



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELCA NO. 29 OF 2019

TIMOTHY NKONGE.....1ST APPELLANT/APPLICANT

MOSES KAIMENYI.....2ND APPELLANT/APPLICANT

LAWRENCE KOOME.....3RD APPELLANT/APPLICANT

ROSE NCUGUNE.....4TH APPELLANT/APPLICANT

-VERSUS-

JOHN MUGAMBI.....RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 23rd October 2019 brought under Sections 79G of the Civil Procedure Act, Order 50 Rule 6 and Order 42 Rule 6 of the Civil Procedure Rules, as well as all other enabling provisions of the law where the Applicant seeks for orders of stay of execution in Nanyuki Chief Magistrate's Court in Civil Suit No. 75 of 2013 delivered on the 9th July 2019, pending the hearing and determination of their intended Appeal.

2. The Applicant also seeks leave to appeal and to extend the time to appeal out of time against the entire judgement in Nanyuki Civil Suit No. 75 of 2013 delivered on the 9th July 2019.

3. The said application is supported by the grounds set on its face as well as on the supporting affidavit of Moses Kaimenyi the 2nd Applicant/Appellant herein.

4. The application was heard orally wherein counsel for the Applicant submitted to the effect that the Respondent had commenced execution proceedings seeking to evict the Applicants from the subject suit. That the Applicants would suffer loss if the Respondent is allowed to execute the application which was coming up for hearing on 12th November, 2019.

5. That they sought for leave of an extension of time to appeal against the entire judgment and that their Appeal had high chances of success therefore no prejudice would be occasioned to the Respondent if their application is allowed.

6. That Judgment was entered in favour of the Respondent on 9th July, 2019 wherein the Applicants applied for proceedings on 12th July, 2019 which proceedings they were yet to be issued and therefore the delay was not intentional. That the Applicants had been on the suit land for generations spurning 38 years wherein they had developed the land and therefore would suffer irreparably if evicted from the land.

7. That Counsel had been instructed on the 20th October, 2019 wherein they had made the application at the soonest time possible. They submitted that they were willing to furnish security.

8. The Application was opposed by the Respondent's counsel who submitted that the Applicant's Counsel on record had been instructed much earlier as they filed documents at the Nanyuki court on 3rd October, 2019. That the Respondents had been served on 25th October, 2019. While relying on their replying affidavit, Counsel submitted that there had been no appeal was filed after judgment was passed on 9th July, 2019, that the Applicants were coming too late in the day.

9. That the notice of motion was omnibus in nature in that the Applicant had combined two applications in the same application which orders could not be obtained. That the provisions of **Order 42 Rule 6** of the Civil Procedure Rules provide that the Applicants ought to have made their application in the lower court for stay of execution. That the application was therefore wrong before court.

10. That the draft of Memorandum of Appeal did not raise any grounds of appeal or arguable case. That the receipt marked as MK-1 did not relate to the proceedings as it was just a deposit by someone who was not a party to the proceedings. Further, that there was no evidence that the proceedings had been applied for since there was no letter requesting for the same annexed. That seeking to file the appeal out of time was intended to delay the Respondent his fruit of the judgment.

11. That the application is an afterthought. That the Applicants had always changed advocates to defeat justice and further they had not provided any security. That the application for eviction was slated for hearing on the 12th November, 2019.

Determination

12. I have considered the parties oral submissions herein. In the case of **Butt Vs Rent Restriction Tribunal (1982) KLR 417**, the Court of Appeal held that:

- 1. The power of the court to grant and refuse an application for stay of execution is discretionary, that is discretionary power. To stay execution must however be exercised in such a way as not to prevent an appeal;**
- 2. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion;**
- 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings;**
- 4. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.**

13. I find the issues arising as follows:

- i. Whether or not the orders of stay of execution orders should issue;
- ii. Whether leave to lodge appeal out of time should be allowed.
- iii. **What is the just order to make in the circumstances?**

14. The law concerning stay of execution pending Appeal under Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

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 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.

15. There are three conditions for granting of stay order pending appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

- a) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- b) The application is brought without undue delay and
- c) 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.

16. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

17. It therefore follows that all the pre-overriding Objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing.

18. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

19. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the applicant to demonstrate what kind of substantial loss they will suffer if the stay order was not made in their favour.

20. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

21. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.

On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be” In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding” On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

22. In the application before me, the Applicants have pleaded that they would suffer irreparably if they were evicted from the suit land having lived on the same for generations spurning 38 years wherein they had developed the land. There is no dispute that the Applicants are in possession of the suit properties. If the judgment is enforced, which the Respondent is already seeking to do through Notice of Motion dated 8th August 2019, the result will be that the Applicants will be evicted which in my view constitutes substantial loss

23. On the second condition, this Court has been informed that the delivery of the Judgment, in the matter being appealed against, was on the 9th July 2019, wherein the Applicant filed the present application on the 23rd October 2019 two months later and after the Respondents had commenced execution proceedings. I find that the said application is brought without undue delay.

24. On the last condition as to provision of security, the Applicant in the present application have indicated their willingness to furnish security for a grant of the order for stay of execution.

25. On the issue of merit of application to extend time, it was held in **Nicholas Kiptoo arap Korir Salat vs. The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR** that:-

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

26. Under Section 79G of the Civil Procedure Act, which section provides that:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”

27. The court is persuaded to rely on the above case and cited provisions of the law on the issue of delay in filing appeal out of time.

28. The Applicants explained themselves in their supporting affidavit that the delay in lodging the appeal was due to lack of proceedings which they applied for on the 12th July 2019 in person and annexed a receipt subsequently in payment of the same which proceedings have yet to be supplied. The court finds that there are sufficient reasons for not filling the appeal in time and therefore grants leave to lodge appeal out of time.

29. In view of the foregoing discourse, I am persuaded that the application for stay of execution pending appeal should be allowed. I proceed to make the following orders:

- i. Stay of the execution of the judgment/decree herein is granted pending hearing and determination of the Applicants' intended Appeal.
- ii. The Applicants shall deposit security of Kshs.1,500,000/= (one million five hundred thousand) in court within 21 (twenty one) days from the date of delivery of this ruling. In default, the stay orders shall automatically lapse.
- iii. The Appellant/Applicant shall lodge his Appeal against the decree of the lower Court within 30 days from this date.
- iv. That upon filing of the memorandum of Appeal in (iii) above, the Applicant shall prepare, file and serve his record of appeal within 45 days.
- v. Costs in the cause.

30. It is so ordered.

Dated and delivered at Nyahururu this 7th day of November 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE