



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 106 OF 2011**

**MADATALI SABERALI CHATUR.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**FARAH HABIB.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**HARUN NDUBI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**AL-AMIN KIMATHI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**REGIONAL REACH MEDIA**

**CO. LTD T/A K24 TV.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**KOFA MRENJE.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**JOSEPHINE MAINA.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**MARIA GALANG.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is the product of the Notice of Motion dated 18<sup>th</sup> January, 2019 brought by the applicant, in which, he is seeking for an order for stay of further proceedings in the suit, pending the hearing and determination of an intended appeal against the ruling delivered on 4<sup>th</sup> December, 2018.
2. The Motion stands supported by the grounds set out on its body and the facts stated in the applicant's affidavit, wherein he asserted that on the aforesaid date, this court dismissed his suit for non-attendance and for want of prosecution, thus allowing the 1<sup>st</sup> defendant's counterclaim to proceed for hearing.
3. The applicant contended that the counterclaim was heard and parties were ordered to put in written submissions, adding that he is dissatisfied with the ruling of this court and is desirous of lodging an appeal against the same and has filed a notice of appeal in that regard.
4. The applicant ensured to state that unless an order for stay of further proceedings is granted, he stands to suffer substantial loss since his case raises triable issues and his failure to attend the hearing of his suit is excusable.
5. The 1<sup>st</sup> defendant/respondent challenged the Motion by swearing the replying affidavit on 1<sup>st</sup> March, 2019 stating that there has been an unreasonable delay in bringing the Motion and the applicant has not demonstrated the substantial loss he stands to suffer if the order being sought is declined.
6. It was equally the 1<sup>st</sup> respondent's averment that the applicant has not filed the substantive appeal despite the existing timelines set for the lodging of an appeal to the Court of Appeal, the impact of which is that the notice of appeal is deemed to have been withdrawn.
7. The 1<sup>st</sup> respondent ensured to point out that the applicant participated at the hearing of her counterclaim and at no point did he seek to have those proceedings stayed then, going further on to state that in any case, the counterclaim constitutes a distinct claim whose outcome has no bearing on the applicant's claim.

8. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents filed Grounds of Opposition dated 12<sup>th</sup> March, 2019 arguing *inter alia*, that the applicant is not deserving of the order being sought since he has been indolent in prosecuting his case and there are really no credible grounds to have the proceedings stayed.

9. The 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/respondents were not left behind in opposing the Motion. They relied on the replying affidavit sworn by *Ken Ngaruiya* in asserting that the application is unmerited by virtue of the fact that it was brought under the wrong legal provision and further echoing the sentiments of their counterparts that the applicant has inexcusably failed to prosecute his suit.

10. This court directed the parties to file and exchange written submissions on the Motion. In his submissions, the applicant by and large restated his position as per the Motion, save to urge this court to consider the provisions of Article 50(1) of the Constitution which grants every person the right to a fair hearing hand in hand with Article 159 (a) which provides for justice for all irrespective of status.

11. On her part, the 1<sup>st</sup> respondent argued her submissions in line with the provisions of Order 42, Rule 6(2) of the Civil Procedure Rules on stay of execution. In this respect, she argued that the applicant has not satisfied any of the conditions set out in the cited provision. It was also the 1<sup>st</sup> respondent's contention that the applicant has not demonstrated that he has an arguable appeal with reasonable chances of success.

12. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents echoed the arguments featuring in their Grounds of Opposition, adding that following the dismissal order made by this court, the applicant ought to have hastened to either have the same set aside or sought to stay any further proceedings, placing reliance on the case of **Constatine Dzombo & 4 others v Lukyn Coats & another [2018] eKLR** where the Environment and Land Court (ELC) held that:

***“It is clear that Order 12 Rule 3 allows the court to dismiss a suit for non-attendance. Rule 7 however allows the aggrieved party to apply to set aside the order for dismissal and reinstate the suit.”***

13. The aforementioned respondents further advanced the argument that the applicant ought to have demonstrated that he has an arguable appeal but this was not done. In the end, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents supported the request for dismissal of the application.

