**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 282 OF 2013**

**CLEMENT WEKESA MUUYI.....PLAINTIFF**

**VERSUS**

**PATRICK WEKESA OKUMU**

**(Sued as Representative of the Estate of OKUMU MASAI(DECEASED).....DEFENDANT**

**CONSOLIDATED WITH**

**ELC CASE NO. 178 OF 2014**

**IDI WASIKE MASAI.....PLAINTIFF**

**VERSUS**

**PATRICK WEKESA OKUMU**

**(Sued as Representative of the Estate of OKUMU MASAI(DECEASED).....DEFENDANT**

**R U L I N G**

Judgment herein was delivered on 21st November 2019 in favour of the plaintiffs.

The defendant has now moved to this Court vide his Notice of Motion dated 30th June 2020 and filed herein on the same date seeking the following orders: -

1. **Spent**

2. **That this Honourable Court be pleased to grant leave to extend the time limited for filing of the appeal herein.**

3. **That there be a stay of execution of the whole Judgment/orders of the ENVIRONMENT AND LAND COURT CASE No 282 of 2013 pending the hearing and determination of the appeal to this Court (sic).**

4. **That corollary to the foregoing, the Memorandum of Appeal filed by the Appellant be deemed as properly and duly filed thus part of the record.**

5. **That the costs of and incidental to this application do abide the result of the said appeal.**

The Notice of Motion is not anchored on any provisions of the law but is premised on the grounds set out therein and is also supported by the affidavit of **PATRICK WEKESA OKUMU** the defendant herein.

The gist of the application is that although the defendant had engaged the firm of **SHITSAMA & COMPANY ADVOCATES** to conduct his defence, the said advocates did not communicate to him about the date for delivery of this Judgment on 21st November 2019 and time to file an appeal has now run out. That he would have attended Court had he been informed. Instead, although he visited the offices of his advocate, he was not up – dated about the progress of this case. That this application has been filed without undue delay and he should not

suffer because of the mistake of his advocate and his appeal raises solid issues of law with overwhelming prospects of success.

The application is opposed and **CLEMENT WEKESA MUUYI**, one of the plaintiffs herein, has filed a replying affidavit dated 29th September 2020 in which he has deponed that the application is not only misconceived and incompetent but is also an abuse of the process of this Honourable Court. That this application has been filed eight (8) months after the Judgment which was delivered on 21st November 2019 which delay is inordinate. That the defendant has not demonstrated what steps he took to know about his case and neither has he satisfied the requirements of **Order 42 Rule 6(2) of the Civil Procedure Rules**. That the plaintiff will suffer if this case which has taken six (6) years to prosecute is delayed due to the defendant's tactics. That the delay in filing the application is inordinate and inexcusable and neither has the defendant demonstrated what loss he will suffer if the orders sought are not granted and neither has he offered any security for the due performance of the decree.

With the consent of the parties, the application was canvassed by way of written submissions. These have been filed both by **MR J.O. MAKALI** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the plaintiff and by **MR NELSON OGETO ADVOCATE** for the defendant.

I have considered the application, the rival affidavits and the submissions by Counsel.

The application is not anchored on any provisions of the law as I have already observed above. However, **Article 159(2) (d) of the Constitution** can come to the aid of the defendant. In any event, the plaintiff was not prejudiced by that omission to cite the relevant law and knew what case to meet.

There are two issues for my determination in this application:-

> **1. Whether or not to grant leave to extend time for filing a Notice of Appeal against this Court's Judgment delivered on 21st November 2019.**
>
> **2. Whether or not to grant a stay of execution of the said Judgment pending the hearing and determination of the appeal to the Court of Appeal.**

With regard to the prayer seeking extension of time to lodge a Notice of Appeal, the manner in which the application is drafted suggests that the appeal is being lodged to this Court. The intended appeal is from my Judgment and so it can only be lodged in the Court of Appeal. There is no doubt that this Court has the jurisdiction to consider and allow such a prayer. **Section 7 of the Appellate Jurisdiction Act** provides as follows: -

> ***7 "Power of High Court to extend time.***
>
> ***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."***

