



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASENO. 393 OF 2017

REUBEN CHESEREM SIMOTWOPLAINTIFF

VERSUS

FRANK KIBET ANDEREDEFENDANT

RULING

1. By Notice of Motion dated 1st July 2019, the plaintiff sought an order of stay of execution of the ruling and order of this court delivered on 30th April 2019 pending hearing and determination of an appeal to the Court of Appeal. The order sought to be stayed is one in which the court struck out the plaintiff's suit for being *res judicata*. Since the defendant has a counterclaim, the court left him free to set it down for hearing.
2. The application is supported by an affidavit sworn by the applicant. He deposed that he filed Notice of Appeal in respect of the decision and that the defendant is in the process of setting the counterclaim down for hearing. He further stated that he will suffer substantial loss if stay is not granted.
3. The defendant opposed the application through a replying affidavit in which he deposed that he is indeed in the process of setting down the counterclaim for hearing and that having filed Notice of appeal on 2nd May 2019, the applicant was aware of the ruling. Consequently, the delay of two months in filing the application is not inordinate and unreasonable. He added that no substantial loss has been demonstrated and that he will suffer prejudice if the application is allowed.
4. The application was canvassed through written submissions. In his submissions, the applicant basically reiterated the position taken in the supporting affidavit and that the application was filed timeously. He urged the court to allow the application. For the defendant, it was argued that the applicant has not filed any appeal since rule 81 (1) of the Court of Appeal Rules has not been complied with and that therefore the orders sought cannot issue. The case of **Noradhco Kenya Limited v Loria Michele [1998] eKLR (Civil Application No. Nai 258 of 1997)** was cited to support those arguments. Further, it was argued that defendant's and the applicant's cases are distinct and that therefore they can proceed separately. It was also argued that there has been inordinate delay.
5. I have considered the application, the affidavits and the submissions. The present application has been brought under **Order 42 rule 6** of the **Civil Procedure Rules, 2010** which provides:

6.(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 sub rule (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.

6. An applicant seeking stay of execution pending appeal under the foregoing rule must satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. It must be remembered that **Order 42 rule 6 (4)** provides that for the purposes of the rule an appeal to the Court of Appeal shall be deemed to have been filed when notice of appeal has been given. The defendant does not dispute that notice of appeal was filed in compliance with rule 75 of the Court of Appeal Rules. With

respect, rule 81 of the Court of Appeal Rules which the defendant has referred to is inapplicable in the circumstances since it deals with withdrawal of notice of appeal and notice of cross-appeal.

7. The applicant has argued that substantial loss will result to him if stay is not granted. Practically, what will happen if stay is not granted is that the counterclaim will proceed. The counterclaim was filed in response to the plaintiff's claim. Were it not for the striking out of the plaintiff's claim, both would have been heard together. I think it makes sense that the applicant be given an opportunity to get a determination from the Court of Appeal as to whether the striking out herein should stand. It would be confusing and untidy if the counterclaim is heard and concluded only for the striking out of the plaintiff's claim to be later reversed upon determination of the appeal. In the circumstances, I am persuaded that the applicant has satisfied the test of substantial loss. The defendant's fears as to possible delay can be addressed by limiting the life of any stay granted so as to encourage the plaintiff to prosecute his appeal timeously.

8. Regarding the question of whether there was unreasonable delay, I note that the application was filed within months of the order being made. I further note that the defendant's advocates went to the registry on 17th May 2019 and fixed the counterclaim for hearing. The present application was filed some one and a half month after a hearing date was set. In the circumstances of this case, I do not consider the delay herein to be inordinate.

9. The final consideration is whether security for the due performance of such order as may ultimately be binding on the applicant has been given. I have agonised over this last requirement. I note that the orders of 30th April 2019 were purely of striking out of the plaint. There was no monetary aspect to the order since even costs was left to be determined later upon conclusion of the counterclaim. In the circumstances, I do not find it necessary to introduce a monetary angle to the matter at this stage. I will not order any security beyond limiting the life of stay that I will grant.

10. In view of the foregoing, I am persuaded that an order of stay of execution pending appeal is merited herein. I therefore make the following orders:

a) The order of this court made on 30th April 2019 is hereby stayed pending hearing and determination of the plaintiff's appeal to the Court of Appeal.

b) The order of stay shall remain in force for a period of only one year from the date of delivery of this ruling.

c) Costs in the cause.

Dated, signed and delivered in open court at Nakuru this 5th day of March 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Weche holding brief for Mr Gai for the plaintiff/applicant

Mr Mutai for the defendant/respondent

Court Assistants: Beatrice & Lotkomoi