



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

MISC APPLICATION NO. 25 OF 2019

MOHAMED GALLO GALGALO.....APPLICANT

VERSUS

ABDULLAHI OMAR SHEIKH.....RESPONDENT

RULING

What is before Court for determination is the Applicant's application dated the 27th March, 2019 brought pursuant to section 78G, 1A, 1B and 3A of the Civil Procedure Act as well as Order 51 (1) & Order 42 (1) of the Civil Procedure Rules. The Applicant seeks the following orders:

1. Spent
2. This Honourable Court be pleased to grant the Applicant leave to lodge an Appeal against the Judgment and Decree issued in Kajiado CMCC No. 375 of 2007.
3. This Honourable Court be pleased to order a stay of execution of the Judgment in Kajiado CMCC No. 375 of 2007 delivered on 13th December, 2018.
4. The Costs of this Application be provided for.

The application is premised on the summarized grounds that Judgment in Kajiado CMCC No. 375 of 2007 was delivered on 13th December, 2018. The Applicant desires to appeal against the same and claims he has an arguable appeal as demonstrated in the draft Memorandum of Appeal. The delay in filing the appeal is not unreasonable or undue and the same is not explicable. The Application has been brought without undue or unreasonable delay.

The application is supported by the affidavit of the Applicant MOHAMED GOLLOW GALGALO wherein he reiterates his claim above and contends that the intended Appeal has overwhelming chances of success. He explains that the delay in filing the Appeal is not unreasonable or undue as it was occasioned by his long periods of work related travels. Further, that the 30 days right of Appeal lapsed and he seeks leave to lodge his Draft Memorandum of Appeal. He is ready to abide by any terms and conditions given by the Court. Further, that no prejudice will be suffered if the Orders sought are granted.

The application is opposed by the Respondent ABDULLAHI OMAR SHEIKH where he deposes that the appeal is out of time and the delay is quite inordinate hence the same should not be entertained. He insists the Appeal should have been filed immediately after the judgement. He contends that the draft appeal does not raise triable issues. Further, reasons advanced in the delay in filing the Appeal does not hold water. He claims the Applicant is a busy body out to frustrate him for no apparent reason given that the Ol Kejuado County Council is willing to give him an alternative parcel of land which he is adamant to accept as clearly contained in the Surveyor's report which was filed in court. He reiterates that the Applicant has not demonstrated a prima facie case to warrant the issuance of orders sought.

Parties filed their submissions which I have considered.

Analysis and Determination

Upon consideration of the instant Notice of Motion application dated 27th March, 2019 including the parties' affidavit and submissions, the following are the issues for determination;

- Whether the Applicant should be granted leave to lodge an Appeal against the Judgment and Decree issued in Kajiado CMCC No. 375 of 2007.
- Whether an order of stay of execution of the Judgment in Kajiado CMCC No. 375 of 2007 delivered on 13th December, 2018 should issue.

As to whether the Applicant should be granted leave to lodge an Appeal against the Judgment and Decree issued in Kajiado CMCC No. 375 of 2007.

I note the Judgement herein was delivered on 13th December, 2018 while the Applicant has filed the instant application on 27th March, 2019. He has explained that the delay in lodging the Appeal within the requisite 30 days was due to his long work related travels. I note on the date of delivery of judgment the Applicant was represented by a lawyer. The Applicant has sought for leave to lodge an Appeal out of time and has annexed a draft Memorandum of Appeal. The Applicant in his submission relied on Order 50 Rule 4 of the Civil Procedure Rules in relation to computation of time. He further relied on the case of **Gachau Patrick V Lucy Wangari Maina (Suing in her capacity as the administrator of the Estate of the late Elijah Ngugi Maina(deceased) (2019) eKLR** and **Samuel Mwaura Muthumbi V Josephine Wanjiru Ngugi & Another (2018) eKLR** to buttress his arguments on the arguability of the Appeal. The Respondent opposed the averments and insists the delay is inordinate and relied on the case of **Leo Sila Mutiso V Rose Hellen Wangari Mwangi (Civil Appeal No. Nai 255 of 1997)** to support his arguments. I note the issue of granting leave to lodge an appeal out of time is discretionary. In the **Civil Application No. 232 of 2017: In Aberdare Steel & Hardware Ltd Vs Shreeji Enterprises Ltd citing with approval the decision in Nicholas Kiptoo Arap Korir Salat V IEBC & 7 others SC Appl 16/2011** Justice Musinga held that extension of time is an equitable remedy that is available to a deserving party and reason for delay must be explained. The Applicant has explained that he has to travel for long on work related issues and that was the reason of delay in lodging his Appeal. I have perused the draft Memorandum of Appeal and note it raises triable issues. As a Court I want to give the Applicant the benefit of doubt and in associating myself with the cited decision. I will proceed to grant him leave of 21 days from the date hereof to lodge an Appeal against the Judgment and Decree issued in Kajiado CMCC No. 375 of 2007.

As to whether an order of stay of execution of the Judgment in Kajiado CMCC No. 375 of 2007 delivered on 13th December, 2018 should issue. The applicant has sought for stay pending appeal. The Respondent opposed the application and submitted that the applicant has to demonstrate substantial loss he stands to suffer and application has to be made with unreasonable delay. Further security has to be granted. He relied on the cases of **Machira t/a Machira & Co Advocates Vs East African Standard (No. 2) (2002)KLR 63; Daniel Chebutul Rotich & 2 Others V Emirates Airlines Civil Case no . 368 of 2001; Civil Appeal No. 186 of 2007 Standard Assurance CO. Ltd V Alfred Mumea Komu; Pamela Akinyi Odhiambo V Barclays Bank Kenya Ltd (2011) eKLR and Kenya Shell Limited V Kibiru (1986) KLR 410** to buttress his opposition to the stay.

I note the Respondent has averred that the applicant had been offered an alternative parcel of land by Ol Kejuado County Council which he declined. Further, that the Applicant had already been granted a 45 days stay pending appeal. The Applicant has not explained the substantial loss he will suffer if the orders of stay is not granted. Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules provides that: **' (1) No appeal or 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 application being made, to consider such application and to make such order thereon as may to it seem just, and 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 such order set aside. (2) No order for stay of execution shall be made under subrule (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.'**

In the case of **Fredrick Kibwana Elabonga V Build Africa Kenya (2017) eKLR** the Court while declining to grant a stay of execution held that substantial loss has to be demonstrated. Further, in the case of **Reliance Bank Limited (in liquidation) V Norlake Investments Ltd (Civil Appeal No. Nairobi 93/2002** the Court of Appeal stated that a party has to demonstrate that if a stay is not granted an Appeal would be rendered nugatory.

In the current case the Respondent has been in occupation of the suit land and the Applicant has not established the substantial loss he will suffer if the stay is not granted nor whether the Appeal would be rendered nugatory. In associating myself with the two decisions I have cited and relying on the legal provisions quoted, I decline to grant the order of stay of execution pending appeal.

It is against the foregoing that I proceed to make the following orders:

- i. The Applicant is granted leave of 21 days from the date hereof to lodge an Appeal against the Judgment and Decree issued in Kajiado CMCC No. 375 of 2007.
- ii. The Application for stay of execution is unmerited and is disallowed.
- iii. Costs will be in the cause

Dated, Signed and Delivered in Kajiado this 26th November, 2019

CHRISTINE OCHIENG

JUDGE