



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 377 OF 2013

(As consolidated with ELC no. 394 of 2013)

STEPHEN K.A.SANG.....1ST PLAINTIFF

REV.LUKA KIPKURGAT.....2ND PLAINTIFF

SIMON DAVID KORIR.....3RD PLAINTIFF

VERSUS

CHEBII BOIYO.....1ST DEFENDANT

SAMMY KIPSAT

ALIAS REUBEN KIPSAT.....2ND DEFENDANT

KIBII BOIYO.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 20th May 2020 by the 3rd plaintiff/applicant seeking for the following orders:

- a) Spent
- b) That the plaintiff be granted leave to appeal out of time against the judgment delivered on 23rd April .2020 and the Notice of appeal annexed hereto be deemed as dully filed.
- c) That there be an order for stay of execution of the judgment dated 23rd April 2020 pending hearing and determination of this application inter-parties.
- d) That the court be pleased to grant a stay of execution of the judgment dated 23.4.2020 pending hearing and determination of the appeal against the said judgment by Hon. Lady Justice M. Odeny.
- e) That the costs of this application be provided for.

Counsel agreed to canvass the application vide written submissions which were duly filed. Counsel for the 1st and 2nd plaintiff indicated that they will not be participating in the application.

3RD PLAINTIFF/ APPLICANT'S SUBMISSIONS

The 3rd plaintiff/applicant averred that the reason for the delay is due to the ongoing COVID-19 Global pandemic as the courts were not in session pursuant to the notices issued by the Chief Justice. The 3rd plaintiff Simon David Korir, deponed that he wished to appeal against the judgment and he had requested for typed proceedings to enable him file an appeal.

Counsel submitted that the issues for determination in this case are as to whether or not the criteria for leave to appeal out of time and stay of execution against the judgment dated 23rd April 2020 has been met.

On the first issue on leave to appeal out of time, counsel submitted that the applicant was aware that a notice of appeal to the Court of Appeal was to be filed within 14 days of delivery of judgment as provided under Rule 75 of the Court of Appeal Rules but the delay was occasioned by the COVID 19 pandemic which necessitated the closure of the courts with limited operations.

Mr Tororei submitted on the jurisdiction of the court to extend time and stated that the court should be guided by the provisions of Section 7 of the Appellate Jurisdiction Act which provides as follows:

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.

Counsel also submitted that section 95 of the Civil Procedure Act has not limited the court's jurisdiction to grant an extension of time for filing a notice of appeal out of time. Further that the applicant has the option of either moving to the Court of Appeal or this court to seek leave to appeal out of time and relied on the cases of **Big Road Enterprises v. DHL Global Forwarding(k) ltd [2017] eKLR, Maree Ahmed & anor v. Leli Chaka Nodoro [2017] eKLR** where a similar issue was discussed.

Counsel urged the court further to be guided by the principles laid down by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others: SC Application No. 16 of 2014**, where the Supreme Court had occasion to consider the applicable principles in an application for extension of time; and had the following to say:

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- 5. Whether there will be any prejudice suffered by the respondents if the 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."*

Mr. Tororei therefore submitted that the court has unfettered discretion under section 95 of the Civil Procedure Act as well as section 7 of the Appellate Jurisdiction Act to enlarge time. That it is not disputed that the judgment was delivered on 23rd April 2020 and that the applicant was not aware that there was any electronic notice issued by the court. Further that the applicant filed this application in May after learning on the delivery of the judgment from the other plaintiffs.

On whether the court should grant stay of execution, counsel submitted that the applicant has met the requirements set out under Order 42 rule 6 of the Civil Procedure Rules as he shall suffer substantial loss should the orders not be granted, that he filed the application without undue delay and is ready and willing to offer security as may be ordered by the court.

Mr. Tororei, counsel for the applicant relied on the case of **Selestica Limited v Gold Rock Development Ltd [2015]** where the court held as follows:

"Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose".

