REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA CASE NO. 4 OF 2019

COUNTY GOVERNMENT OF NYERI……..….APPLICANT/APPELLANT

VERSUS

BENSON WARUI ……...……..…..……1st RESPONDENT

PETER NDIRANGU ……..……....2nd RESPONDENT

RULING

1. Before me for determination is an Application via a the Notice of Motion dated 22nd January 2019 brought under the provisions of Section 79G of the Civil Procedure Act, Order 42 Rule 6(1) and (6) of the Civil Procedure Rules, Sections 1A,1B and 3A of the Civil Procedure Act, and all other enabling provisions of the law where the Applicant seeks for Orders of stay of the judgement and decree delivered by the Court (sic) on the 19th November 2018 pending the hearing and determination of the Appeal.

2. The Applicant also seeks for leave to Appeal out of time against the Ruling of Hon R. Kefa delivered on the 19th November 2018 and for the Memorandum of Appeal dated the 22nd January 2019 to be deemed to be properly on record.

3. The Application is supported by the grounds set on its face as well as on the sworn affidavit of Benjamin W Gachichio the Applicant herein, dated the 23rd January 2019.

4. The said Application was opposed vide the Respondents' Replying Affidavits dated the 7th February 2019 and 26th February 2019 respectively in which the Respondents sought for the said Application be dismissed with costs for being incompetent and without merit.

5. By consent parties agreed to dispose of the Application by way of written submission wherein the Applicant gave brief facts of the matter in issue to the effect that judgment was entered for the 1st Respondent against the Applicant on 19th November 2018 requiring the Applicant to pay the 1st Respondent Ksh 1,300,000/=.

6. The Applicant therefore framed his issues for determination as follows;

i. Whether the Appellant should be granted stay of execution pending Appeal.

ii. Whether the Appellant should be allowed to Appeal out of time.

7. On the first issue for determination, the Applicant relied on the provisions of Order 42 Rule 6(1) and (6) of the Civil Procedure Rules to submit that the Court had powers to grant stay of execution pending Appeal where substantial loss may result.

8. That if stay of execution was not granted, the 1st Respondent would proceed with the execution thus rendering the outcome of the Appeal nugatory.

9. That indeed the 1st Respondent had deponed that he was a retired teacher and a businessman with resources to reimburse the Applicant although he did not state the nature of the business he was engaged in or tendered any proof of his resources. The Applicant was therefore apprehensive that he would suffer irreparable harm if the Appeal was successful.

10. That on the other hand if the Appeal failed, the Applicant being the County Government had enough resources to pay the 1 st Respondent

the decretal some and costs.

11. Secondly on the issue as to whether the Application for stay had been made without reasonable delay, the Applicant submitted that the judgment by the lower Court had been entered on 19th November 2018 during the December holiday when officers were away.

12. That the legal Committee had been convened on 15th of January 2019 when it was resolved that an Appeal be preferred against the judgment. Counsel was subsequently appointed and filed their Memorandum of Appeal on 24th January 2019 together with the Application for stay. The Application was therefore made less than two months which was not inordinate in the circumstance. They relied on the decided case of **Mombasa County Government vs Pauline Wanjiku Kageni [2017] eKLR.**

13. The Applicant also submitted that being a County Government, they were exempt from providing security for deposit of the decretal sum by virtue of the provisions of Order 42(8) of the Civil Procedure Rules. In so submitting, they relied on the case of **Mombasa County Government (supra)**

14. On the second issue for determination as to whether the Applicant should be allowed to prefer an Appeal out of time, it was their submission that after the judgment by the lower Court had been entered on 19th November 2018, they had filed their Memorandum of Appeal on 24th January 2019 which was less than two months and therefore the delay in filing of the Appeal was not unreasonable and they should be allowed to prefer the same out of time in the circumstance.

15. In response to the Applicant's Application and in opposition thereto, the 1st Respondent vide his submission, framed his issues for determination as follows;

i. Whether there had been an unreasonable delay in filing the Application

ii. Whether the Applicant had satisfied the conditions for the grant of stay of execution

iii. Who should bear the costs of this suit.

