



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**E.L.C. APPEAL NO. 12 OF 2020**

**DAVID MAINA WAIGWA.....APPELLANT**

**VERSUS**

**ELISHIBA MWERU WAITHAKA...RESPONDENT**

**RULING**

**A. INTRODUCTION**

1. This ruling is in respect of two applications. The 1<sup>st</sup> is the Appellant's notice of motion dated 27<sup>th</sup> July, 2020 seeking stay of execution of the order of the *Hon. S. N. Mwangi (SRM) in Nyahururu CM's Court ELC No. 22 of 2020* dated 25<sup>th</sup> June, 2020. The 2<sup>nd</sup> application is the Respondent's notice of motion dated 11<sup>th</sup> August, 2020 seeking the striking out of the Appeal and the Appellant's notice of motion dated 27<sup>th</sup> July, 2020.

**B. THE APPELLANT'S APPLICATION**

2. By a notice of motion dated 27<sup>th</sup> July, 2020 expressed to be brought under the provisions of **Sections 1A, 1B, and 3A of the Civil Procedure Act (Cap. 21), Order 42 Rule 6 and Order 50 Rule 1 of the Civil Procedure Rule 2010 (the Rules)** and any other enabling provisions of the law, the Appellant sought the following orders;

a. Spent

b. Spent

c. Spent

d. That pending the hearing and determination of this appeal, the Honorable Court be pleased to grant a stay of execution of the order of the Honorable S. N. Mwangi SRM in Nyahururu CM ELC Case No. 22 of 2020 delivered on the 25<sup>th</sup> day of June, 2020 to the extent that the Applicant is not evicted from his premises situated at Nyahururu Block 6/423 Nyandarua House along Kenyatta Avenue.

e. That the OCS Nyahururu Police Station be ordered to ensure compliance with the orders of court granted.

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

3. The said application was based upon the several grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on 27<sup>th</sup> July, 2020 and the annexures thereto. The Appellant contended that being aggrieved by the ruling and order of the trial court striking out his suit he lodged an appeal which is pending before this court. He further contended that although he has already been evicted from the suit premises, the pending appeal might be rendered nugatory unless a stay of execution is granted.

**C. THE RESPONDENT'S RESPONSE**

4. The Respondent filed a replying affidavit sworn on 11<sup>th</sup> August, 2020 in opposition to the said application. It was contended that the memorandum of appeal dated and filed on 27<sup>th</sup> July, 2020 was filed out of time and without leave of court. It was further contended that the Appellant ought to have filed the application for stay before the trial court in the first instance and not directly before this court.

5. The Respondent further disputed that the Appellant was forcibly evicted from the suit premises and stated that he voluntarily vacated on 27<sup>th</sup> July, 2020 hence he ought not to be reinstated. The Respondent was of the view that there was no legal basis for the instant application.

#### **D. THE APPELLANT'S REJOINDER**

6. The Appellant filed a supplementary affidavit sworn on 28/08/2020 in response to the Respondent's Replying Affidavit. He disputed that the appeal was filed out of time and contended that under **Order 50 of the Rules** Sundays and non-working days are excluded from the computation of time. It was contended that since the last day for filing the appeal fell on a weekend, then the appeal was validly filed on the next working day which was 27<sup>th</sup> July, 2020.

7. The Appellant contended that he vacated the suit premises on the morning of 27<sup>th</sup> July, 2020 after the Respondent showed him a copy of the ruling dated 25<sup>th</sup> June, 2020 and demanded that he vacates. He further stated that he agreed to vacate because he did not want to risk a forcible eviction and possible destruction of his goods.

