



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC. APPLICATION NO. 10 OF 2019

LABAN MAINA KAMAU.....APPLICANT

VERSUS

KAMAU GITHINJI KAGECHU.....RESPONDENT

RULING

The applicant, Laban Maina Kamau filed the Notice of Motion dated 18th July 2019 seeking the following orders:

1. Spent.

2. That leave be granted to the firm of Wanjiru Waweru & Co. Advocates to act for the Applicant herein in place of the firm of G.O. Ombachi & Co. Advocates.

3. That this Honourable Court be pleased to grant a stay of execution of the decree issued on 8th April 2019 in Wanguru PMCC No. 121 of 2018 pending hearing and determination of this application.

4. That this Honourable Court be pleased to grant a stay of execution of the decree issued on 8th April 2019 in Wanguru PMCC No. 121 of 2018 pending the hearing and determination of the intended appeal.

5. That this Honourable Court be pleased to grant leave to appeal against the decree issued on 8th April 2019 in Wanguru PMCC No. 121 of 2018 out of time.

6. That costs of this application be provided for.

The application is supported by seven grounds apparent on the face of the said application and an affidavit sworn by the applicant on 18th July 2019.

The respondent filed a replying affidavit in opposition to the said application sworn on 21st August 2019. When the matter came up for hearing, the parties agreed to canvass the same by way of written submissions.

APPLICANT'S CASE

The applicant contends that after the judgment was delivered on 8th April 2019, his former counsel did not notify him as he was bed ridden due to a road traffic accident. When he later learned of the impugned judgment and decree, he was dissatisfied with the same. Particularly the order condemning him to pay costs to the respondent who is his blood relative. He then called his previous counsel Mr. Ombachi and instructed him to lodge an Appeal on his behalf within 30 days but to-date, he has not done so. He stated that the mistake by counsel to file Appeal in time should not be visited on him since he has a right to be heard. He said that the Bill of costs in Wanguru Court is due for taxation on 22nd July 2019 and that should the bill be taxed, his intended appeal will be rendered nugatory.

RESPONDENT'S CASE

The respondent on his part argued that the applicant has not met the threshold for the grant of the orders sought and that the application is incompetent, vexatious, frivolous and lacks merit. He stated that the allegations by the applicant that he was not aware of the judgment date is untrue as he was all along attending Court for this case accompanied by his previous advocate and in particular on 8th April 2019 when the impugned judgment was delivered. He stated that the allegation by the applicant that he was not notified by his previous advocate of the judgment date is just a mere scapegoat as the same is not supported by any evidence. In conclusion, the respondent stated that after he succeeded in his suit before the Lower Court, the law requires that costs shall follow the events and that the trial Court was right in awarding

him costs.

LEGAL ANALYSIS

I have considered the factual and legal arguments both in support and the opposition to this application. I have also considered the relevant law. The substantive orders in this application is for stay pending appeal under **Order 42 Rule 6 (2) CPR**. That is an order for stay pending appeal. The Court of Appeal in a myriad of decisions has pronounced itself on the principles required by an applicant who seeks the protection of the law for those orders. First, an applicant must demonstrate that he will suffer substantial loss unless the orders of stay are granted. Secondly, the applicant must demonstrate that the application has been brought without undue delay and finally he should give such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him. From my analysis of the evidence adduced by the applicant, there is no evidence showing that the applicant will suffer substantial loss unless the orders are granted. In the case of *Kenya Shell Ltd Vs Kiburu & another Civil Appeal No. 97 of 1986 Nairobi (unreported)*, the Court observed as follows:

“The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the respondents would not be unable to pay the money”.

In the instant case, the applicant has not demonstrated to the satisfaction of the Court that the respondent would not be in a position to repay the amount awarded in costs if the intended appeal succeeds. It was sufficient for the applicant to show the respondent’s inability to pay the decretal amount to justify the grant of the stay orders pending appeal. As regards the second condition, the impugned decision was read and delivered on 8th April 2019. The treatment sheet attached to the supporting affidavit and marked **LMK 1** shows that the applicant was treated at Gathigiriri Health Centre on 11th May 2019 more than one month after the said judgment was delivered. There is no evidence that the he was admitted or prevented from taking steps to contact his hitherto advocate with instructions to lodge appeal in the matter. It appears that he went to slumber until he was served with the notice of taxation and filed the present application. A period of three months without a plausible explanation is inexcusable. The sum total of my analysis is that the application dated 18th July 2019 has not met the threshold for the grant of the orders sought.

Having said that, I note that one of the prayers being sought by the applicant is for leave to appeal out of time and for the firm of Wanjiru Waweru & Co. Advocates to act for the applicant in place of the firm of G.O. Ombachi & Co. Advocates. Having found that the applicant has not shown to the satisfaction of the Court that he is entitled to the orders of stay, I nevertheless grant the other two orders for leave as follows:

- (1) The firm of Wanjiru Waweru & Co. Advocates are granted leave to act for the applicant in place of G.O. Ombachi & Co. Advocates.**
- (2) The applicant is granted 14 days leave to file and serve a Memorandum of Appeal against the judgment and decree issued by the Principal Magistrate Wanguru on 8th April 2019.**
- (3) The costs of this application shall be costs in the cause.**

READ, DELIVERED and SIGNED in open Court at Kerugoya this 15th day of November, 2019.

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E.C. CHERONO

ELC JUDGE

15TH NOVEMBER, 2019

In the presence of:

- 1. Defendant present
- 2. M/S Nzellele holding brief for Waweru for Applicant
- 3. Mr. Asimwe holding brief for Ann Thungu for Respondent
- 4. Mr. Mbogo – Court Assistant – present