



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: AKIWUMI, SHAH & LAKHA, J.J.A.)
CIVIL APPLICATION NO. NAI. 279 OF 1997
BETWEEN

JOHN NDUNGU MBUGUAAPPLICANT
AND
MUCHOHI GIKONYORESPONDENT

**(Being an application for stay of execution in the intended
appeal against the decision, judgment and decree of the
High Court of Kenya at Nairobi (Lady Justice Aluoch) made
on the 28th June, 1990**

in

H.C.C.C. NO. 3480 OF 1995

RULING OF THE COURT

The applicant was the unsuccessful defendant against whom the superior court (Aluoch, J.) entered judgment on June 28, 1990 whereby she declared the plaintiff as the owner of the land known as **DAGORETTI/RIRUTA/770** (the suit property) and ordered the applicant to transfer the suit property to the plaintiff. The plaintiff sued in the superior court claiming a declaration that he had acquired title over the suit property and for an order that the defendant do transfer the same to the plaintiff. After a full hearing, the superior court, as stated earlier, entered judgment in favour of the plaintiff.

A notice of appeal was filed on July 4, 1990 within the prescribed time and certified copies of the proceedings and judgment had been applied for on July 3, 1990. Although these were ready in December 1991 the applicant's advocate became aware of that fact in January 1992 when the letter from the High Court Registry dated November 1, 1991 was received by him. The advocate did not collect them until December 1992. The time for the filing of the appeal expired on February 19, 1992 as was conceded by Mr. Akhaabi the advocate for the applicant in the single judge application for extension of time to file the record of appeal made on February 26, 1993, which was refused. This was on May 14, 1997.

Whilst a reference is pending, by a notice of motion filed in this Court on October 28, 1997 the defendant seeks, under **rule 5(2)(b)** of the Court of Appeal Rules, a stay of execution of the decree pending the hearing and final disposal of the appeal against the said decision or until the further orders of this Court.

In support of the application before us, Mr. Nowrojee for the applicant submitted that the applicant had an arguable appeal and that the same will be rendered nugatory if a stay is not granted. It is now well settled that these are the two usual conditions that must be satisfied if the jurisdiction of this Court is to be successfully invoked.

Mr. Nderitu, on the other hand, for the respondent submitted that there was nothing to stay as there already was an order for the Registrar of the High Court to execute the transfer and the transfer document has already been lodged in the Lands Office. Further, because of the delay on the applicant's part this Court should not exercise its discretion in favour of the applicant.

Assuming, without deciding, that the two conditions above referred to for the grant of a stay are satisfied, does it follow that this Court must, without more, grant an order for stay? The answer to this question, in our judgment, is "NO". The power to grant a stay is discretionary as **rule 5(2)(b)** itself declares. It is a discretion to be judicially exercised and imports a consideration of all other circumstances that may be relevant to the case and on such terms as may be just. In the instant case, it is now eight years since the judgment of the superior court. And, as was rightly conceded by the then advocate for the applicant in the single judge application, there has been an inordinate delay which we find has not been satisfactorily explained. Such a delay, in our judgment, is sufficient to entitle this Court to decline, as we hereby do, to grant a stay.

This defence of laches is more effective whenever there is an application seeking the exercise of the court's discretion, as in the present case, or upon an interlocutory injunction than to a claim for a perpetual injunction at the trial when delay short of the limitation period is not normally enough of itself to operate as a defence to a claim for injunction. A plaintiff must be able to show that he has not been guilty of improper delay in applying to the Court for stay, for delay, even if not amounting to acquiescence, may deprive him of the right to the exercise of the Court's discretion or to an interlocutory injunction.

Applications for injunctive relief and stay are a cause of much delay and expense in the conduct of litigation. They cause the litigation to drag for longer than necessary. Delays encourage and even entail satellite litigation. Delays are, therefore, a cause for much public concern because, by complicating and exaggerating the cost of litigation, they constitute a clog on access to justice. The courts must, therefore, show some determination to stamp out continuation of litigation where there is, as is in this case, inordinate delay which has not been sufficiently accounted for. Accordingly and, for the reasons above stated, this application is dismissed with costs.

Dated and delivered at Nairobi this 9th day of June,

1998.

A.M. AKIWUMI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR