



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND COURT AT KAKAMEGA

ELCA NO. 3 OF 2018

MUSA LICHUNGU.....APPELLANT

VERSUS

MAMISABU ARAP SITIENEL..... RESPONDENT

RULING

The application is dated 28th November 2019 and is brought under order 45 rules 1 & 2 of the Civil Procedure Rules and section 80 of the Civil Procedure Act seeking the following orders;

1. 1. That the present application be and is hereby certified urgent and be heard on priority basis.
2. 2. That this court be pleased to review its ruling delivered on 23rd July, 2019 as
 - (a) (a) There is error of law on the face of record.
 - (b) (b) There may have been a mix up in the typing of the ruling.
3. 3. That the costs hereof be in the course.

It is based on the grounds that, the ruling was in respect of the application dated 30th May, 2019. That the application sought five orders that leave to come on record of J.N. Njuguna & Co. Advocates. Stay of execution of the decree herein. Substitution of appellant. Status quo and that there was no prayer for review. That the ruling was on review of decree. That there is an error on the face of record that may have been bought up due to many files handled by the court. There was totally no mention of the issues raised. That it is in the interest of justice that a review be undertaken to correct the error. That the parties are unable to proceed further for one of the parties is deceased. That there are sufficient grounds to order review of the order.

The applicant submitted that, Musa Lichungu the appellant died on 30th April, 2019. That the application dated 30th May, 2019 was filed seeking among other orders to be enjoined in this matter. Annexed and marked JM1 is a copy of the application. That this court made the ruling dated 23rd July, 2019. Annexed and marked JM2 is a copy of the ruling. That there appears to have been a mix up somewhere as the ruling dated 23rd July, 2019 centered on review of the judgment. That there was no prayer for review in the application dated 30th May, 2019. That it is clear that there was an error leading to the ruling which error ought to be rectified to enable the parties in this matter to proceed.

The respondent submitted that the said application is vexatious and otherwise an abuse of the court process. That the applicant in the said application is unknown as it is said that appellant herein Musa Lichungu died sometime on 30th April, 2019. That the unknown applicant herein has therefore no locus standi to institute this application. That the orders sought in the instant application are unclear and the court cannot therefore issue them. That the application is therefore a waste of judicial time.

This court has carefully considered the application and the submissions herein. Section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

“Any person who considers himself aggrieved-

- (a) *by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
- (b) *by a decree or order from which no appeal is allowed by this Act.*

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. Indeed I find that there was an error as the application sought for orders of stay and not review. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42, rule 6 states:

“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.”

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. 1. Substantial loss may result to the applicant unless the order is made.
2. 2. The application has been made without unreasonable delay, and
3. 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)*, thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. *That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
2. *That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others eKLR* where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of *Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR*, the court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by this court’s decision in *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997*, at Page 4 as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

Prayer b of the application dated 30th May 2019 is granted for leave to come on record of J.N. Njuguna & Co. Advocates. From the grounds therein, the applicant who was dissatisfied with the judgement of this court of has filed an appeal. The judgement having been delivered this

court is now functus officio and cannot grant substitution of parties. On orders for stay this court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application aside from prayer b has no merit and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL 2020.

N.A. MATHEKA

JUDGE