On the issue of substantial loss as a requirement for grant of stay of execution, counsel relied on the case of **James Wangalwa & anor v. Agnes Naliaka Cheseto(2012)eKLR** where Gikonyo J held that

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

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. This is what substantial loss would entail,

question that was aptly discussed in the case of *Silverstein Vs Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma Vs. Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

It was the applicant's case that he will suffer substantial loss as he had been restrained from interfering with the suit property as the respondents have threatened to invade the disputed land.

On the issue of unreasonable delay, counsel relied on the case of **Jaber Mohsen Ali & another v Priscillah Boit & another [2014]** where the court held that :

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”

Mr. Tororei urged the court to find that the application was filed without undue delay.

Finally on the issue of security of costs, counsel relied on the case of **Selestica Limited(supra)** where the court held as follows:

“On the third condition of whether sufficient security has been offered for the due performance of decree, in the supporting affidavit, the appellant states that it is ready to furnish security to the court should the court so order. Order 42 Rule 6(2) (b) states in material particulars: “..... such security as the court orders for the due performance....”

In my view, the rule gives the court unfettered discretion to issue any orders as to preserve the subject matter pending the hearing of the appeal. I have no doubt therefore that I have the power to order such security for the due performance of decree or order, and that the appellant did not have to furnish such security upfront before arguing the application for stay pending appeal. In any event, where the court orders for security deposit and there is default, then the orders for stay are rendered useless for a defaulting party.”

In conclusion counsel urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

Counsel for the respondent filed grounds of opposition dated 24th June 2020 stating that there was inordinate delay in filing this application and that the leave to appeal out of time was to be sought at the Court of Appeal and not this court and there has been no good reason tendered by the 3rd plaintiff for failing to file appeal within time.

The Defendant/ Respondents relied on the grounds of opposition together with the 1st defendant's replying affidavit and stated that the application is an abuse of the court process meant to deny the defendants' their fruits of judgment hence should be dismissed with costs.

Counsel submitted that the application violates Rule 4 and 39 of the Court of Appeal Rules. In addition, counsel submitted that there is no intended appeal and thus stay of execution cannot not be granted

Mr Terer Kibii submitted that the applicant has never been in occupation of the suit land thus he cannot suffer any prejudice and he had not demonstrated any substantial loss. Counsel therefore urged the court to dismiss the application as the applicant has not met the threshold for grant of orders prayed.

ANALYSIS AND DETERMINATION

This is an application for leave to file an appeal out of time and an order for stay of execution.

Section 7 of the Appellate Jurisdiction Act provides as follows:

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.

This court has the discretion to either grant or deny leave to file notice of appeal out of time. Section 75(2) of the Court of Appeals Rules provides that a person is to file a notice of appeal within 14 days from the day the decision was made. The applicant agrees that he failed to file a notice of appeal since judgment was delivered electronically in his absence. The applicant has also cited the effects of COVID -19 pandemic which the court takes judicial notice of and the operational difficulties at the beginning of the pandemic.

The court was navigating territories of online and virtual hearings which came with a lot of teething challenges. It should be noted that there were many challenges of reaching unrepresented litigants like the 3rd plaintiff whose email addresses or telephone numbers were unavailable.

It is true notices were given for delivery of rulings and judgments through various channels like Kenya Law, Facebook, and noticeboards but there were litigants who were not able to access such channels.

In the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** the principles were set out thus;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

The judgment in this case was delivered on 23rd April 2020 and the applicant filed this application on 26th May 2020. The 14-day period was to expire on 7th May 2020 which is a one-week delay.

I find that the applicant has explained the reason for not filing the notice of appeal within time. These are extraordinary circumstances which will go into the annals of history on how the year 2020 was impacted by the COVID -19 pandemic. In furtherance of access to justice mandate, the court has the power to exercise discretion under section 3A of the Civil Procedure Act states as:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

On the issue of stay of execution of the judgment pending appeal, the same is guided by the principles as set out in Order 42 rule 6(2) of the Civil Procedure Rules.

