



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO 23 OF 2017

(FORMERLY NAKURU ELC 142 OF 2012)

NGORIKA FARMERS CO-OPERATIVE LTD.....APPLICANT

VERSUS

JOHN KIARIE.....1ST RESPONDENT

PETER MAINA KIMANI.....2ND RESPONDENT

MARY WAMBUI KIMOTHO.....3RD RESPONDENT

RULING

1. Pursuant to a judgment that was delivered by the Court on the 12th November 2019, the Applicant has now filed the present Application by way of a Notice of Motion dated 28th November 2019, brought under the provisions of Section 3A, 75, 78, 79G of the Civil Procedure Act and Order 52 Rule 1(3) of the Civil Procedure Rules(sic) and all enabling provisions of the Law where they seek for orders of stay of execution of the judgement pending the hearing and determination of an Appeal. The Applicant also seeks to be allowed to appeal the judgment after the prescribed time.
2. The said Application is supported by the grounds set on its face as well as on the supporting affidavit of Gideon Mwangi Rubia the Chairperson of the Applicant Co-operation herein dated the 28th November 2019.
3. The Application was opposed vide the 1st Respondent's undated Replying Affidavit in which the 1st Respondent sought that the said application be struck out with costs for being bad in law and for being an abuse of the Court process.
4. Despite there being orders that the said application be disposed of by way of written submissions, by that time the Court is writing this ruling, none of the parties had filed their written submissions. To this effect thereof the Court shall rely on the averments in the sworn affidavits in support thereof and in opposition of the application herein.
5. I have considered both the supporting affidavits sworn on behalf of the Co-operative Society by the Chairman of the same wherein he sought for leave to file an Appeal out of time for reasons that after the judgment was delivered on 12th November 2019, the typed copy of the Judgment was availed to the Applicant on the 25th November 2019 when the time for Appeal had run out and therefore the Respondents were likely to execute the Decree herein at any time.
6. The Applicant's supporting affidavit to the Application that seeks orders of stay of execution of the judgement pending the hearing and determination of the Appeal is in form of a Memorandum of Appeal and does not conform to the provisions of Order 42 Rule 6 of the Civil Procedure Rules which sets the three conditions for stay of execution pending Appeal.
7. The Replying Affidavit in opposition of the application herein was to the effect that the application was omnibus and a mongrel of different prayers governed by different rules of practice procedures and parameters and therefore was incapable of any proper response, adjudication and determination and therefore the same ought to be dismissed.
8. That the Applicant did not demonstrate to the Court the extent of loss that it would incur should the judgment not be stayed. That further the orders sought to be stayed were negative orders where the Court had dismissed the Applicant's suit and therefore the same was incapable of execution save for the order of costs. The 1st Respondent relied on the holding in the case of **Raymond vs Austine Pyan Maranga** (sic)

9. The 1st Respondent's response on the application to file the Appeal out of time was that the Applicant's Notice of Appeal was undated and therefore should not be relied upon. Further that the said application was barred in law and was an abuse of the Court process because the orders sought could not be issued since the time expected for the Applicants to file a record of appeal had not lapsed. That the Applicant was bent to waste the Court's precious time and abuse the sanctity of the judicial process.

10. It was the 1st Respondent's averment that the Applicant's annexures marked as GMR 3-15 ought to be expunged from the Court record and completely disregarded as the same had not been cited in his supporting affidavit. The 1st Respondent further sought for the Applicant's application to be struck out with costs for being improper, bad in law and an abuse of the Court process.

Determination.

11. To begin with I must point out that the application herein having been filed by a lay man, was brought under the wrong provisions of the law. That notwithstanding, I find that the same is not fatal and I shall therefore consider the same, pursuant to the discretion of the Court as provided for under Sections 3A and 63 (e) of the Civil Procedure Act, which discretion is anchored under Article 159 of the Constitution of Kenya 2010.

12. Secondly, I also wish to point out that only the 1st Respondent herein filed his response to the Applicant's Application.

