



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT EMBU**

**MISC. APPLICATION NO. 14 OF 2017**

**(FORMERLY KERUGOYA ELC MISC 18 OF 2017)**

**CHARLES KIURA MURIITHI.....APPLICANT**

**VERSUS**

**GRACE WAINOI.....RESPONDENT**

**RULING**

1. By a notice of motion dated and filed on 25<sup>th</sup> July 2017 brought under the provisions of **Order 53 and Order 42 Rule 6 of the Civil Procedure Rules, sections 1A, 2A and 3A of the Civil Procedure Act (Cap 21)**, the **Constitution of Kenya 2010**, and **all other enabling provisions of the law**, the Applicant sought the following orders;

*a. That this matter be certified as urgent and heard on priority basis.*

*b. That this honourable court be pleased to grant an order for stay of execution of judgement and consequential orders of Resident Magistrate's Court Kerugoya delivered on 26<sup>th</sup> May 2017 in Civil Suit No. 205 of 2011 pending the hearing and determination of the application and the appeal.*

*c. That this honourable court be pleased to grant the Applicant leave to file appeal out of time.*

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

2. The application was based upon the grounds shown on the face thereof and supported by an affidavit sworn by the Applicant on 25<sup>th</sup> July 2017. The Applicant stated that he was aggrieved by the judgement and consequential orders of the trial Magistrate in *Kerugoya CMCC No. 205 of 2011* and that he was desirous of appealing against it. He had apparently applied for copies of the proceedings and judgement to enable him lodge the appeal but the same were supplied on 18<sup>th</sup> July 2017. He was consequently issued with a certificate of delay by the Magistrate's Court to that effect.

3. The Applicant exhibited copies of the deposit payment receipt for the proceedings and judgement, copies of the proceedings and judgement as well as a certificate of delay.

4. The Respondent filed a replying affidavit in opposition to the said application. The Respondent contended that the Appellant had not annexed a copy of the letter requesting for copies of the proceedings and judgement. The Respondent further contended that the said application was incurably defective for combining the prayers for leave to appeal out of time and stay of execution.

5. The Respondent further opposed the said application on the grounds that it did not meet the requirements of **Order 46 Rule 6(1) of the Civil Procedure Rules**; that the Applicant did not seek a review or setting aside of the decree before the Magistrates Court; and that it was otherwise frivolous, vexatious and an abuse of the court process.

6. When the said application was listed for hearing on 26<sup>th</sup> February 2018 the Applicant prosecuted his said application orally whereas the Respondent's Advocate opposed the same. The court thereupon fixed the matter for ruling on 21<sup>st</sup> June 2018.

7. The Court has considered the Applicant's said application, the Respondent's replying affidavit in opposition thereto as well as the oral arguments of the parties at the hearing hereof. The court shall first deal with the prayer for leave to appeal out of time.

8. The judgement of the Magistrate's Court was delivered on 26<sup>th</sup> May 2017. The Applicant applied for certified copies of the proceedings within 3 days as shown by the certificate of delay. The documents sought were supplied on 18<sup>th</sup> July 2017. He filed the instant application on 25<sup>th</sup> July 2017. In my view, the Applicant acted diligently and expeditiously in the various steps he took with a view to lodging an appeal. The court does not agree with the Respondent's contention that there was undue delay of any sort.

9. The court is, therefore, inclined to grant and hereby grants leave to, the Applicant to file an appeal out of time to enable him exercise his right of appeal. The Respondent will not suffer any prejudice since she will have an opportunity to challenge or oppose the appeal.

10. The second aspect is the matter of application for stay of execution pending the filing, hearing and determination of the intended appeal. The provisions of the law upon which such an order may be sought are found in **Order 42 Rule 6 (2) of the Civil Procedure Rules** which provide, *inter alia*, that;

**(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.**

11. The Court of Appeal of Kenya in the case of **Kenya Shell Ltd Vs Kibiru & Another [1986] KLR 410** made the following observation on the jurisdiction of a court to grant a stay of execution pending appeal;

**“It is normally a good thing 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 can be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented (per Platt Ag. JA).**

12. The court has considered the material on record on the question of substantial loss. The Applicant has completely failed to demonstrate what substantial loss, if any, he may suffer unless the stay sought is granted. The scanty material on record indicates that the Respondent is in possession of the suit property. The developments thereon were not put up by the Applicant. There is, therefore, no basis upon which the Applicant may be granted a stay of execution.

13. The court does not agree with the Respondent that the instant application is fatally defective for combining the prayers for leave to appeal out of time and stay of execution. In my view, that is a mere technicality. This court is obliged to hear and determine matters without undue regard to technicalities of procedure under Article 159 2(d) of the Constitution of Kenya and section 19(1) of the Environment and Land Court Act (Cap 12A).

14. The upshot of the foregoing is that the Applicant's notice of motion dated 29<sup>th</sup> July 2017 is hereby allowed in terms of prayer No. 3 only. The order for stay of execution is hereby declined. Costs of the application shall abide the outcome of the intended appeal.

15. It is so decided.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 21<sup>ST</sup> day of JUNE, 2018.**

In the presence of the Applicant in person and Ms Njuguna holding brief for Mr Muchiri for the Respondent.

Court clerk Mr Muinde.

**Y.M. ANGIMA**

**JUDGE**

**21.06.18**