



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**MISCELLANEOUS APPLICATION NO. 11 OF 2019**

NANCY MUTHONI MACERE (Suing as the Legal Representative of the Estate of  
PETER MACHERE KAMUNDO (Deceased)..... PLAINTIFF

VERSUS

KIRINYAGA COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT

REGINA MUTHONI MWANGI.....2<sup>ND</sup> DEFENDANT

AND

MICHAEL MUTHII MWANGI.....INTERESTED PARTY

**RULING**

The application before me is the Notice of Motion dated 14<sup>th</sup> August 2019 brought under *Section 1A, 1B & 3A and 63 (e) CPA, Order 12 Rule 7 and Order 51, Rule 1 CPR, Article 159 (2) (d) & (e) of the Constitution*. The applicant sought the following orders:

**1. Spent.**

**2. That this Honourable Court be pleased to discharge, vary or set aside the orders of dismissal of the application dated 30<sup>th</sup> July 2019 pending the hearing and determination of the present application inter-parties.**

**3. that this Honourable Court be pleased to order that the temporary orders of stay of execution issued on 31<sup>st</sup> July 2019 be operative and be extended pending the hearing and determination of the present application inter-parties.**

**4. that the Honourable Court be pleased to reinstate the applicant's application dated 30<sup>th</sup> July 2019 which was dismissed on 14<sup>th</sup> August 2019 for non-attendance and be settled for hearing inter-parties.**

**5. That the costs of this application be provided for.**

That application is supported by 11 grounds shown on the face thereof and the applicant's affidavit sworn the same date. That application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Michael Muthii Mwangi who is an interested party who filed replying affidavit.

**APPLICANT'S CASE**

The applicant stated that he filed an application dated 30<sup>th</sup> July 2019 and since the Resident Judge in Kerugoya was not sitting, the file was forwarded to the ELC Court in Muranga for directions. On various occasions, they sent their representatives to Muranga to check whether directions had been issued. In the process of going back and forth, the file was brought back to Kerugoya without being notified. On 13<sup>th</sup> August 2019, they sent their representative to Muranga to confirm the status of the application, only to be informed that the file had been forwarded to Kerugoya the same day. he sent their representative to Kerugoya to check the position on 14<sup>th</sup> August 2019 and found out that unfortunately the application was slated for hearing the same day and orders of dismissal had already been issued. He stated that failure to attend Court on the said 14<sup>th</sup> August 2019 was inadvertent and that the mistake of counsel ought not be visited on an innocent litigant. He stated that unless the orders sought are granted, the applicant will suffer loss and damages as the 2<sup>nd</sup> respondent has already commenced execution of the judgment in CMCC No. 323 of 2012. He contends that no prejudice would be occasioned to the respondent if the orders herein are set aside.

## 1<sup>ST</sup> RESPONDENT'S CASE

The 1<sup>st</sup> respondent through the County Attorney one Caroline Kinyua filed a replying affidavit stating that since judgment was delivered on 20<sup>th</sup> December 2018, no action was taken either to review or set aside/or appeal the said judgment. She stated that the delay has not been explained as the applicant sat on his haules. She stated that the explanation by the applicant for the delay in lodging appeal is a blatant lie as she fully participated in the proceedings before the lower Court and cannot now turn around and state that she was not aware of her rights to lodge appeal. She sought to have the application dismissed with costs.

## 2<sup>ND</sup> RESPONDENT'S CASE

The 2<sup>nd</sup> respondent also filed a replying affidavit in which she contends that when the judgment before the lower Court was being delivered on 20<sup>th</sup> December 2018, neither the applicant nor his advocate were present in Court. She further stated that upon expiry of the appeal period, she instructed her advocates to file their bill of costs. She believes that this application is an afterthought intended to delay the execution of the decree herein. She wants the application dismissed with costs.

## INTERESTED PARTY'S CASE

Michael Muthii Mwangi who is named as interested party also filed a replying affidavit opposing this application. According to him, the application by the applicant is an afterthought intended to delay the execution of the decree herein. He wants the application dismissed with costs.