13. I have therefore considered the Applicants' Application for stay of execution of the judgement which was delivered on the 12th November 2019, pending the hearing and determination of the Appeal. I have also considered the reasons given for and against the said Application.

14. 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 1st 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 1st Applicant.

15. 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 1st 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 Applicants.

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

i. Whether the Applicant had satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What orders this Court should make

17. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **"and"** which connotes that all three (3) conditions must be met simultaneously.

18. Having said so, and having regard to the Application before me, I note that the orders issued vide the judgment delivered on the 12th November 2019 were to the following effect:

'I find that the Plaintiff having not adduced any evidence to show that the Title Deed for the suit land herein was procured by the Defendants fraudulently, or by misrepresentative or through a corrupt scheme, the claim that the suit property belongs to the society cannot therefore stand. The end result is that the Plaintiff's suit is herein dismissed with costs to the Defendants.'

19. These orders, were in my humble opinion and in agreement with the 1st Respondent's averments, negative orders.

20. In the case of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR** the Court had held that an order for stay cannot be granted where a negative order had been issued.

21. Under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed. It defines a decree holder as:

‘any person in whose favour a decree has been passed or an order capable of execution has been made...’

22. In the present judgment, the Court did not order the Applicant to do anything or to abstain from doing anything or to pay any sum of money.

23. In the case of **Western College of Arts and Applied Sciences vs. Oronga (1976) KLR 63** at p. 66 Law V P said:-

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay, to enforce or to restrain by injunction.”

24. In the decided case of **Sonalux Limited & Another v Barclays Bank of Kenya Limited & 2 others [2008] eKLR** the Court of Appeal held:

‘As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.’

25. For the foregoing reasons, the upshot of this Court's Ruling to the Applicant's Application for orders of stay of execution of the judgement pending the hearing and determination of an Appeal is that the same is not merited and therefore the said Application is hereby dismissed.

26. On the second issue where the Applicant seeks to be allowed to file an appeal out of the statutory period, I find that pursuant to the fact that the power to grant leave to extend the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis, an Applicant is usually under an obligation to explain to the satisfaction of the Court that they are entitled to the discretion being exercised in their favour, by placing before the Court sufficient material.

27. Although the matters to be considered by the Court are not exhaustive and each case may raise its own unique issues that may not be in other cases for consideration, the Supreme Court, in the case of **Fahim Yasin Twaha vs Timamy Issa Abdalla & 2 Others [2015] eKLR** laid out some general principles regarding extension of time, as follows:-

"As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the Respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”. [emphasis supplied].

28. In the present case, the Applicant has stated that after the judgment was delivered on 12th November 2019, the typed copy of the

Judgment was availed to them on the 25th November 2019 when the time for Appeal had run out and therefore the Respondents were likely to execute the Decree herein at any time.

29. Section 7 of the Appellate Jurisdiction Act, provides as follows:-

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

30. To this end, since the power to extend time for the filing of a Notice of Appeal is vested both in the High Court and Courts of equal status, Order 43 Rule 1(3) of the Civil Procedure Rules provides as follows:

An application for leave to appeal under [section 75](#) of the Act shall in the first instance be made to the Court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

31. In the present matter, upon Judgment having been delivered on the 12th November 2019, the Applicant filed their Application dated the 28th November 2019, seeking to file their Appeal out of time, on the 2nd December 2019 which was about 6 days out of the period of 14 days prescribed by the law and which period, I find was not inordinate in the circumstance.

32. I find that the 1st Respondent, indeed all the Respondents(who did not respond to the Application) 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 and make the following orders:-

i. The time within which the Applicant ought to have filed an appeal to the Court of 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, they should liaise with the Deputy Registrar of this Court and ensure that the same are supplied to them within **thirty (30)** days of this order.

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

iv. The cost of this Application is granted to the 1st Respondent herein.

Dated and delivered at Nyahururu this 8th day of June 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE