



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL APPEAL NO. 61 OF 2019

MOHAMMED ADAN ISSAK.....1ST APPELLANT

ANTHONY NYONGESA WAFULA.....2ND APPELLANT

=VERSUS=

CHRIS NDOLO MUTUKU.....RESPONDENT

RULING

1. This is the notice of motion brought under section 10 of the High Court (Organization & Administration) Act, rule 17 of the High Court (Organization & Administration) (General) rules, order 42 rule 6, order 51 rule 1 of the Civil Procedure Rules 2010, section 1A, 1B and 3A of the Civil Procedure Act, (Cap 21 of the Laws of Kenya and all other enabling provisions of the law).

2. It seeks:-

(a) Spent.

(b) Spent.

(c) Spent.

(d) That there be a stay of the judgment dated 4th April 2019 by Hon. P. N. Gesora in NBI CMCC No. 1020 of 2018 and all consequential order pending the determination of the Appeal lodged by the appellant.

(e) That the appellant be at liberty to apply for further orders and/or directions as the honourable court may deem just to grant.

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

3. The grounds are on the face of the application and are set out in paragraphs (1) to (11).

4. The application is supported by the affidavit of Mohammed Adan Issak, the 1st appellant/applicant sworn on the 4th September 2019 and a supplementary affidavit sworn on the 25th September 2019 and a further affidavit sworn on the 2nd December 2019.

5. The application is opposed. There is a replying affidavit sworn by Chris Ndolo Mutuku the respondent herein sworn on the 12th September 2019. The respondent also filed a preliminary objection dated 12th September 2019. The grounds are:-

1. That the memorandum of appeal dated 4th September 2019, is incompetent, null and void as it has been filed by advocates who are not properly on record for the intended appellants. Specifically, the firm of Muma & Kanjama Advocates has not complied with the mandatory provisions of order 9 rules 9 of the Civil Procedure Rules, which renders these proceedings a nullity in law. The firm that was properly on record for the purported appellants in the subordinate court was Said Wanja & Nyangayo Advocates.

2. That the ruling of the court dated 26th August, 2019, which the appellants purport to have appealed against, was in respect of the appellants' application for review dated 10th May 2019, and it is trite law that once a party opts for review, the right to appeal automatically terminates and no appeal may be entertained on orders made on an application for review. Indeed, after the

dismissal of the first application for review dated 10th May 2019 through the ruling of 26th August, 2019, the appellants filed yet another application for review dated 28th August, 2019 which second application for review was likewise dismissed with costs on 30th Augusts 2019.

3. That the memorandum of appeal dated 4th September 2019 and filed in court on the same date, is in reality an appeal against the judgment of the court dated and delivered on 4th April, 2019, and no leave to file this appeal out of time was ever sought and obtained. The said appeal has been lodged 153 days after entry of the judgment, whilst the right of appeal terminated on 3rd May 2019, 30 days after the said judgment.

4. That setting aside the ruling of the subordinate court dated 26th August, 2019 is inconsequential and an exercise in futility unless the court is being asked to set aside the judgment of the court dated 4th April 2019. The procedure adopted in inherently and incurably defective and, regrettably, mischievous and deceitful.

5. That an appeal has the same effect as an application for review, which renders this defective appeal currently before the court the third application for review. Consequently, the appeal and the two applications dated 4th September 2019 are a nullity in law as they offend the express provisions of order 45 rule 6 of the Civil Procedure Rules, which state in no uncertain terms as follows.

6. No application to review an order made on an application for review of a decree or order passed on a review shall be entertained.

7. That the applications dated 4th September 2019 are bad in law.

6. On the 18th September 2019 the court with the consent of parties directed that the preliminary objection and the notice of motion dated 4th September 2019 be heard together. It also directed that they be canvassed by way of written submissions.

The appellant's submissions

7. They are dated 26th September 2019. They raise two issues for determination:-

(a) Whether the firm of Muma & Kanjama are properly on record.

(b) Whether the appellants are entitled to the orders sought once a judgment is entered and appeal to the appellant court is not continuation of proceedings in the lower court, but a commencement of a new proceedings in another court. Parties should therefore have the right to choose whether to remain with the same counsel or to engage another counsel on appeal without being required to obtain leave. They have put forward the cases of Stanley Mugambi vs Anthony Mugambi [2005] eKLR; Martin Mutisya Kiio & Another vs Benson Mwendu Kasyali Machakos HC Misc. Appl NO 107 of 2013; Kenya Pipeline Company Ltd vs Lucy Njoki Njuru [2014] eKLR; Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR.