14. The 4<sup>th</sup> to 7<sup>th</sup> respondents, like the 1<sup>st</sup> respondent, rode on the conditions laid out under Order 42, Rule 6(2) of the Civil Procedure Rules in making their argument that the applicant has failed to meet the threshold for granting the order being sought. The said respondents also echoed the 1<sup>st</sup> respondent's sentiments that the applicant has not shown any evidence of having filed a substantive appeal with the Court of Appeal.

15. In closing, the above respondents referred this court to the analysis made in the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR** where the court appreciated that whether or not to grant an order for stay of proceedings is a matter of judicial discretion to be exercised with the interest of justice in mind and upon consideration of all relevant factors. Ultimately, the respondents supported their counterparts' views that it would be well in order to dismiss the application.

16. I have considered the grounds on the face of the Motion; the affidavits both supporting and opposing the same; the Grounds of Opposition on record and the competing written submissions placed before me.

17. I deem it necessary to mention that the merits of the suit and/or appeal are not a subject for consideration at this stage. Further to this, it is worth clarifying that the conditions set out under Order 42, Rule 6(2) of the Civil Procedure Rules on which the application is premised are confined to an order for stay of execution; in the present instance, the order being sought is that of a stay of proceedings which is entirely different. This therefore means that the application was brought under the wrong provision. That notwithstanding, I am called upon to consider substantive justice and I will adhere to that principle.

18. Nevertheless, before I examine the merits of the Motion, I wish to address the issue of competency of the application raised by a majority of the respondents.

19. It is well noted that the intended appeal lies with the Court of Appeal. In that case, the procedure and timelines for lodging an appeal of such nature are clearly set out in the Court of Appeal Rules (“*the Rules*”). **Rule 75(2)** of the Rules stipulates that a notice of appeal which constitutes the first step of an appeal shall be lodged within 14 days of the date on which the impugned decision was delivered.

20. Moreover, **Rule 82(1)** provides for a 60-day window period for filing the substantive appeal including the memorandum and record of appeal, with a proviso which reads as follows:

***“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”***

21. Of equal relevance is sub-rule (2) of the above-cited Rule 81 which stipulates that an appellant shall not be entitled to rely on the above proviso unless his or her application for a copy of the proceedings and order/decreed was made in writing and a copy of it was served upon the respondent.

22. In the present scenario, it is not disputed that this court dismissed the applicant's suit on 4<sup>th</sup> December, 2018. It is also not contested that the applicant soon thereafter lodged a notice of appeal on 13<sup>th</sup> December, 2018 which falls within the timelines set out above. The real issue

lies in whether a substantive appeal has since been filed.

23. Upon perusal of the record, I note that the applicant through his advocate applied for certified copies of the typed proceedings and order being appealed against vide the letters dated 10<sup>th</sup> December, 2018 and 26<sup>th</sup> January, 2019. Nonetheless, there is nothing to indicate that copies of the said letters were served upon the respondents as required under **Rule 82(2)** of the Rules. Were we to assume that the letters had been served, it would have been essential for the applicant to avail a Certificate of Delay from the Registrar indicating the time required for preparing and availing the requisite documents; I have not come across any document of such nature. In the absence thereof, sub-rule (1) could not have applied to the applicant.

24. More importantly, it is apparent that the 60-day period for lodging a substantive appeal has long lapsed and the applicant did not mention or demonstrate that he has filed a memorandum of appeal at the very least or sought an extension of time for filing the same. In the premises, I am duty bound to invoke the provisions of **Rule 83** of the Rules setting out the following:

***“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”***

25. In view of the foregoing, I am satisfied that the notice of appeal having been deemed withdrawn, there is no appeal in place and consequently, there is no basis for me to address the merits of the application.

26. Accordingly, the Motion is hereby struck out with costs to the respondents.

**Dated, signed and delivered at NAIROBI this 5<sup>th</sup> day of December, 2019**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

..... **for the Plaintiff/Applicant**

..... **for the 1<sup>st</sup> Defendant/Respondent**

..... **for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents**

..... **for the 4<sup>th</sup> - 7<sup>th</sup> Defendants/Respondents**