



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 102 OF 2017**

**CHEMA HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**JULIUS JUMA KUYOYI.....1<sup>ST</sup> DEFENDANT**

**ELIZABETH NANYAMA KUTOYI.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The background to the instant application dated 7/1/2017 is that on 31/10/2017 this court ordered that the defendants in this suit to conduct the exhumation and re-interment at any public cemetery of the body of **Peter Kutoyi** (deceased) which had been interred on **Land Reference No. 6650 (I.R.19633) Trans-Nzoia County** and the defendants were also found guilty of the offence of contempt of court and they were ordered to appear before the court on 8/11/2017 for sentencing failure to which warrants of arrest would promptly issue against them.

2. On 7<sup>th</sup> November, 2017, the instant application which bears the same date, was filed. It seeks the following orders:-

**(a) This application be certified as urgent, service of it be dispensed with at first instance and it be heard ex-parte and interim orders be granted in terms of prayer (b) and (c) below.**

**(b) Stay of execution and/or stay of further proceedings pending the lodging, hearing and determination of an intended appeal from the ruling of this Honourable Court as delivered on 31<sup>st</sup> October, 2017.**

**(c) Costs of this application be provided for.**

3. The grounds upon which the application is brought are that the defendants are dissatisfied with the decision of this court dated 31/10/2017; that execution may issue and hence occasion the defendants irreparable damage and render an appeal nugatory; that the plaintiff would suffer no prejudice and that the said application has been made timeously.

4. The application is supported by the sworn affidavit of Juma Peter Kutoyi sworn on 7/11/2017. In that affidavit he exhibits a copy of a Notice of Appeal and a draft Memorandum of Appeal. He avers that the defendants will suffer humiliation embarrassment and irreparable loss for the costs of having to exhume the body of Peter Kutoyi (deceased) yet the defendants have a "good case for appeal" unless the proceedings in this case are stayed pending appeal.

5. The plaintiff responded to the application by filings grounds of opposition dated 13/11/2017. In summary, the plaintiff avers that the actions of disobedience of this court's orders is a grave offence, that undermines the dignity and authority of the court; that the application should not be entertained till the respondents have purged their contempt; that the orders sought cannot be obtained in the absence of the express order and/or decree intended to be stayed; that the application is belated and the defendants have not demonstrated sufficient or reasonable cause to warrant the orders sought; that the application offends the inherent powers of court under **Section 3A of the Civil Procedure Act**.

6. The defendants filed their written submissions on 8/12/2017 and the plaintiff responded by filing its submissions on 17/1/2018. I have considered those submissions.

7. The defendants cite the case of **Safaricom Ltd -vs- Ocean View Breach Hotel Ltd & 2 Others Civil Application No. 327 of 2009** for the proposition that where they have demonstrated their intention to appeal by filing the Notice of Appeal where as one cannot obtain a stay order unless they have filed such a Notice: They also submit that they have filed a **Civil Appeal No. 40 of 2017**. They do not indicate in

which Registry or Sub-registry that Appeal has been filed.

8. However they cite the case of **Butt -vs- Rent Restriction Tribunal** as supporting the proposition that though the issuance of a stay order is discretionary the court should not exercise its discretion in such a manner as to prevent an Appeal and that if there is no other overwhelming hindrance a stay must be granted so that an Appeal may be rendered nugatory should the Appeal Court reverse the judge's discretion and that the 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; they aver that the court, in exercising its discretion will consider the special circumstances of the case and its unique requirements.

9. The defendants therefore argue that they would suffer substantial loss should a stay be denied as they have an arguable appeal. They cite the case of **Silverstein -vs- Chesoni**, replicating the following passage:-

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

10. On its part the plaintiff avers that the stay application has not expressly illustrated which order the defendants intend to be stayed and it is therefore defective. The plaintiff also argues that this court having found the defendants to be in contempt of court, it is quite clear that the defendants do not have an arguable appeal. It is also argued that the defendants waited till the eve of the sentencing date and, in the plaintiffs view, that is a sign that the instant application is frivolous and brought in bad faith to delay the sentencing of the defendants.

11. The plaintiff cites the case of **Bestlady Cosmetic Shop Limited -vs- Leah Wangechi Gioche**. The plaintiff submits that the defendants have failed to establish that they have an arguable appeal and that the filing of an Appeal per se is not an automatic entitlement for the grant of stay orders.

