



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 195 OF 2015(MULTI TRACK)

HAMISI MOHAMED BAKARI

SULTAN MOHAMED BAKARI

WAZIRI MOHAMED BAKARI

RAMADHANI MOHAMED BAKARI

BARU W. MOHAMED

SAID MOHAMED BAKARI.....PLAINTIFFS

VERSUS

THOMAS SADIKI

JOYCE SADIKI

KIBOKO NDURYA

TOM NANCHOKE.....DEFENDANTS

RULING

1. There are two applications for consideration. The first application is the Notice of Motion dated 15th June, 2020 by the 1st and 2nd defendants seeking for leave to file a notice of appeal out of time against the judgment and decree of this court delivered on 5th February 2020 and for stay of execution of the said judgment and decree pending the hearing and determination of the intended appeal to the Court of Appeal. There is also the 3rd defendant's Notice of Motion dated 14th July, 2020 also seeking a stay of execution of the said judgment and decree and all consequential orders pending the hearing and determination of the intended appeal.

2. The application dated 15th June, 2020 is supported by the affidavit of the 1st and 2nd defendants sworn on 15th June, 2020 in which they have deposed that being aggrieved with the judgment herein, they immediately instructed their advocates on record to lodge appeal to the Court of Appeal. That the time to lodge the Notice of Appeal expired on 9th March, 2020 and the delay in lodging the appeal was occasioned by the restructuring and reshuffle of the advocate's office. That the delay in lodging the appeal is not inordinate in the circumstances and the same is excusable. They have deposed that the intended appeal is arguable as it has both matters of law and facts which are very substantial and needs to be determined by the Court of Appeal. A copy of the draft Memorandum of Appeal has been annexed. It is contended that the execution by the plaintiff is by way of eviction and if carried out will occasion great prejudice on the part of the applicants because they will be rendered homeless, destitute and helpless and the intended appeal if successful shall be rendered nugatory. That the respondents shall suffer no prejudice if the application is allowed.

3. The application dated 14th July, 202 is supported by the affidavit of Kiboko Ndurya, the 3rd defendant sworn on 14th July, 2020. He has deposed that he was aggrieved by the judgment and decree herein as the suit property is his only home and has been so for the last 40 years and enforcement of the judgment will render his family homeless. He has deposed that he has instructed his advocates on record to appeal against the judgment and decree and has annexed a copy of receipt for filing Notice of Appeal dated 27th February, 2020. The 3rd defendant contends that if execution is not stayed, the intended appeal if successful shall be rendered nugatory as he will have lost his property that cannot be compensated in damages and costs by the plaintiffs. That the respondents shall suffer no prejudice if the application is allowed.

4. In opposing the applications, the plaintiff/respondents filed a replying affidavit on 17th July, 2020. It is their contention that the applications lack merit, that no loss shall be suffered by the applicants, that the delay in filing the applications is inordinate and the applications are non-starter since there is no appeal.

5. The applications were canvassed by way of written submissions. The 1st and 2nd defendants filed their submissions on 27th August, 2020 while the 3rd defendant filed his on 28th August, 2020 and the plaintiffs filed theirs on 29th September, 2020.

6. I have considered the applications and the submissions made. The first issue for determination is whether this court should grant the 1st and 2nd defendants leave to file a notice of appeal to the Court of Appeal out of time against the judgment and decree of this court delivered on 5th February 2020. The second issues for determination is whether stay of execution of the said judgment and decree should be granted pending the hearing and determination of the intended appeals to the Court of Appeal.

7. In their application for leave to file a notice of appeal to the Court of Appeal out of time, the 1st and 2nd defendants invoke Section 79G and 95 of the Civil Procedure Act. Section 79G of the Civil Procedure Act relates to the court's jurisdiction on appeals from the subordinate court to this court. And even though Section 95 of the said Act gives the court discretion to enlarge time where the period originally fixed or granted may have expired, I am of the view that the same relates only to matters pending before the court including appeals from subordinate courts. In this case, the intended appeal is against the judgment and decree of this court and the notice of appeal is to the Court of Appeal. Rule 4 of the Court of Appeal Rules gives the Court of Appeal the discretion to extend the time for doing of any act limited by the rules before that court. I do not think I have the requisite jurisdiction to grant the orders as sought by the 1st and 2nd defendants. The court's jurisdiction is exercisable only on the basis of express provisions of the constitution and the law. The Appellate Jurisdiction Act and the Court of Appeal Rules are not applicable when moving this court. The operational rules for this court are the Civil Procedure Rules made under the Civil Procedure Act. If I were to grant extension of time in this matter, I will certainly have usurped the powers and jurisdiction of the Court of Appeal. I am afraid I cannot do that.

8. The next issue for determination is whether stay of execution of the judgment and decree herein should be granted pending the hearing and determination of the intended appeals. Order 42 Rule 6(1) of the Civil Procedure Rules provides that the Court appealed from may for sufficient cause stay of execution of a decree or order pending the hearing and determination of an appeal. It provides as follows:

“ 6 (1) 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 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 such application has been made without undue delay;

(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.”

9. From the above provision, the pre-requisites that an applicant must satisfy the court on are that the application must be brought without undue delay, that substantial loss may result to the applicant unless the order is made, and 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.

10. The decree appealed against was made on 5th February, 2020. The 1st and 2nd defendants' application was filed on 17th June, 2020 while the 3rd defendant's application was filed on 14th July 2020. The 1st and 2nd defendants' application was filed after the expiry of about four months and two weeks while that of the 3rd defendant was filed after the expiry of about five months and two weeks. The 1st and 2nd defendants have given an explanation for their failure to file Notice of Appeal in time. However, none of the applicants have given any explanation for filing the application herein after a period of over four (4) months which in my view was inordinate. There was absolutely no explanation given by the applicants for the delay. In my considered view, the applications were not made timeously and an explanation for the delay ought to have been given.

11. Regarding the other condition, that is substantial loss occurring to the applicants, I wish to refer to the case of **Kenya Shell Limited –v- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982- 1988)KAR 108** where the Court of Appeal stated:

“It is usually a good rule to see if order 41 rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

12. The Court of Appeal also dealt with the issue in the case of **Charles Wahome Gethi –v- Angela Wairimu Gethi (2008) eKLR** and held as follows:

“The applicant does not claim that the respondent intends to sell the portion of land in dispute and it will not be in existence by the time the appeal is determined... In the circumstances of this case, the applicant would suffer substantial loss

rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory. ”

13. The applicants must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicants as the successful parties in the appeal. In the present applications, the applicants have stated that if execution by way of eviction were carried out, it will occasion great prejudice on the applicants part and render the appeals if successful nugatory. The subject property of the suit herein is land. As was stated by the Court of Appeal in the case of **Charles Wahome Gethi (supra)**, ‘the applicants have not claimed that the respondents intend to sell the portion of land in dispute and that it will not be in existence by the time the appeals are determined.’ In my view, the appeals if successful would not be rendered nugatory as the applicants may still recover possession, and the respondents evicted. This court is not satisfied that the applicants would suffer substantial loss if the order of stay of execution pending appeal was not granted.

14. In the circumstances, and for the reasons I have given above, I find that the applications are without merit. I dismiss the 1st and 2nd defendants’ application dated 15th June, 2020 and the 3rd defendant’s application dated 14th July 2020 with costs to the plaintiffs.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 22nd day of October 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE