



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 443 OF 2016**

**EDWIN KIPKORIR NGETICH.....PLAINTIFF**

**VERSUS**

**ANNE SIMATEI.....1<sup>ST</sup> DEFENDANT**

**JOSEPH SIMATEI.....2<sup>ND</sup> DEFENDANT**

**ELIZABETH CHEPNGETICH KORAT....3<sup>RD</sup> DEFENDANT**

**RULING**

***(Application for stay pending appeal to the Court of Appeal; application dismissed as the Notice of Appeal is incompetent; Notice of Appeal filed 36 days after judgment while the rules require that the notice be filed within 14 days of judgment; no purpose in granting a stay if there is no proper appeal)***

1. The application before me is that dated 29 May 2019 filed by the 1<sup>st</sup> defendant. It is an application brought pursuant to the provisions of Order 52 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, and 3A of the Civil Procedure Act. The main prayer sought in the application is for an order of stay of execution of the judgment herein pending hearing of an intended appeal to the Court of Appeal.

2. To put matters into context, this suit was commenced through a plaint which was filed on 17 October 2016. The plaintiff averred that he purchased the land parcels Rongai/Rongai Block 4/178 and 179 from the 2<sup>nd</sup> defendant and despite paying the full purchase price, the land was yet to be transferred to him, mainly due to objection by the 1<sup>st</sup> defendant/applicant who is first wife to the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant, is 2<sup>nd</sup> wife to the 2<sup>nd</sup> defendant and she did issue consent for the sale of the suit properties. In the suit, the plaintiff wished to have orders for the lifting of a restriction placed by the applicant, orders of specific performance, and for a permanent injunction against all the defendants. I heard the suit, and on 28 March 2019, I entered judgment for the plaintiff. It is this judgment which the applicant wishes to have stayed pending hearing of her intended appeal to the Court of Appeal.

3. In support of her application, the applicant has averred that she has filed a Notice of Appeal and has feared that if stay is not granted, she will be denied the fruits of any successful judgment on appeal. She has further mentioned that her children may be denied access to the land if the judgment is executed.

4. The plaintiff has opposed the motion through a replying affidavit. His view is that the applicant has not demonstrated any substantial loss if the stay is denied. He also believes that the applicant delayed in presenting this application. He has stated that he has spent a considerable amount of money in purchasing the suit land. He has also urged that the Notice of Appeal was filed out of time.

5. The 2<sup>nd</sup> defendant also filed a replying affidavit to oppose the motion. It is his view that the delay of about two months from the time of judgment to the time that this application was filed is inordinate. He has also pointed out that the Notice of Appeal was filed 36 days from the date of judgment and is therefore incompetent.

6. I have considered the application. At the outset, I do note that the body of the application posits that it has been filed pursuant inter alia to the provisions of Order 52 Rule 6. I take this to be a typographical error for it is Order 42 Rule 6 which deals with applications for stay pending appeal. I will thus deem this application as an application under Order 42 Rule 6 and not Order 52 Rule 6.

7. Before I go too far, there is the issue raised that the Notice of Appeal is incompetent and I think I need first to deal with this, for if there is no competent Notice of Appeal, I do not see how the applicant can succeed in her application for stay pending appeal. In essence, there

would be no need of granting a stay pending appeal, for there cannot be filed an appeal to the Court of Appeal if the Notice of Appeal is incapable of launching an appeal.

8. The respondents have argued that the Notice of Appeal has been filed way out of time and is thus incompetent. I have seen the Notice of Appeal and I do note that it was filed on 3 May 2019. Judgment in this matter was delivered on 28 March 2019. It is thus apparent that the Notice of Appeal was filed 36 days after judgment. This is contrary to Rule 75 (2) of the Court of Appeal Rules which provides that a Notice of Appeal needs to be lodged within 14 days of the decision against which it is desired to appeal. It is clear that the Notice of Appeal is thus incompetent.

9. Mr. Kipkoech, learned counsel for the 2<sup>nd</sup> defendant/respondent, relied on my decision in the case of *Muhu Holdings & 2 Others vs Achina Nangomo & Others (2019) eKLR* to support the view that a Notice of Appeal lodged out of time cannot sustain an appeal, and thus, in such a case, an applicant cannot succeed in an application for stay of execution pending appeal. Ms. Njoroge, learned counsel for the applicant, did not supply me with any contrary authority which would have led me to rethink my decision. Neither is there any application before me seeking orders to extend the time within which to have the Notice of Appeal be deemed as lodged within time.

10. I am therefore of the view that since the Notice of Appeal is incompetent, and cannot found an appeal to the Court of Appeal, the applicant cannot therefore succeed in her application for stay pending appeal, for the simple reason that she has not demonstrated that she has an appeal that is capable of being presented before the Court of Appeal.

11. For the above reasons, this application is hereby dismissed with costs.

12 Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 30<sup>th</sup> day of July 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mrs. Gathecha for the plaintiff/respondent.

Ms. Ogange holding brief for Mr. Kipkoech for 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents.

No appearance on the part of Ms. Nancy Njoroge for the 1<sup>st</sup> defendant/applicant.

Court Assistants- Nelima Janepher /Patrick Kemboi.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**