12. The plaintiff also cite the case of **Albert Kwegera Karuma & 2 Others -vs- Kung'u Gatabaki & Others 2015 eKLR** for the proposition that a contemnor would not have any right of audience in any court of law until he is either punished for it or he purges the contempt. The plaintiff prays that the application for stay be dismissed.

#### **Determination**

13. The issues for determination in this application are as follows:-

***(1) Do the defendants deserve audience before this court?***

***(2) Is the application defective?***

***(3) Is the appeal arguable and would the intended appeal be rendered nugatory if no stay was issued?***

**(1) Do the Defendants deserve audience?**

14. The audience sought by the defendants vide the instant application relates not to the furtherance of these proceedings, but rather to their stoppage. They also seek that there be a stay of execution. The plaintiff has cited the case of **Albert Karuma & 2 Others -vs- Kung'u Gatabaki & Others (Supra)**. However in my view, the situation discussed in that case is different from the scenario herein. In that case the issue arose as to whether the contempt application should be heard before the other previous application which it found on the record; the defendants/respondents therein had not been convicted of contempt as the defendants in this case have. Besides, I find it an odd proposition that a party may not be allowed to defend itself in respect of adverse orders made against it by filing an application for stay pending appeal simply because the orders challenged in the intended appeal are orders of conviction of that party for contempt of court, yet an application for stay of execution pending is a right enjoyable by any party to the suit.

15. The plaintiff has failed to cite any authority for the proposition that the defendants have no audience on their application dated 7/11/2017. In my view this ground holds no water and this application would better be determined on the basis of the answers to the 2<sup>nd</sup> and 3<sup>rd</sup> issues herein. (Is the application defective?)

16. The application seeks “stay of execution and/or stay of further proceedings pending the lodging, hearing and determination of an intended appeal”. I find that the limb on stay of execution is not properly expressed. This court cannot step in to place words in the applicant's application, so to speak. The objection on that aspect is clearly merited. However, there are orders that the plaintiff would execute in the absence of a stay, and the grounds to the application are clear on that aspect. It would not be far fetched to believe that it is these orders that are sought to be stayed. However, I do not find anything relating to the orders concerning punishment for contempt in either the prayers or the grounds in the application: and that is where I find a fatal defect in the application in so far as the punishment for contempt of court is concerned.

***(2) Is the Appeal arguable and would the intended appeal be rendered nugatory if no stay was issued?***

17. This court has already convicted the defendants of the offence of contempt of court what now remains which the application dated 7/11/2017 has pre-empted is the sentencing.

18. I have examined the Grounds of Appeal in the draft Memorandum of Appeal exhibited. I have not seen any copy of record of Appeal in this file record though the defendants' submissions intimate that the Appeal has been filed. Grounds No.1, 2 and 5 relate to the issue of

whether the defendants were served with, or knew of the court order they are convicted of having disobeyed. This court has made its findings on that issue in the Ruling dated 31/10/2017.

**19.** However Ground No. 2 raises the legal issue of whether this court erred by “shifting the burden of proof” to the defendants. An examination of the Ruling of this court will reveal that the court merely pointed out glaring gaps and improbabilities contained in the defendants’ version of the events.

**20.** Grounds 3, 4 and 7 relate to the making of mandatory orders and this court found that in certain circumstances where the court has found that the acts of the contemnor were meant to steal a march on the adversary, orders of mandatory injunction could issue. I found that to be the case here: the defendants, having been served and being in possession of knowledge of the contempt of the order issued on 8/6/2017, disobeyed those orders.

**21.** In my view, there is no arguable appeal. Consequently find that the appeal will not be rendered nugatory. In those circumstances, I find that the application dated 7/11/2017 has no merit. The same is hereby dismissed with costs. A further order will issue hereby summoning the defendants to attend court to 15/2/2018 for sentencing.

**22.** Meanwhile I order that the plaint herein shall be amended to reflect the proper names of the defendants herein as supplied by themselves in their own descriptions in this suit. Such plaint shall be served within 7 days.

**Dated, signed and delivered at Kitale on this 1<sup>st</sup> day of February, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**1/2/2018**

Coram - before Mwangi Njoroge Judge

Court Assistant - Isabellah

Mr. Analo for the Respondents

N/A for the Applicants

**COURT**

Ruling read in open court in the presence of the Counsel for the Respondent and in the absence of Counsel for the Applicant.

**MWANGI NJOROGE**

**JUDGE**

**1/2/2018**