16. On the first issue for determination, it was the 1st Respondent's submission that the judgment in this matter was delivered on 19th November 2018, wherein the Applicant, as an afterthought, filed their Application on the 22nd January 2019 which was 2 months and 6 days later.

17. That the Applicant's action was unjust, unfair and unreasonable because they had denied the 1st Respondent the enjoyment of the fruits of his judgment delivered on 19th November 2018 which was a miscarriage of justice. To buttress their submissions, they relied on the decided case in **Selestica Limited vs Gold Rock Development Civil Appeal No. 48 of 2015** where the Court had made reference to a matter in **Jaber Moshen Ali & Another vs Priscillah Boit & Another [2014] eKLR**

18. On the second issue for determination as to whether the Applicant had satisfied the conditions set for the grant of stay, the 1st Respondent's submission was that the Applicant's Appeal, having been brought out of time, was incompetent by virtue of the provisions of section 79 (G) of the Civil Procedure Act and therefore the stay of execution was premature.

19. Secondly that under the provisions of Order 42 Rule 6 to of the Civil Procedure Rules, the Applicant did not provide sufficient evidence that he would suffer irreparable loss, on the contrary, it had been their submission that they had resources enough to pay the 1st Respondent which was clear that they would not suffer any loss should the judgment be executed.

20. It was further the 1st Respondent's submission, that the Applicant had offered no security and therefore the Application was incompetent and bad in law. To support his submission, the 1st Respondent relied on the authorities in the cases of **Kenya shell Limited vs Benjamin Karuga Kibiru & Another, Civil Application No. NAI 97 OF 1986** and **Kenya Hotel Properties Limited vs Willesden Investments Limited Civil Application No. 322 of 2006 (U/R 178/06)**

21. The 1st Respondent also submitted that the Applicant had not made out a prima facie case with the probability of success, to warrant the grant of stay of execution, as required by the law.

22. On the last issue for determination as to who would bear the costs of the suit, the 1st Respondent's submission was to the effect that pursuant to the provisions of Section 27 of the Civil Procedure Act as well as the decided case in **Ethics and Anti-Corruption Commission vs Nderitu Wachira & 2 Others Misc Application No. 19 of 2015**, the costs followed the event. That it was however at the discretion of the Court as to whether costs were payable to one party by another and the amount of costs to be paid. He therefore sought that the Applicant's Notice of Motion which had no merit, be dismissed with costs.

23. The 2nd Respondent's Submissions supported the 1st Respondent's submission to the effect that the Applicant had not satisfied the conditions stipulated under Order 42 Rule 6(1) to be grated the stay of execution. They relied on the decided case in **Karunguru Estate Limited vs Beatrice Wamere Karanja [2012]** in support of their submission. Their further submission was that the Applicant had not demonstrated the kind of substantial loss they would suffer if the Order of stay of execution was not granted.

24. The 2nd Respondent also submitted that there had been unreasonable delay by the Applicant in filing the present Application which delay had not been supported by any tangible evidence/explanation.

25. On whether the Applicant ought to be granted leave to file their Appeal out of time, the 2nd Respondent submitted that the Applicant's Application was incompetent by virtue of the provisions of Section 79 (G) of the Civil Procedure Act. That the Applicant had not placed enough evidence as to why judicial discretion to enlarge time should be in their favour. That the decision on whether or not to extend time was discretionary which discretion ought to be exercised judiciously as was held in the case of **Peter Maina Mwangi vs Nancy Murthoni Nyaruai [2017] eKLR.** He sought for the Application to be dismissed with costs.

Determination.

26. I have considered the Applicant's Application for stay of execution of the ex-parte judgement in Nyeri CM EC No. 27 of 2018 delivered on the 19th November 2018, in favour of the 1st Respondent herein, pending the hearing and determination of the Appeal. I have also considered the authorities, as well as the reasons given for and against the said Application.

27. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

> *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 .*

28. There are three conditions for granting of stay Order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

> i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is Ordered;
>
> ii. The Application is brought without undue delay and
>
> iii. 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.