Reference to the High Court in the above provision no doubt applies mutatis mutanda to this Court. If there was any doubt that the High Court and, since 2010, this Court enjoys the power to allow extension of time to file a Notice of Appeal, that was settled as far back in **GABRIEL KIGI & OTHERS .V. KIMOTHO MWAURA & ANOTHER C.A CIVIL APPLICATION No 197 of 1997** where **SHAH J A** stated thus in reference to the Appellate Jurisdiction Act: -

> ***"But I must revert to Section 7 of the Act. That section in my view gives discretionary powers to the High Court to allow extension of time to file a Notice of Appeal when there is as yet nothing before this Court. It is in this particular aspect that I agree with BOSIRE Ag JA in the ROBINSON & OTHERS .V. MUTHAMI application (supra)."***

See also **TRIMBORN AGRICULTURAL ENGINEERING LIMITED .V. DAVID NJOROGE KABAIKO & ANOTHER 2000 eKLR** where **GICHERU SHAH AND OWUOR JJA** took the same view.

Having confirmed that this Court has the jurisdiction to grant the prayer for extension of time to file a Notice of Appeal, I must now consider if the application before me merits the grant of that prayer.

The general principles that guide a Court considering an application such as this one were set out by the **SUPREME COURT IN NICHOLAS KIPTOO Arap KORIR SALAT .V. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS S.C APPLICATION No 16 of 2014 [2014 eKLR]**:

> ***"……. 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 it's 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."***

The same principles were more or less reiterated by the Court of Appeal in the case of **LEO SILA MUTISO .V. ROSE HELLEN WANGARI MWANGI C.A CIVIL APPLICATION No 255 of 1997** which has been cited by Counsel for the defendant. It is clear therefore that an application such as this must be made timeously if the party seeking the Court's discretion is to succeed. The Judgment sought to be appealed was delivered on 21st November 2019 and this application was filed on 30th June 2020 a delay of seven (7) months which, in my view, is unreasonable. The defendant would therefore be expected to offer an explanation for that delay. That explanation has been offered in paragraphs III, IV and V of the Notice of Motion as follows: -

***III "That the defendant/Applicant engaged the services of SHITSAMA & CO ADVOCATES to conduct the defence in this matter"***

***IV "That the said firm did not communicate to the Applicant/defendant the day of Judgment hence the Applicant/defendant failure to attend Court on the Judgment."***

***V "That had the advocate for the Applicant/defendant informed him on the day of Judgment, the Applicant/defendant could have attended Court on that particular date and be aware of the existing Judgment that had been passed against him."***

The defendant is therefore blaming his then Counsel for not informing him about the Judgment herein. In rebutting that averment, the plaintiff in his replying affidavit at paragraph 10 has averred as follows: -

***"That although the Applicant herein alleges that he was not notified by his Counsel, he does not demonstrate to the Court the steps he took to know the state of his case."***

Litigation belongs to the party and not his Counsel. And as the Court of Appeal observed in **HABO AGENCIES .V. WILFRED ODHIAMBO MUSINGO 2015 eKLR**: -

***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by Counsel."***

Nonetheless, even assuming that his previous Counsel let him down by not informing him about the Judgment date, the defendant has not told this Court when he eventually became aware about this Judgment. The remedy which the defendant seeks being an equitable one to be granted at the discretion of the Court, he was expected to approach the Court with clean hands and make a full disclosure. Unfortunately for the defendant, he has not done so and from the record, it would appear that he only moved to this Court when the process of taxation of the plaintiff's bill of costs dated 9th June 2020 commenced and long after his then Counsel **MR SHITSAMA** had been served with the draft decree on 10th January 2020. The delay of seven (7) moths is not only unreasonable but it has not been explained to the satisfaction of this Court. The defendant is therefore not deserving the exercise of this Court's discretion in his favour. And other than stating that the plaintiff will not suffer any prejudice if the orders sought are granted, he has not indicated what prejudice he will suffer if the application is not allowed.

The prayer for extension of time within which to file a Notice of Appeal is not well founded and I must therefore disallow it.

The second limb of the application seeks an order for stay of execution pending appeal.

This is provided for in **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules** 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 <u>may for sufficient cause</u> 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."***

***6 (2) "No order for stay of execution shall be made under subrule (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."*** Emphasis added.

