



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISCELLANEOUS APPLICATION NO. 11 OF 2019

NANCY MUTHONI MACERE (Suing as the legal

representative of the Estate of PETER

MACERE KAMUNDO (Deceased).....APPLICANT

VERSUS

KIRINYAGA COUNTY GOVERNMENT.....1ST RESPONDENT

REGINA MUTHONI MWANGI.....2ND RESPONDENT

MICHAEL MUTHUI MWANGI.....INTERESTED PARTY

RULING

The application before me is the Notice of Motion dated 30th July 2019 brought under Section **1A, 1B, 3A, 79 G and 95 CPA, Order 42 Rule 6 CPR, Article 159 sub-rule (2) (d) & (e)** of the Constitution of Kenya. The applicant is seeking the following orders:

(1) Spent.

(2) That leave be granted to the applicant herein to lodge an Appeal against the entire judgment and decree in KERUGOYA CMCC No. 323 of 2012.

(3) That this Honourable Court be pleased to temporarily stay execution of the judgment entered against the applicant herein on 20th December 2018, the resultant decree and all consequential orders pending the hearing and determination of this application.

(4) That this Honourable Court be pleased to grant a stay of execution of the judgment entered against the applicant on 20th December 2018, the resultant decree and all consequential orders pending the hearing and final determination of the applicant's Appeal.

(5) That the costs of this application be provided for.

The application is supported by the affidavit of the applicant and grounds apparent on the face of the application. When the application was placed before the vacation Court on 31st July 2019, the same was certified urgent and a temporary stay of execution was granted to last until the inter-parties hearing on 14th August 2019. When the matter was called out during the inter-parties hearing on 14th August 2019, neither the applicant nor his counsel was present. There was also no attendance on the part of the respondent. There being no explanation why the applicant or his advocate was absent, the application was dismissed for non-attendance and for want of prosecution. The temporary stay orders which were issued on 31st July 2019 were also discharged. The applicant later filed yet another application dated 14th August 2019 seeking to inter alia discharge vary and/or set aside the orders of dismissal of this application issued on 31st July 2019. That application was opposed by the respondent and on 8th November 2019, this Court rendered itself by setting aside the dismissal of this application dated 30th July 2019. However, the interim orders issued on 31st July 2019 were not reinstated. It is the same application which is now coming up for determination. The 1st respondent through her County Attorney Ms Carolyn Kinyua filed a replying affidavit opposing the said application and sworn on 30th July 2019 stated that the impugned judgment before the lower Court was delivered on 20th December 2018 and after the judgment was delivered, no action was taken either to review or set aside and/or appeal the same. The 1st respondent also stated that the delay has not been explained as the applicant sat on her haunches.

It is also stated by the 1st respondent that the allegations by the applicant that the delay was due to the advanced age of the applicant cannot

be true as she duly participated in the proceedings and filed documents to prove the case. The 1st respondent further argued that the applicants were duly served with notice of taxation hence she cannot state that she was not aware of the judgment herein. The 1st respondent therefore urged that the application has not met the threshold for the grant of leave to appeal out of time.

The 2nd respondent also filed a replying affidavit opposing the said

application sworn on 4th August 2019. According to her, the applicant and her counsel absconded, ignored and/or refused to attend Court for judgment and that the same was delivered in her presence and her son and upon expiry of the Appeal window, she instructed the firm of Wanjiru Waweru & Company Advocates to institute bill of costs and the taxation notice was filed on 14th March 2019. The 2nd respondent also stated that the applicant did not attend Court during the delivery of the judgment and has not applied to set aside or challenge the taxation notice or lodge any Appeal if indeed they were aggrieved as alleged. The 2nd respondent therefore believes that this application is an afterthought filed only after the applicant was served with a Notice to show cause why she should not be committed to civil jail for failing to comply with the taxation order and that the same should be dismissed with costs.

The interested party also filed a replying affidavit in opposition thereto. In the said affidavit sworn on 30th August 2019, the interested party stated that the judgment date was issued by the Court in the presence of the plaintiff/applicant on 20th December 2018. He stated that the action by the applicant is an afterthought and a delaying tactic. The interested party contends that the applicant has taken more than 7 months to file the present application and no explanation has been given for such inordinate delay.

ANALYSIS AND DECISION

The applicant in this application is seeking a substantive order of stay pending appeal and leave to appeal against the judgment of the lower Court entered on 20th December 2018. This application was filed on 30th July 2019, almost seven months after the delivery of judgment. It is an undoubted right of a party who is aggrieved from a decision to appeal to the appellate Court. The applicant has explained that the reason for his delay is due to old age. I find a period of seven (7) months to be inordinate and the reasons given for the delay not convincing. However, the Court's discretion cannot take away the undoubted right of a litigant to appeal if the delay, can be compensated by an award of costs. I have noted that the applicant has annexed a copy of Memorandum of Appeal to his supporting affidavit. He has not taken any other step(s) e.g. applying for certified copies of proceedings and the impugned judgment presumably because he is yet to be granted leave to appeal. I also note that this application may have been precipitated by the execution process which was commenced by the 2nd respondent.

In an application for stay pending appeal, an applicant must comply with **Order 42 Rule 6 (2) CPR** 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 such decree or order as may ultimately be binding on him has been given by the applicant”.

The applicant has not given security for due performance of the decree and/or order that may ultimately be binding on him. He has not also given any undertaking to abide by such terms and conditions as may ultimately be binding on him. Having made my analysis as hereinabove and considering that the 2nd respondent has taxed his bill in respect of costs awarded by the lower Court in the judgment sought to be appealed therefrom, I reluctantly allow the application in the following terms:

(1) The applicant is granted leave to file Appeal against the judgment of the lower Court in CMCC No. 323 of 2012 delivered on 20th December 2018 within 14 days from today.

(2) The applicant is granted a stay of execution for 12 months after which the same shall lapse.

(3) The applicant shall deposit a sum of Ksh. 100,000/= in a joint interest earning account in the names of his lawyers and that of the respondent as security for costs and other incidentals thereto within 30 days from today.

(4) The costs of this application shall be borne by the applicant.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 5th day of June, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. *Ms Kinyua holding brief for D.N. Gitonga*
2. *Mr. Asimwe holding brief for the Applicant*
3. *Mbogo – Court clerk*