereof.

iv. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 11th day of December, 2020.

…….……..

J. K. SERGON

JUDGE

In the presence of:

……. for the Appellants

……. for the Respondents