**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 43 OF 2016**

**FRANCIS MUKOMA…...……...1ST APPELLANT/APPLICANT**

**DAVID MWANGI…….2ND APPELLANT/APPLICANT**

**VERSUS**

**PAUL MUITA NDERITU……...RESPONDENT**

**RULING**

By a notice of motion dated 7th October, 2016, the applicants are seeking for an order for stay of execution of the decree issued in **Othaya Principal Magistrates' Court Civil Case No. 45 of 2014** pending the hearing and determination of their appeal against the decree and the judgment from which it was extracted. The applicants are also seeking for an order to set aside the order by the magistrates' court dismissing their application dated 17th of August 2016 which, just like the current application, sought to stay execution of the judgment in the aforesaid civil case pending the hearing and determination of their appeal.

This notice is filed under **order 42 rule 6** and **order 51 rule 1** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** and all the enabling provisions of the law. It is supported by the affidavit of the 1st applicant sworn on 7th October, 2016.

According to the applicants, the respondent's suit against them in the magistrates' court was allowed and the respondent awarded the sum of Kshs 255,104/= together with costs and interest. The court granted a stay of execution of the judgment but was only limited to a 30-day period which expired on 7th August, 2016.

Being dissatisfied with the judgment the appellants lodged an appeal against it on 8th of August 2016 and on 17th August, 2016 they filed an application for stay of execution pending the determination of that appeal. The application was opposed by the respondent.

After considering the submissions presented before it the trial court dismissed the application on the ground that the appeal had been filed out of time. According to the applicants, that ruling was erroneous because the last day on which they ought to have filed the appeal was the 7th of August, 2016 but since it was falling on a Sunday, the appeal could only be filed on the next day which was 8th August, 2016. In any event, so they deposed, the judgement was delivered on 7th of July, 2016 which had been declared a public holiday and therefore time started running on 8th July 2016.

The applicants are now apprehensive that should the respondent proceed to execute the judgement against

them, they will suffer substantial and irreparable loss because the respondent's ability to refund the decretal sum, should the appeal succeed, has not been demonstrated. If execution proceeds, so they argue, their appeal will be rendered nugatory. They are, ready, able and willing to furnish such security for the due performance of the decree as may ultimately be binding upon them as this Honourable Court may order.

The applicants also believe that their appeal is an arguable one and has high chances of success.

The respondent opposed the application and in that respect filed a replying affidavit sworn on 19th October, 2016. He insisted that the appellants' appeal was filed out of time. He also claimed that there are numerous errors on the face of the memorandum of appeal that render the entire appeal defective; for instance, the heading of the memorandum says that it is an appeal against a judgment delivered at Baricho law courts yet the case was heard at Othaya law courts; it goes further to say that case was tried in the Chief Magistrates' Court at Othaya yet the court at Othaya is a Senior Resident Magistrates' court. Finally, the grounds in support of the application and the supporting affidavit indicated that the appeal is against a judgment delivered by Honourable R.K. Langat yet the memorandum of appeal indicates that the judgment impugned is that of Honourable B.M. Ekhubi.

The affidavit in support of the application is also said to be defective in that it is sworn in second person and also the source of the deponent's information is not disclosed.

Apart from pointing out these defects, the respondent also swore that the delay in filing the application for stay of execution was inordinate and no reasonable or plausible explanation was given for the delay.

Whether the appeal was filed in time is an issue that can and should immediately be disposed of because if it was to be established that there is no appeal, it would be unnecessary to consider other issues arising from the disputants' submissions.

There is no dispute that the subordinate court's judgment was delivered on 7th July, 2016 and it is also common ground that, despite the respondent's reservations about the memorandum of appeal, the appeal was filed on 8th August, 2016. On the face of it, it would appear the last day for the appellants to file the appeal was 6th August, 2016 or 7th August, 2016 if the date on which the judgment was delivered is disregarded as the functional date on which time started running. The two dates fell on Saturday and Sunday respectively and therefore the next available date on which the appellants could possibly file their appeal was on 8th August, 2016. This is what **Order 50(3)** of the **Civil Procedure Rules** provides; it states:

> ***50.(3). Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.***

Regardless of whether time expired on 6th or 7th August, 2016 those dates fell on days when either the court registry was closed or on a Sunday; the day when the registry was next open was on Monday 8th August, 2016 which is the date that the memorandum of appeal was filed. It follows that the appeal was duly filed within the limitation period.

But even if the memorandum of appeal was filed in time the respondent has, as noted, questioned its validity owing to various defects on its face. In order to appreciate properly this aspect of the respondent's concerns, it is necessary to reproduce here the offending part of the memorandum of appeal:

> ***"(AN APPEAL FROM THE JUDGEMENT OF HON. B.M. EKHUBI SENIOR RESIDENT MAGISTRATE, BARICHO DELIVERED ON 7TH JULY, 2016 IN OTHAYA CMCC NO. 45 OF 2014)***

***MEMORANDUM OF APPEAL***

***The Appellant herein aggrieved by the Judgement of the Resident Magistrate at Othaya in Civil Case No. 45 of 2014 delivered on 7th July, 2016 appeal against the said judgement on the following grounds:-"***

The respondent is right that there are obvious defects on the face of the memorandum of appeal to the extent that Hon. B.M. Ekhubi is misrepresented as a senior resident magistrate in Baricho rather than in Othaya law courts where the case was apparently filed. Again, the Othaya court is a senior resident magistrates' court and not a chief magistrates court as the memorandum seems to suggest.

These mistakes are, in my humble view, errors that can be corrected or amended; they are not as worse as to render the appeal fatally defective. Any objective observer looking at the memorandum should be able to tell that the decision appealed against arose from the magistrates' court at Othaya. The improper description of that court as the chief magistrates' court rather than a resident magistrates' court is also insignificant because under section 5 of the Magistrates' Court Act, 2015, they both comprise a magistrate's court which is defined in that provision as a court subordinate to the High Court and which is properly constituted when presided over by a chief magistrate, senior principal magistrate, a principal magistrate, a senior resident magistrate or a resident magistrate. If the court in which the case was instituted was properly constituted and seized of the jurisdiction to dispose of the dispute before it, it really matters little whether it is described as a chief magistrates' court rather than a senior resident magistrates' court. This does not mean, however, that the appellants shouldn't amend their memorandum of appeal to correct the anomalies and put it into its proper perspective; I am only saying that the mistakes are not that bad as to render the appeal fatally defective.

Coming back to the applicants' application, it is not in dispute that the grant by the court of the order of stay under order 42 rule 6 (1) of civil procedure rules is discretionary except that rule 6(2) of the same rules goes further to prescribe the circumstances when the grant of stay of execution will be declined notwithstanding the discretion given under Rule 6(1). In other words, the exercise of discretion under Rule (1) is subject to Rule 6(2) which provides as follows:

"***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 the decree or order as may ultimately be binding on him has been given by the applicant."***

The conclusion that one can draw from this provision is that, over and above the discretion which the court enjoys to grant or refuse stay, it must be satisfied, where it is inclined to make an order for stay, that the applicant will suffer substantial loss if the order for stay is not made and, secondly, that the application for stay has been made without unreasonable delay and, finally, the applicant must have given security for satisfaction or performance of the decree in the event his appeal fails.

The applicants have sworn that they will suffer substantial loss if the order is not made and that they are also ready to give such security as may be ordered by the court for satisfaction or performance of the decree. However, they have not explained the delay in the filing of their application. As noted they filed their appeal on 8th August, 2016 but it was not until 7th October, 2016, two months down the line, that the application for stay of execution was filed. I agree with counsel for the respondent that a delay of two months is inordinate and at the very least, the applicants owed this court some explanation why it took them this long to file the application after they had filed their appeal. In the absence of any explanation for the delay, this court is restricted in exercising its discretion in favour of the applicants and for this reason the applicants do not deserve the order for stay.

The applicants also asked for an order to set aside the order dismissing their application for stay in the

magistrates' court. I should think that they applied for a similar order for stay of execution in this court on the assumption that the order had been refused by the magistrates' court regardless of whether or not that refusal was justified. In any event, the appeal filed is not against the order of refusal to grant the order for stay but rather against the judgment whose execution was sought to be stayed. In these circumstances, the prayer to set aside the order of the magistrates' court is misconceived.

For the reasons I have given, I am satisfied that the appellants' application is not merited and it is hereby dismissed with costs.

**Signed, dated and delivered in open court this 10th day of February, 2017**

Ngaah Jairus

**JUDGE**