



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. PETITION NO. 36 OF 2017

TOM RADING KUYOH.....PETITIONER

VERSUS

JOSHUA NYIERA

CHAIRMAN OF FERA ASSOCIATION.....RESPONDENT

NAIROBI CITY COUNTY.....INTERESTED PARTY

RULING

1. On 18/9/2018, this court rendered a judgment in this suit, in which it dismissed the petitioner's petition and allowed the respondent's cross-petition. On 4/10/2018, the petitioner brought a notice of motion dated 4/10/2018 under Order 42 rule 6(2) of the Civil Procedure Rules seeking a stay of execution of the said judgment. The application was supported by the petitioner's affidavit sworn on 4/10/2018. He contended that he had filed an appeal against the said judgment and if stay was not granted, the impugned structures on the suit property would be demolished and the appeal would be rendered nugatory. He further contended that he had a good and arguable appeal.
2. The respondent opposed the application through grounds of opposition dated 11/1/2019. He contended that the application was a last resort to frustrate Fedha Estate Residents and Members of Fedha Estate Residents Association. Secondly, he contended that the applicant had not satisfied the requirements of Order 42 rule 6(2) of the Civil Procedure Rules. He added that the applicant had not demonstrated that he would not be indemnified through damages if the appeal succeeded. It was further contended that the applicant had not demonstrated that he had a good and arguable appeal. Lastly, it was contended that the application was an abuse of the court process and lacked merit. The respondent urged the court to dismiss the application.
3. The application was canvassed by way of written submissions. The applicant filed his submissions on 8/4/2019. It was his submission that stay of execution is granted at the court's discretion and is governed by Order 42 rule 6 of the Civil Procedure Rules 2010. He submitted that the conditions to be met before stay is granted are provided by Order 42 rule 6(2). He argued that in the absence of any overwhelming hindrance, the court is obligated to grant a stay order so that an appeal is not rendered nugatory. Reliance was placed on the case of **Butt v Rent Restriction Tribunal (1979) eKLR** where it was held that in considering a plea for stay of execution, the court ought to exercise its best discretion in a way that endures that the appeal, if successful, is not rendered nugatory.
4. It was further submitted that the appeal had high chances of success and if a stay of execution was not granted, his structures will be demolished and the appeal will be rendered nugatory. He added that demolishing the structures will occasion him substantial and irreversible loss which cannot be remedied or recovered. The applicant added that the application was filed without undue delay and that he was ready to deposit security as the court may order in a joint interest earning account. It was further submitted that the purpose of stay of execution pending appeal is to preserve the subject matter. Lastly, it was submitted that this court had jurisdiction to stay execution notwithstanding that a similar application was dismissed by the Court of Appeal.
5. The respondent filed submissions on 14/5/2019. It was his submission that the application was an abuse of the court process because the appellant filed a similar application in the Court of Appeal and the Court of Appeal dismissed the application for want of prosecution. It was also submitted that the notice of appeal in this court was served outside the required period. Reliance was placed on **Macharia t/a Macharia & Co. Advocates v East African Standard, Civil Case No. 612 of 1996** where Kuloba J stated that the courts should be firm, do justice and prevent abuse of the court process.
6. It was the respondent's submission that the applicant had not met the requirements for stay under Order 42 rule 6(2) of the Civil Procedure Rules. It was argued that substantial loss must be proved for a stay to be granted. Reliance was placed on **Macharia t/a Macharia & Co. Advocates v East African Standard (No. 2 of 2002) KLR 63** and **Marie Stopes Kenya & 2 Others v Georgina Sheriff, Civil Appeal No.172 of 2015**. The respondent argued that the applicant's construction can be quantified and damages be awarded to compensate him.
7. I have considered the application, the grounds of opposition, and the parties' rival submissions. I have also considered the relevant legal

framework and jurisprudence. Two key issues fall for determination in this application. The first issue is whether the application under consideration is an abuse of the process of the court. The second issue is whether the application meets the criteria for grant of stay order under Order 42 rule 6(2) of the Civil Procedure Rules. I will make brief pronouncements on the two issues sequentially in that order.

8. What emerges from the materials presented to this court is that the appellant filed a notice of appeal on 25/9/2018. He subsequently filed this application on 4/10/2018. The application was considered on the same day and the applicant was ordered to serve it and come for interpartes hearing on 22/1/2019. He subsequently prepared a similar application dated 16/11/2018 and presented it to the Court of Appeal. The Court of Appeal set down the application for interpartes hearing on 8/1/2019 before M Warsame , D K Musinga and J O Odek, JJA. The Court of Appeal convened to dispose the applicant's application on 8/1/2019 but the applicant did not turn up to prosecute the application. Consequently, the Court of Appeal made a determination dismissing the application under Rule 56 of the Court of Appeal Rules. Against the above background, the applicant has canvassed the present application and wants the court to grant him the orders which the Court of Appeal declined to grant him.

9. The position of the respondent is that the Court of Appeal having been seized of a similar application and having dismissed the same on account of non-attendance and want of prosecution, the applicant is abusing the process of the court by canvassing a similar application before a lower court. The applicant contends that this court has jurisdiction to grant stay order notwithstanding the dismissal order by the Court of Appeal.

10. The Civil Procedure Rules permit a litigant to canvass an application for stay in the trial court. Where the litigant fails to obtain stay, the Rules permit the applicant to make a similar application in the appellate court. The Rules do not, however, countenance a scenario where an applicant presents an application to the appellate court seeking stay orders, loses the application, and retreats back to the lower court to canvass a similar application. That, in my view, would be an abuse of the process of the court and should not be allowed. If I were to assume jurisdiction and grant the stay I shall in essence have sat to indirectly review the dismissal order made by the Court of Appeal. I have no jurisdiction to review orders of the Court of Appeal.

11. In my view, the applicant having elected to seek a stay order in the Court of Appeal and his application having been dismissed for non-attendance and want of prosecution under Rule 56 of the Court of Appeal Rules, the recourse available to him is an application for restoration of the application for hearing under Rule 56 (3) of the Court of Appeal Rules. To ignore that forum and retreat to this court to canvass a similar application is an abuse of the process of the Court and that conduct cannot be countenanced by this court.. Consequently, my finding on the first issue is that the present application is an abuse of the process of the court and is untenable.

12. Even if I were wrong on my finding on the first issue, my finding on the issue as to whether the applicant has satisfied the requirements of Order 42 rule 6(2) of the Civil Procedure Rules would be in the negative. I say so because the applicant has not demonstrated that he served a notice of appeal within the prescribed time. The respondent contended that the applicant had not served the notice. This contention was not controverted.

13. Secondly, a party seeking stay under Order 42 rule 6(2) of the Civil Procedure Rules is required to satisfy the court that he stands to suffer substantial loss if the stay order is not granted. In the present application , the applicant has not exhibited any evidence of likely irreparable substantial loss which may result from his compliance with the framework in the Physical Planning Act and the Special Conditions in the instrument of title. In my view, deference to the requirements of the Physical Planning Act and the Special Conditions in the title serve a public interest and outweigh all other considerations. My finding on the second issue therefore is that the applicant has not satisfied the requirements of Order 42 6(2) of the Civil Procedure Rules.

14. In light of the above findings, the petitioner's notice of motion dated 4/10/2018 is dismissed for being an abuse of the process of the court and for lack of merit.

DATED, SIGNED AND READ AT NAIROBI ON THIS 17TH DAY OF JULY 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Pala holding brief for Mr Ojienda for the Petitioner

Mr Pala holding brief for Mr Wamae for the Respondent

Court Clerk - June Nafula