



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 277 OF 2014

HEMAN JISSI WANGA.....PLAINTIFF/RESPONDENT

VERSUS

JOASH JISII MMBAYA.....DEFENDANT/APPLICANT

RULING

The application is dated 16th May 2019 and is brought under Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders;

1. That judgment delivered on the 23rd of October, 2018 an dated same date and the subject decree herein be stayed pending the filing, hearing and determination of the intended appeal by the defendant/respondent herein against the whole of the judgment of this court.
2. That the honourable court be pleased to direct the Registry to expedite the typing of the proceedings and judgment herein, certification of the same and issuance of copies thereof and decree to the advocates for the defendant/respondent herein.
3. That the costs of this application be provided for.

The applicant submitted that, on 22nd November, 2018 his firm received instructions from the defendant herein to apply for certified copies of proceedings and judgment with a view to preparing an appeal against the judgment of this honourable court. That the defendant instructed him that he had appeared in person before this honourable court and he was aggrieved and dissatisfied with the outcome. That on the 26th November, 2018 he did a Notice of Appointment of Advocates, filed and serve the same (Annexed and marked "AAJ1" is a copy of the Notice). That on the same 26th November, 2018 he did a letter to Deputy Registrar of this court requesting certified copies of proceedings and judgment in this case (Annexed and marked "AAJ2" is a copy of the reminder letter to Deputy Registrar). That on the 3rd of May, 2019 they did a reminder to the Deputy Registrar and urged that the urgency of supplying the proceedings be understood (Annexed and marked "AAJ3" is a copy of the reminder letter to Deputy Registrar). That despite having filed a Notice of Appointment and served the same on the plaintiff's Counsel they have not been served with any application or Notice from the plaintiff's Counsel. That it is only on 6th May, at 4 p.m. that the defendant handed to him the Notice of Motion dated 10th April, 2019 that the import of the judgment that the defendant wants to appeal against dawned on his firm and the defendant. That the defendant informed him, that he was given a copy of the judgment in court when the judgment was read but that while sharing the contents of the same with family members the judgment got misplaced or lost. That not having represented the defendant before this court and not having copies of proceedings and judgment he would not be able to prepare the appeal on behalf of the defendant without the copies he had requested for. That from the instruction he has received from the defendant, his intended appeal has high chances of success. That the intended appeal would be rendered nugatory if the application of the plaintiff dated 16th April, 2019 is granted and execution allowed to proceed. That it is in the interest of justice that a stay of execution and further proceedings in this case be granted the defendant/applicant until the intended appeal is filed, heard and determined.

The respondent submitted that, the application is bad in law, incurably defective and offends the Civil Procedure Rules, 2010. There is no basis for stay of the decree herein as there is no appeal preferred by the defendant against the judgment of this court. The application amounts gross abuse of the process of the honourable court and out to be struck out.

This court has carefully considered the application and the submissions herein. The principles for granting stay of execution are provided for under **Order 42 rule 6 (1)** of the **Civil Procedure Rules** as follows:

"No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider

such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (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.”

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)**, thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable *one, that is, that it is not a frivolous appeal,*
2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in **Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others eKLR** where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of **Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR**, the court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by this court’s decision in **Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4** as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

This application is based on the annexed affidavit of Amena Amendi and on the grounds that defendant/applicant is dissatisfied and aggrieved by the judgment of this honourable court on the 23rd day of October, 2018. That through his lawyers on record, the defendant applied for proceedings on the 29th day of November, 2018 and through the same lawyers, did a reminder to court on the 7th day of May, 2019. That to date the defendant/applicant and his lawyers have neither received a response from the court to the 2 letters nor the requested for certified copies of proceedings and judgment. That it is important that a stay be granted so that the intended appeal is not rendered nugatory. That granting of this application will not unduly prejudice the plaintiff/respondent. The appeal is yet to be filed in this matter. This court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD JULY 2019.

N.A. MATHEKA

JUDGE