



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC 48 OF 2013**

**M/S FLAVEMART ENTERPRISE LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....DEFENDANT**

**RULING**

Order 42, rule 6 of the Civil Procedure Rules 2010 gives the court powers to grant stay pending appeal. The order provides for stay in case of appeal thus:-

(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; 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 1<sup>st</sup> issue to be considered is whether the application is brought without unreasonable delay. In this matter, I do find that the application was made within 10 days after Judgment was delivered and therefore there is no unreasonable delay in filing the application.

The second issue is whether the applicant is likely to suffer substantial loss if stay is not granted. The applicant has demonstrated that he stays on the land with his family and has extensively developed the property. I have seen photos of the suit property annexed in the further affidavit of Peter Ochieng Okore sworn on 25/11/2019. The respondent had sought for the use of the police force to evict the applicant. I do find that eviction of the applicant from the suit property will cause substantial loss. On security, this court has the powers to determine the security to be deposited by the applicant.

However, the above notwithstanding, there must be a proper notice of Appeal. The Judgment was entered on 30/10/2019. The notice of Appeal dated 18/11/2019 and presented to the registry on 18<sup>th</sup> November 2018 was lodged on 19/11/2019. More than 14 days of the Judgment as opposed to the provision of Rules 75 (1) and (2) of the Court of Appeal rules that states:

**(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**

**(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.**

I do find that failure to comply with the simple rule and failure to seek leave to file the notice of appeal out of time is fatal to the intended appellant's application as there is no appeal before the court. The upshot of the above is that the application lacks merit as there is no appeal before court and the same is dismissed with costs. Orders accordingly.

**DATED AND DELIVERED THIS 30 DAY OF APRIL, 2020.**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

**This ruling is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15<sup>TH</sup> March 2019 and with the consent of the parties.**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**