## LEGAL ANALYSIS

I have considered the affidavit evidence and the legal arguments both in support and in opposition to this application. It is now settled that an applicant who seeks to stay execution pending appeal before this Honourable Court under **Order 42 Rule 6** must satisfy itself whether it is in the interest of justice to order a stay of proceedings and if it is, in what terms to be granted. At the back of her mind, the Court must always bear in mind such factors as the need for expeditious disposal of cases and whether the application has been brought without undue delay. I have noted that the impugned judgment of the lower Court was issued on 20<sup>th</sup> December 2018. There was no action taken by the applicant until she was served with notice of taxation in execution of the decree herein. It was then that the applicant drew the draft Memorandum of Appeal attached to the supporting affidavit. The draft Memorandum of Appeal was not drawn and filed within the stipulated period. I agree that the intended appeal is an afterthought. **Order 42 Rule 6 (2) CPR** provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:

- 1. Substantial loss may result to the applicant unless the order was made.**
- 2. The application was made without unreasonable delay; and**
- 3. 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.**

From my reading of the affidavit evidence in support of this application, the applicant stated that the respondent has commenced execution of the decree before the lower Court and that unless a stay is granted, she will suffer irreparable loss.

First, the impugned judgment of the lower Court was delivered on 20<sup>th</sup> December 2018. The applicant took more than seven months to bring this application. A period of more than seven (7) months in my view is unreasonable delay. The other issue is whether substantial loss may result to the applicant if the order was not granted. The decree of the lower Court is execution of costs after the applicant's suit was dismissed which was assessed at Ksh. 56,726/=. The execution of a decree issued by a Court of competent jurisdiction in a legal process and the applicant cannot be heard to say that such execution will cause him substantial loss unless he can demonstrate that the respondent is a man of straw who may not repay back such amount should the appeal ultimately succeed.

In the case of *Ujagar Singh Vs Runda Coffee Estates Limited (1966) E.A 263*, the Court observed as follows:

**“..... it is not normal for a Court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful .....”**

The applicant has not demonstrated any substantial loss he stands to suffer if the orders sought is not granted. On the third ground the applicant has stated that he is willing to give any security for the due performance of the decree herein which this Honourable Court may demand. Whereas the applicant has expressed her willingness to offer any security that this Honourable Court may require for the due performance of the decree which is the subject of this Appeal, she has not satisfied the Court the other two grounds under **Order 42 Rule 6 (2) CPR**. Whereas the orders sought is a matter of judicial discretion, the exercise of such discretion must be exercised bearing in mind that the sole purpose is whether it will be in the interest of justice to grant the orders. In balancing the two sides, the Court must consider the pros and cons of granting or not granting the order. Faced with such a question, **Justice Ringera** (as he then was) in the case of *Global Towns & Travels Limited Nairobi HC Winding up Cause No. 43 of 2000* held as follows:

**“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially**

*weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended Appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously".* (Emphasis mine).

The application by the applicant to reinstate the Notice of Motion dated 30<sup>th</sup> July 2019 which was dismissed on 14<sup>th</sup> August 2019 shall be looked in conjunction with the overall conduct in the intended Appeal. The impugned judgment and decision by the lower Court was delivered on 20<sup>th</sup> December 2018. The applicant took no steps to appeal against the said decision until she was served with a notice of taxation. It was only after she was served with the said notice of taxation that she moved to this Court. Since it was during the High Court Vacation, the duty Judge was based in ELC Muranga where the file was forwarded for directions. The duty Judge granted a temporary stay of execution to last for 14 days until 14<sup>th</sup> August 2019. When the matter was called out on 14<sup>th</sup> August 2019, there was no response and the application was dismissed for non-attendance. The application was filed under certificate of urgency and the applicant could not have gone to slumber without checking the fate of her application. I find that no plausible explanation has been given why the applicant who is represented by a competent advocate could not follow up her case from 30<sup>th</sup> July 2019 until 14<sup>th</sup> August 2019. I find the application partially successful.

In the final analysis, I make the following orders:

- 1. The orders of dismissal of the applicant's Notice of Motion dated 30<sup>th</sup> July 2019 is hereby set aside and/or varied.**
- 2. The costs of this application shall be borne by the applicant in any event.**
- 3. The interim orders granted on 30<sup>th</sup> July 2019 are not reinstated.**

READ, DELIVERED and SIGNED in open Court at Kerugoya this 8<sup>th</sup> day of November, 2019.

.....

**E.C. CHERONO**

**ELC JUDGE**

**8<sup>TH</sup> NOVEMBER, 2019**

In the presence of:

1. Mr. Asimwe holding brief for Mr. Mungai for Plaintiff/Applicant
2. 1<sup>st</sup> Defendant/Advocate – absent
3. 2<sup>nd</sup> Defendant – absent
4. Interested party – present