It is clear from the above that in an application of this nature, the Applicant must satisfy the following: -

**1: Demonstrate that if the order for stay is not granted, he might suffer substantial loss.**

**2: That the application has been filed without unreasonable delay.**

**3: That the Applicant has offered security for the due performance of any decree or order that may be binding on him.**

In **KENYA SHELL LTD .V. BENJAMIN KIBIRU 1986 KLR 410 PLATT Ag JA** (as he then was) said the following on the issue of substantial loss: -

***"It is usually a good rule to see if Order XLI rule 4 of the Civil Procedure Rules can be substantiated. 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 event. Substantial loss in it's various forms is the corner stone of both jurisdictions 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."***

In the same case, **GACHUHI Ag JA** (as he then was) added as follows: -

***"In an application of this nature, the applicant should show what damages it would suffer if the order for stay is not granted."***

See also **SILVERSTERIN .V. CHESON 2002 I KLR 867** and **MUKUMA .V. ABUOGA 1988 KLR 645**.

In **MACHIRA T/A MACHIRA & CO ADVOCATES .V. EAST AFRICAN STANDARD (NO 2) 2002 KLR 63**, the Court stated that: -

***"In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars …….***

***Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay***." Emphasis added.

The nearest that the defendant has come to demonstrating substantial loss is in paragraph 16 of his supporting affidavit where he has deponed as follows: -

***"That I will suffer irreparable loss if the application herein is disallowed."***

The word irreparable is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

***"Incapable of being rectified, restored, remedied, cured, regained or repaired;***

***That cannot be made right or good."***

The word substantial is defined in the same dictionary to include: -

***"Considerable in amount or value; large in volume or number …… Having permanence or near permanence; long lasting ……"***

In **JAMES WANGALWA & ANOTHER .V. AGNES NALIAKA CHESETO 2012 eKLR** the Court stated that: -

***"The Applicant 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 Applicant as the successful party in the appeal. That is what substantial loss would entail.'***

The defendant has merely pleaded that he will suffer ***"irreparable loss"*** if the application for stay is allowed. Whether the loss that the defendant will suffer is irreparable or substantial, he was expected to go further and demonstrate in what way such loss will be irreparable or

substantial. It is not enough to simply allege such loss and leave it at that. For instance, in a situation like this where the decree involves cancellation of a title and eviction of the defendants, the Court would be interested to know if there is any evidence that the land in dispute is likely to be disposed off before the appeal is determined or if the land is the defendant's only home and therefore he and his family may be rendered destitute or any other mitigating factor(s) that will persuade the Court to exercise it's discretion in favour of granting a stay. It must be remembered that even as the defendant seeks a stay of execution as he exercises his right of appeal, the plaintiff has a decree which he is entitled to enjoy. The onus is therefore on the defendant to place before the Court any satisfactory evidence to tilt the scales in his favour. Merely alleging **irreparable** or **substantial** loss is not enough and the Court should not be left to second guess. Clearly, the defendant has not surmounted that hurdle.

The defendant was also required to file the application without unreasonable delay. The delay in this case, as I have already found above, is seven (7) months and has not been satisfactorily explained.

Finally, the defendant was required to furnish security. In **VISHRAM RAVJI HALAI & ANOTHER .V. THORNTON & TURPIN (1963) LTD C.A CIVIL APPEAL NO 15 OF 1990 (1990 KLR 365)**, The Court of Appeal stated as follows: -

> ***"Thus, the superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."*** Emphasis added.

And as was held in **WYCLIFF SIKUKU WALUSAKA .V. PHILIP KAITA WEKESA 2020 eKLR:** -

> ***"The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as decoy to obstruct and delay the Respondent's right to enjoy the fruits of his Judgment."***

Other than stating in paragraph 15 of his supporting affidavit that the ***"application is made in good faith and in the interest of justice and the respondent will not suffer any prejudice if the same is allowed,"*** the defendant has not offered any security for the due performance of any decree or order that ***"may ultimately be binding on him"*** nor even averred that he is prepared to abide by any terms that this Court may impose as a condition for granting the order for stay pending appeal.

The up – shot of the above is that the defendant's Notice of Motion dated 30th June 2020 is devoid of merit. It is accordingly dismissed with costs to the plaintiff.

**Boaz N. Olao.**

**J U D G E**

**19th November 2020.**

**Ruling dated, signed and delivered at BUNGOMA this 19th day of November 2020 by way of electronic mail in keeping with the COVID – 19 pandemic guidelines.**

**Boaz N. Olao.**

**J U D G E**

**19th November 2020.**