#### **E. THE RESPONDENT'S APPLICATION**

8. By a notice of motion dated 11<sup>th</sup> August, 2020 expressed to be brought under **Sections 67 (2) and 79B of the Civil Procedure Act; Order 2 rules 15 (1) & (2) and Order 42 rules (1), (2) and (13) sub rule (2) and Order 51 rule 1 of the Rules and all other enabling provisions of the law**, the Respondent sought the following pertinent orders;

- a. That the Honorable Court be pleased to strike out the memorandum of appeal dated 27<sup>th</sup> July, 2020 for having been filed out of time.
- b. That the Honorable Court be pleased to summarily dismiss the appeal for being untenable, devoid of substance and an abuse of the court process.
- c. That the Honorable Court be pleased to strike out the notice of motion dated 27<sup>th</sup> July, 2020 for being prejudicial, embarrassing to BPRT No. 62 of 2020 and for being frivolous, scandalous, vexatious and otherwise an abuse of the court process.

9. The said application was based upon the several grounds set out on the face of the motion and the contents of the supporting affidavit sworn by *Dominic Mbugua Wagathia Advocate* on 11<sup>th</sup> August, 2020. It was contended that the appeal was filed out of time stipulated under **Section 79 G of the Civil Procedure Act (Cap.21)** and without any enlargement of time being sought and granted. It was contended that the matters in dispute before the trial court were also the subject of BPRT Reference No. 62 of 2020 involving the same parties hence the present appeal was merely intended to delay the speedy trial and disposal of the said reference.

#### **F. THE APPELLANT'S RESPONSE**

10. The Appellant filed a replying affidavit sworn on 9<sup>th</sup> September, 2020 in opposition to the said application. The Appellant stated that some of the matters raised in the application were the very ones which were raised before the trial court and which resulted in the striking out of the suit. He further contended that some of the issues raised were on the merits of the pending appeal which should not be prematurely canvassed through an application.

11. The Appellant further stated that the subject matter of the reference before the Tribunal was different from the subject matter in the instant appeal hence his right of appeal should not be fettered. The Appellant disputed that the appeal was filed out of time and maintained that the last date for filing fell on a Saturday hence he was justified in filing it on the next working day. He, therefore, urged the court to dismiss the said application.

#### **G. DIRECTIONS ON SUBMISSIONS**

12. It would appear from the record that it was directed that the said applications shall be canvassed through written submissions. The record further shows that the Appellant's submissions were filed on 13<sup>th</sup> October, 2020 whereas the Respondent's submissions were filed on or about 13<sup>th</sup> November, 2020.

#### **H. THE ISSUES FOR DETERMINATION**

13. The court has considered the Appellant's notice of motion dated 27<sup>th</sup> July, 2020 and the response thereto, the Respondent's notice of motion dated 11<sup>th</sup> August, 2020 and the response thereto, as well as the material on record. The court is of the opinion that the following issues arise for determination:

- a. Whether the Appellant has made out a case for stay of execution pending appeal.
- b. Whether the Appellant's appeal was filed out of time without leave of court.
- c. Whether the Appellant's appeal and notice of motion dated 27<sup>th</sup> July, 2020 should be dismissed summarily for being frivolous, vexatious, scandalous and otherwise an abuse of the court process.

d. Who shall bear costs of the two applications.

## **I. ANALYSIS AND DETERMINATION**

### **a. Whether the Appellant is entitled to an order of stay**

15. The court has considered the material on record and the submissions of the parties on this issue. The court has noted that the impugned order of the trial court dated 25<sup>th</sup> June, 2020 was an order merely upholding the Respondent's preliminary objection and striking out the Appellant's suit before that court. The trial court held, *inter alia*, that the subject matter and the parties to the suit were the same as the parties and the subject matter before the Tribunal. Accordingly, the court found that the suit was otherwise an abuse of the court process since the same issues were already pending before the Tribunal which was competent to handle the matter.

15. The court is of the opinion that since the trial court did not make any positive order capable of execution the Appellant's prayer for stay of execution is misconceived since there is nothing to be stayed. A striking out order or dismissal order is not capable of being stayed in the manner contemplated under **Order 42 Rule 6 of the Rules**.

16. In the case of **Western College of Arts & Applied Sciences V Oranga & Others [1976 – 80] KLR 78** the Court of Appeal held, *inter alia*, that:

“But what is there to be executed under the judgement the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs.