8. The appeal is properly before this court as it is an appeal from a decision dated 26th August 2019. The decision of 26th August 2019 was for an application for review and set aside the interlocutory judgment dated 9th July 2019 and the expert hearing and judgment dated 4th April 2019. Under order 42 rule (1) (1)(x) of the Civil Procedure Rules, an appeal from an order dismissing or allowing an application for review lies as of right. This court is the appellate court that can deal with the issue before it, hence the appeal is proper before court.

9. The principles that govern the grant of stay of execution pending appeal are set out under order 42 rule 6 of the Civil Procedure Rules. They have put forward the cases of **Focin Motorcycle Co. Limited vs Ann Wangui & Another [2018] eKLR**; **Tassam Logistics Ltd vs David Macharia & Another [2018] eKLR**; **Meteine Ole Kilelu & 10 Others vs Moses K. Nailole Civil Appeal No 340 of 2008**. The applicants herein have satisfied the conditions set out under order 42 rule 6 of the Civil Procedure Rules.

10. The instant application raises serious grounds that potentially expose the judgment of the trial court to being overturned. The grounds of the appeal raises serious questions as to whether the trial court properly applied itself to the concept of setting aside ex parte judgments.

11. The execution herein is likely to threaten the very existence of the appellant. He is required to pay Kshs.10,000,000/- and in addition to, he loses his land. He will suffer substantial loss if orders of stay are not issued.

12. The notice of motion dated 4th September 2019 was filed without undue delay as the ruling was delivered on 26th August 2018.

13. The appellant has offered his parcel of land located in Nairobi as security for the due settlement of the decree. Land is a recognized form of security in this country. They have put forward the case of **John Mark Obure vs Fidelity Security Ltd [2006] eKLR**. They pray that the application be allowed.

The Respondent's Submissions

14. They are dated 27th September 2019 and 10th September 2019. The memorandum of appeal dated 4th September 2019 and filed in court on the same date is in reality an appeal against the judgment of the court dated and delivered on 4th April 2019. No leave was sought and obtained to file this appeal out of time. The said appeal was lodged 153 days after entry of judgment, whilst the right of appeal terminated on

3rd May 2019.

15. The appeal and the two applications dated 4th September 2019 are a nullity in law as they offend the express provisions of order 45 rule 6 of the Civil Procedure Rules. He has put forward the case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors [1969] EA 696**. The appellants were represented by other law firms other than the firm of Muma & Kanjama Advocates before and after judgment. It was incumbent upon the said law firm to comply with the law. He has also put forward the case of **Stephen Mwangi Kimote vs Murata Sacco Society [2018] eKLR; S. K. Tarwadi vs Veronica Muehlemann [2019] eKLR**.

16. The appeal herein is against the ruling of the Chief Magistrate delivered on 26th August 2019 which ruling dismissed the application for review dated 10th May 2019. He has put forward the case of **Serephen Nyasani Menge vs Rispah Onsase [2018] eKLR**.

The appellants herein filed two applications for review. It was after the dismissal of the second application that they sought to try their luck in this court. The appeal ought to be struck out summarily.

17. The memorandum of appeal has been filed out of time and without leave of the court. He has relied on Section 79 G of the Civil Procedure Act and the case of **Sound Entertainment Ltd vs Antony Burugu & Co. Advocates [2014] eKLR**. The setting aside the ruling of the subordinate court dated 26th August 2019 is inconsequential and an exercise in futility, unless the court is being asked to set aside the judgment of the court dated 4th April 2019. He has put forward the cases of **Rep vs Public procurement Review Board & Another vs (Interested party Optic Technologies Kenya Ltd) Exparte County Assembly of Busia [2017] eKLR. Abraham Lenauia Lenkeu vs Charles Katekeyo Nkaru [2016] eKLR; Speaker of the National Assmebly vs Karume [2018] eKLR**.

18. An appeal has the same effect of an application for review. The appeal and the two applications dated 4th September 2019 are a nullity in law as they offend the express provisions of order 45 rule 6 of the Civil Procedure Rules. He prays that the appeal and the notice of motion dated 4th September 2019 be struck out with costs.

19. The appellants have no arguable case against the decision of the lower court and are therefore not entitled to a stay of execution of the said decree. That in the likely event that the court is persuaded to grant the stay of execution the adequate security ought to be provided as the total decretal sum stands at Kshs.12,000,000/-. The appellants ought to deposit the said amount.

20. I have considered the preliminary objection, the notice of motion together with the affidavits in support. I have considered the replying affidavit, the written submissions filed on behalf of the parties together with the oral highlights and the authorities cited.

21. The issues for determination are:-

(i) Whether the preliminary objection is merited.

(ii) Whether the appellants have satisfied the conditions for grant of stay of execution pending appeal.

(iii) Who should bear costs?

22. It is the Respondents contention that the firm of Muma Kanjama Advocates are not properly on record. I am guided by the case of **Stanley Mugambi vs Anthony Mugambi [2005] eKLR** when Sitati J stated thus;

“The issue for determination is whether commencing an appeal by an advocate other than the one who conducted the case in the lower court falls within the provisions of order III rule 9A. In my considered view, I do not think so. My reading of the provisions of Rule 9A is to the effect that such change or intention is restricted to a suit that is either going on or one that has been concluded. The rule does not apply to appeals. If the intention of the drafters was to include appeals under this rule it would have been so stated. To my mine, rule 9A envisages a situation where after judgment has been entered, a new advocate desires to come on record for purposes of applying for stay of execution or to proceed with the execution proceedings in that suit. If any other meaning were to be assigned to the rule, the high court and the Court of Appeal on behalf of litigants who were represented by different advocates in the lower court, I would agree with Mr. C Kariuki for the appellants/respondent that the aim of rule 9A was only intended to prevent parties from throwing advocates after judgment with the aim of denying the advocate the fruits of their costs. I therefore find that this application is misplaced and misconceived. It would, in my view, be draconian to strike out the appellant’s appeal on the grounds raised in the application”.

I find that the firm of Muma & Kanjama Advocates are properly on record as they did not require any leave to come on record.

23. The Memorandum of Appeal dated 4th September 2019 is against the ruling and orders of Hon. P. N Gesora at Nairobi CMCC No 1020 of 2018 dated 26th August 2019. The application herein is dated 4th September 2019. I find that it has been brought without undue delay.

24. I also find that the appellants have a right to appeal to this court as of right as envisaged under order 43 rule 1(1) (X) of the Civil Procedure Rules. The appellants right to be heard means this court ought to entertain this appeal. I am aware that at this point the court should not go into the merits of the appeal. For the above reasons I find no merit in the preliminary objection and the same is dismissed.

25. The principles guiding the grant of stay of execution pending appeal are well settled. **Order 42 rule 6 (2)** of the Civil Procedure Rules provides that:-

“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.

26. It is clear that the above provisions that for an order of stay to be granted specific conditions must be met by the application.

27. I have considered the notice of motion herein. I find that it has been brought without unreasonable delay.

28. In the case of **Feisal Amini Jan Mohammed t/a Dunvia Forwarders vs Shami Trading Co. Ltd MSA HC Civil Appeal No. 65 of 2013 [2014] eKLR Kasango J** stated as follows:-

“It is trite law therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss that may result to him unless the order is made, that the application is made without unreasonable delay and that the applicant has offered proper security”.

29. Substantial loss is a matter of fact. I find that the appellants have failed to show what substantial loss they are likely to suffer if those orders are not granted. I am guided by the case of **Machira t/a Machira & Co. Advocates vs East Africa Standard [2000] KLR 63** where it was stated thus:-

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide 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.....”.

30. The 1st appellant has sworn several affidavits but has failed to attach any documents showing that he is the owner of the suit property the subject matter in CMCC No 1020 of 2018. Nothing could have been easier than for him to annex any document as a basis of his claim. It is on record that the attached motor vehicles have already been sold.

31. I find that the appellants have failed to meet the requirements set out under order 42 rule 6 of the Civil Procedure Rules.

32. In conclusion I find no merit in this application and the same is dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 16th day of December 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms. Owano for Mr. Kanjama for the Appellants

No appearance for the Respondent

Kajuju – Court Assistant