In the case of **Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR**, the Court held that:

The foundation of the stay pending appeal is that the party is intending to file or has filed an appeal in the exercise of his constitutional right of appeal. He must, however, show sufficient cause and preponderantly, that, if his appeal succeeds, he will suffer substantial loss unless stay is ordered. Moreover, he must bring his application without unreasonable delay and give security sufficient to cover performance of the decree which may ultimately be payable by him. The Applicant filed the appeal in a supersonic speed but did not act likewise to cover his back by applying for stay of execution pending appeal. Indeed, going by his arguments, a prudent and diligent suitor should have been awakened by the applications by the Respondent to levy execution on his immovable property and apply without delay to have the execution stayed. But the Applicant waited for the Respondent to go through all the motions of execution until a prohibitory order on the immovable property was issued in execution. It should be noted that filing of an appeal alone will never operate as a stay of execution and order 42 Rule 6 of the Civil Procedure Rules is as clear. And therefore, with all due respect, the explanations offered by the Applicant for not applying in a timeous manner do not hold firm or at all. From the conduct of the Applicant in allowing the Respondent to go through time-consuming and costly rigours of the process of applying for execution renders credence to the Respondent’s assertion that the Applicant deliberately allowed too much time to pass-by as a gimmick by the Applicant to obstruct and delay the course of justice in this matter. Surely, the Applicant did not bring this application timeously and is the indolent litigant whose conduct compromises his equity and may not excite any love from a court of equity. Except, I realize that notwithstanding, the fact that his equity is tainted with laches, will need to be coupled with other grounds for the Court to state with absolute sanctification that the Applicant has not shown any sufficient cause for a stay to be ordered. This course ensures that the Applicant is not disentitled of a remedy in limine. That is why the court must go ahead and examine the other grounds under order 42 Rule 6 of the Civil Procedure Rules and take the overall impression of the entire circumstances of the case to see whether any sufficient cause has been shown as to order a stay of execution.

The applicant had moved to court at the earliest opportunity to file this application and has explained his predicament in complying with the timeline.

The applicant is also under a duty to show that he will suffer substantial loss if the order of stay is not granted. The applicant averred that the defendant/respondents are in the process of evicting him from the suit land on which he has been residing. The respondents on the other hand opposed and the application and stated that the plaintiff has not been in occupation of the land and therefore he shall not suffer any substantial loss.

There is no evidence that the applicant is in occupation of the suit land and further he has not established the substantial loss that he will suffer if the order is not granted.

In the case of **Antoine Ndiaye v African Virtual University [2015] eKLR**, the learned judge Gikonyo J. cited the holding in the case of **Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005** where it was held that;

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”.

The principle behind this requirement of establishment of substantial loss is that the appeal ought not to be rendered nugatory if successful.

However, it must also be appreciated that a successful litigant is entitled to the fruits of his judgment. The court must therefore balance the interests of the successful litigant and the aggrieved party as was stated by the Court of Appeal in the case of **Reliance Bank vs Norlake Investments Ltd (2002) 1 EA 227**.

On the third condition of whether sufficient security has been offered for the due performance of decree, the applicant averred that he is ready and willing to furnish security to the court should the court so order.

I have considered the application together with the submission by counsel and find that the application for extension of time has merit and the applicant is granted 14 days to file a notice of appeal out of time.

On the issue of stay of execution, the applicant has partially met the threshold for grant of an order of stay in that no substantial loss has been shown. In the interest of justice, I will order for a stay of execution but with a condition that the applicant deposits Kshs. 200,000/ in a joint interest earning account in the names of the advocates for the 1st defendant and the 3rd plaintiff within 30 days failure to which the order lapses.

DATED and DELIVERED at ELDORET this 3RD DAY OF DECEMBER, 2020

M. A. ODENY

JUDGE