



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 8 OF 2018

JANE NJERI MURIITHI (Suing as the Administrator

of the Estate of MURIITHI NGARI Alias

TITUS MURIITHI.....APPELLANT

VERSUS

PETER GITHINJI MUTHIGANI.....RESPONDENT

RULING

Introduction

In a Notice of Motion under certificate of urgency dated 24th June 2020 brought under *Order 42 Rule 6 CPR*, the Applicant seeks the following orders:-

(1) Spent.

(2) That there be a stay of proceedings pending the hearing of the appeal preferred before the Court of Appeal as against the ruling/orders dated 29th May 2020.

(3) That costs be provided for.

The application is premised on the following grounds:-

(a) That the applicant intends to exercise his right of appeal as against the said decision.

(b) The applicant believes that he has an arguable Appeal.

The said application is further supported by the affidavit of the applicant sworn the same date. The respondent filed a replying affidavit in response to the said application sworn on 2nd July, 2020.

Applicant's Statement of Facts

The applicant in his supporting affidavit deponed that being aggrieved by the decision of this Court delivered on 29th May 2020, he opted to exercise his right of appeal and has since lodged a notice of appeal, a copy of which he annexed and marked **JMN 1**. The applicant also stated that he strongly believes that he has an arguable case as he has lodged an appeal as against ELCA No. 188/2013 (Kerugoya) which he strongly believe dealt with the same issues.

Respondent's Statement of Facts

The respondent in her replying affidavit stated that the applicant is trying to confuse and misled the Court by including persons who are not parties in this appeal as respondents. He stated that the applicant has included one Joseph Wanjohi, Harrison Maina, Muruthi Daniel, Munene Muruthi and Esther Nyakanguyu as respondents in this Appeal yet they have not yet been enjoined in this appeal. The respondent further stated that the applicant purports to be seeking orders against the said respondents yet they are not parties in this appeal.

He stated that the applicant seeks to litigate the issue a third time as he also raised the issue in this case vide an application dated 26th July

2019 and that he has no arguable appeal either from the decision in this file or ELC No. 188/2013 as this Court is now functus officio. The applicant also stated that this Court heard the appeal herein and delivered its judgment on 5th July 2019 and that no one has appealed against that judgment. He stated that the applicant has brought this application under *Order 42 Rule 6 CPR* and that he has not demonstrated that he will suffer substantial loss unless the application is allowed.

Legal Analysis

I have considered the Notice of Motion dated 24th June 2020 and the supporting affidavit. I have also considered the annexures thereto and the replying affidavit. The applicant has moved this Court under *Order 42 Rule 6 CPR*. *Order 42 Rule 6(1)* provides 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 in 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 deem 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 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”.

It is clear from the provisions of the law that an applicant must establish the following three grounds before an application for stay pending appeal is granted, that is to wit:-

(1) The applicant must establish that he will suffer substantial loss unless the orders are given.

(2) The application has been brought without unreasonable delay; and

(3) The applicant has given security for the due performance of the decree/order as may ultimately be binding on him.

On the first principle, **Platt, Ag. J.A** (as he then was) in the case of **Kenya Shell Limited Vs Kibiru (1986) K.L.R 410**, expressed himself as follows:-

“It is usually a good rule to see if Order XLII Rule 4 of the Civil Procedure Rules can be established. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other events. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”.

Again in **Machira T/A Machira & Co. Advocates Vs East African Standard (No. 2) (2002) K.L.R 63**, it was held:-

“To be obsessed with the protection of an appellant in total disregard or flirting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must, be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Court, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

I agree with the above decisions. The same way an applicant can demonstrate in an application for stay in a money decree can show that the decree holder is a man of straw and would not be able to pay the decretal sum if the stay is not granted, an applicant in matters of land and environment must also go an extra mile and show that unless the stay order is granted, the respondent would sell, dispose of, transfer or alienate the suit property thereby rendering the intended appeal nugatory. There is no iota of evidence by the applicant that the decree holder intends to dispose of the suit property or do any other thing that would render the intended appeal nugatory.

The applicant in paragraph 4 of the supporting affidavit believes that he has an arguable appeal which he has preferred to the Court of Appeal. Whereas it is a Constitutional right of any unsuccessful party to prefer an appeal to the appellate Court, an arguable appeal is not one of the grounds of stay of execution pending appeal under *Order 42 Rule 6 CPR*.

Though I have no doubt in my mind that I have considered all the factual issues and principles of law in the impugned judgment, I am also alive that the superior Court may overturn the same in favour of the respondent. In balancing the rights of applicant which is yet to crystallize and that of the respondent who is the successful litigant, this Court cannot be obsessed with the protection of a right that has not crystallized in total disregard of that of a successful party. The overriding objective of the law must always be kept alive. In the final analysis, I find the application dated 24th June 2020 lacking merit and the same is hereby dismissed with costs. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 9th day of October, 2020.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Plaintiff – present
2. Mr. Ngigi holding brief for Mwai
3. Ms Kiragu holding brief for Ann Thungu
4. Mbogo – Court clerk.