In *Wilson Vs Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgement for this court, in an application of a stay. It is so ordered.”

17. That holding was followed in other subsequent cases such as **Kilindini Warehouses (K) Ltd & Another V Omar Saleh Said & Another [2014] eKLR and Sonalux Limited & Another V Barclays Bank of Kenya Ltd Nairobi Civil Application No. Nairobi 219 of 2007**. The court is thus satisfied that the Appellant is not entitled to any orders of stay under **Order 42 Rule 6** of the **Rules** since there are really no positive orders to be stayed in the decree appealed from.

### **b. Whether the Appellant's appeal was filed out of time**

18. The Respondent contended that the memorandum of appeal was filed 31 days instead of 30 days after the date of the order appeal against. The Respondent further contended that the period for filing an appeal was limited to 30 days under **Section 79G of the Civil Procedure Acts (Cap.21)**. The Appellant's submission was that the last date for filing the appeal was 25<sup>th</sup> July, 2020 which fell on a Saturday when the court registry was closed hence he could validly file the appeal the next working day which was on 27<sup>th</sup> July, 2020. He relied on the provisions of **Order 50 Rules 1, 2 & 3 of the Rules**.

19. It is common ground that the ruling of the trial court was delivered on 25<sup>th</sup> June, 2020. The 30 days for filing an appeal have to be computed in accordance with **Order 50 Rule 8** which excludes the first day and includes the last day. Accordingly, time started running on 26<sup>th</sup> June, 2020 until 25<sup>th</sup> July, 2020. A perusal of the calendar for 2020 reveals that 25<sup>th</sup> July, 2020 fell on a Saturday when the court was not operational hence the Appellant was justified in filing his appeal the next working day which was 27<sup>th</sup> July, 2020.

### **c. Whether the appeal and application dated 27/07/2020 should be dismissed summarily**

20. The Respondent contended that the Appellant's appeal and the application dated 27<sup>th</sup> February, 2020 should be dismissed summarily for being, *inter alia*, frivolous, vexatious, scandalous and otherwise an abuse of the court process. On the appeal, the Respondent was of the opinion that it was very weak on the merits. The Respondent was also of the opinion that it was merely intended to delay the fair trial of the reference before the Tribunal.

21. The court is of the opinion that the Respondent's contentions cannot be adjudicated upon without going into the merits of the pending appeal. The court is further of the opinion that it cannot venture into the merits of the pending appeal before the appeal is admitted and the parties accorded a chance of fully canvassing the merits of the appeal. It would thus be premature and unfair for the court to adjudicate on the merits of the appeal at this interlocutory stage.

22. The question of whether or not the Appellant's notice of motion dated 27<sup>th</sup> July, 2020 should be dismissed for whatever reasons is now moot in view of the court's holding that the striking out order of 25<sup>th</sup> June, 2020 is incapable of being stayed.

### **d. Who shall bear costs of the two applications**

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap.21)**. As such, a successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**.

Since both parties have failed in their respective applications, the court is of the opinion that the appropriate order to make is that each party

shall bear his own costs.

**J. CONCLUSION AND DISPOSAL ORDER**

24. The upshot of the foregoing is that the court finds no merit in both applications. Accordingly, the court makes the followings orders for disposal thereof:

- a. The Appellant's notice of motion dated 27<sup>th</sup> July, 2020 be and is hereby dismissed in its entirety.**
- b. The Respondent's notice motion dated 11<sup>th</sup> August, 2020 be and is hereby dismissed in its entirety.**
- c. Each party shall bear his own costs in both applications.**

It is so ordered.

**RULING DATED and SIGNED** at NYAHURURU this **8<sup>th</sup>** of **December, 2020** and **DELIVERED** via Microsoft teams platform.

**In the presence of:**

No appearance for the Appellant

No appearance for the Respondent

C/Asst: Carol

**Y.M. ANGIMA**

**JUDGE**

**08/12/2020**