29. I find two issues for determination arising therein namely:

> i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
>
> ii. What Orders this Court should make

30. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2)

> *The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.*

31. While under section 1B some of the aims of the said objective are;

> *The just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties*.

32. It therefore follows that all the pre-overriding Objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

33. On the first condition of proving that substantial loss may result unless stay Order is made, it was incumbent upon the Applicant to demonstrate the kind of substantial loss they would suffer if the stay Order was not made in their favour.

34. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their

Lordships stated that;

> "***Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."***

35. The Applicant contends that they would suffer irreparable loss for reason that since the 1st Respondent who was a retired teacher and also a businessman had not produced any proof of his resources and therefore they were apprehensive that he might not be in a position to refund the decretal amount if their Appeal succeeded. They had submitted that on the other hand, being the County Government, they had enough resources to pay the 1st Respondent the decretal some and costs if the Appeal did not succeed.

36. What amounts to reasonable grounds for believing that the 1st Respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the 1st Respondent was a person of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success.

37. As was held in the case of **Justus Kyalo Musyoka v John Kivungo [2019] eKLR.**

> *Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgment. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court*

38. Financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income. In the case at hand, the 1st Respondent has disclosed that he was a retired teacher and also a businessman. This could mean therefore that he is a person with a source of income and would therefore be in a position to refund the Applicant the decretal amount should the Appeal succeed. The Applicant had thus not discharged their burden of proving that that the 1st Respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree as was held in the case of **Caneland Ltd & 2 Others (supra)**

39. It therefore follows that even without going to the merit of the Appeal even if Orders sought herein are not granted, there is no evidence that the Applicant /Appellants will suffer substantial loss. The Court makes this finding taking into account that it is not the duty of the Court to deny successful litigants the fruits of his/her Judgment.

40. On the second condition, there is no dispute that the impugned judgment was delivered on the 19th November 2018. The present Application as well as the Appeal were subsequently filed on the the 22nd January 2019. I find that the delay was inordinate in the circumstance.

41. On the last condition as to provision of security, the provisions of Oder 42(8) are self-explanatory in that the Applicant, being a County Government, is exempt from providing security for deposit of the decretal sum.

42. Having found that two conditions necessary for grant of Orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Appellant/Applicant and further, having regard to the provisions of the law as stipulated under Section 3A of the Civil Procedure Act, this Court is not inclined to grant the Order of stay of execution so sought and the same is herein dismissed.

43. On the second Orders sought by the Applicant for extension of time to file their Appeal out of time.

44. **The parameters for the exercise of such discretion were clearly set out in the case of Thuita *Mwangi vs Kenya Airways Ltd, [2003[eKLR w*here the Court of Appeal held as follows:**

> **"***For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:*
>
> *"It is now well settled that the decision whether or not to extend the time for Appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the Appeal succeeding if the Application is granted: and, fourthly, the degree of prejudice to the Respondent if the Application is granted".*

45. **The Court went on to state that:**

> **"*The list of factors a Court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered…..***

46. **From the above finding, it can be said that for such an Application to be allowed, it is upon the Applicant to place sufficient material before the Court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the Applicant with those of the Respondent.**

47. Lord Romilly MR **explained in *Haywood vs Cope, (1858) 25 BEAV 140*:**

> ***"… the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the Court may oblige him to do so."***

48. I have considered the peculiar circumstances of this case, the Respondents have not demonstrated what prejudice, if any they would suffer if the Application is allowed. I am, therefore, inclined to exercise the discretion vested in this Court in favour of the Applicant as no substantial prejudice will be occasioned on the Respondent.

49. I therefore make the following Orders:

i. The time within which the Applicant ought to have filed their Appeal is extended by **forty-five** (**45**) days from the date of this ruling.

ii. If the Applicant has not been supplied with the documents required to prepare the record of Appeal, the Applicant's counsel to liaise with the Deputy Registrar of this Court and ensure that the same are supplied within **thirty (30)** days of this Order.

iii. If the Applicant does not file the Appeal within the time stipulated in (i) above, the window granted to file the Appeal shall automatically lapse.

iv. Costs be in Cause.

Dated and delivered at Nyeri this 15th day of May 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE