



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 607 OF 2010**

**NJUGUNA NGARUIYA**

**MARGARET KABURA NGAYUIYA.....PLAINTIFFS**

**VERSUS**

**VICTOR KATANA & 36 OTHERS.....RESPONDENTS**

**RULING**

Through their application dated 4<sup>th</sup> July 2014, the Applicants seek to have the orders of stay of execution issued on 30<sup>th</sup> March, 2012 set aside on the grounds that the 25<sup>th</sup> defendant has not filed her appeal for over two years since the stay orders were granted pending appeal and, in addition, that the 25<sup>th</sup> defendant continues to occupy the plaintiff's premises without paying rent on account of the stay orders granted. The plaintiff further contends that the 25<sup>th</sup> defendant's continued delay in filing the appeal is prejudicial to the plaintiff. The application is supported by the joint affidavit sworn by Njuguna Ngaruiya and Margaret Kabura Nyaga on 4<sup>th</sup> July, 2014. The Applicants are the joint administrators of the estate of the late Naomi Kabura who owns L.R. No. 209/2389/72, being a residential building comprising flats one of which is occupied by the 25<sup>th</sup> Defendant ("the Suit Property").

Parties filed and relied on their Written Submissions.

The background to this case is that through a ruling delivered on 21<sup>st</sup> November, 2011, the Court struck out the defence of the 25<sup>th</sup> Defendant and made an order that she was to be evicted from the Suit Property. Being aggrieved by that ruling, the 25<sup>th</sup> Defendant filed a Notice of Appeal and requested for proceedings to enable her file the appeal vide the letter dated 23<sup>rd</sup> November, 2011. The 25<sup>th</sup> Defendant also applied for stay of execution which was granted on 30<sup>th</sup> March, 2012. To date the 25<sup>th</sup> defendant has not filed the appeal. The Applicant urged that the 25<sup>th</sup> defendant continues to occupy the Suit Property without paying rent as a result of the stay order granted by the court thus making the Estate of the late Naomi Kabura lose income. Further, that the 25<sup>th</sup> Defendant is not keen to file or pursue the appeal since she is enjoying the stay orders. The Applicant seeks to have the stay orders vacated so that the estate of the late Naomi Kabura can enjoy the fruits of the court ruling made on 21<sup>st</sup> November, 2011 in its favour.

The 25<sup>th</sup> defendant relied on the Affidavit she swore on 22<sup>nd</sup> December, 2013 in opposing the application. She argues that she has not received a letter from the Deputy Registrar confirming that the certified proceedings are ready for collection. She further urges that she has lived on the Suit Property most of her life and that this is the only place she calls home.

Having considered the oral and written submissions and having looked at the previous rulings delivered on 21<sup>st</sup> November, 2011 and 30<sup>th</sup> March, 2012 the court notes that the 25<sup>th</sup> Defendant has not taken any steps to file its appeal after she lodged her Notice of Appeal. No evidence was placed before the court to show what efforts the 25<sup>th</sup> defendant had made to progress her appeal. It is noteworthy that the 25<sup>th</sup> Defendant's letter applying for certified copies of the pleadings, proceedings and ruling was filed in Court on 23<sup>rd</sup> November, 2011, which is almost six years ago. The normal practice is that a party who wishes to appeal makes a down payment of the court fees before the proceedings can be typed. It is also incumbent upon a party seeking proceedings to follow up with the court registry to ensure that the proceedings are typed and the order certified to enable it prepare and file its record of appeal timeously.

The Applicant relied on the case of ***Reuben Indiatsi Nasibi –v- Alfred Machayo and 2 others [2012] eKLR*** in which the court while dealing with a similar scenario made the following observation: -

***“The other issue is that for the last six or so years the 1<sup>st</sup> respondent has been baby-sitting his notice of appeal without taking steps to ensure that the appeal is lodged. Whereas the 1<sup>st</sup> respondent contends that the proceedings are yet to be supplied, there is no indication of the steps taken by the 1<sup>st</sup> respondent to expedite the process. In the absence of such evidence one cannot help agreeing with the applicant that the 1<sup>st</sup> respondent has no interest in pursuing the appeal. Where a party has been granted an indulgence in form of a stay of execution order to enable him pursue an appeal, it behoves him to take all the necessary steps to ensure that the said appeal is expedited. He should not just sit back and twiddle his thumbs under the pretext that he is awaiting proceedings. The exercise of judicial discretion in favour of a party places a corresponding duty on the party to avoid abuse of the said orders.....”***

I agree with the court's finding above that when judicial discretion is exercised in favour of a party and it is granted orders, that party has a duty to avoid abuse of the said orders.

In this case it is clear that the 25<sup>th</sup> Defendant has not been diligent. She has not taken any steps to expedite the process of obtaining typed proceedings so that she can pursue her appeal. The court agrees with the Applicant that the 25<sup>th</sup> Defendant is happy to enjoy the orders of stay she was granted without making any efforts to pursue her appeal yet the orders were granted pending appeal.

The court therefore sets aside the orders made on 30<sup>th</sup> March, 2012 and the stay is discharged. The costs of this application shall be borne by the 25<sup>th</sup> Defendant.

Dated and delivered at Nairobi this 9<sup>th</sup> day of March, 2017.

**K. BOR**

**JUDGE**

In the presence of: -

Ms. Kamau - for the Plaintiffs/Applicants

Mrs. Njiru- for the 25<sup>th</sup> Defendant/Respondent

V. Owuor- Court Assistant