



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 75 OF 2015**

**(FORMERLY ELC NO. 792 OF 2013)**

**(FORMERLY EMBU CMCC NO. 256 OF 1991)**

**HORIDA WANJUKI NGARI.....PLAINTIFF**

**VERSUS**

**EDWIN NJERU IRERI.....DEFENDANT**

**RULING**

1. By a notice of motion dated 4<sup>th</sup> April 2018 and expressed to be brought under the provisions of **section 5 (2) (b) of the Appellate Jurisdiction Act** and **all enabling provisions of the law**, the Plaintiff sought an order of stay of execution of the judgement and decree dated 1<sup>st</sup> March 2008 together with all consequential orders pending the hearing and determination of an intended appeal to the Court of Appeal.
2. The said application was based upon the several grounds enumerated on the face of the motion. It was stated that an irregular eviction notice had been issued against her; that she had applied for copies of proceedings from the court for purposes of appeal and that she had an arguable appeal which would be rendered nugatory unless a stay was granted.
3. The said application was supported by an affidavit sworn by the Plaintiff on 4<sup>th</sup> April 2018 in which she reiterated and expounded on the grounds in her notice of motion. She stated that being aggrieved by the judgement delivered on 1<sup>st</sup> March 2018 she had filed a notice of appeal with a view to challenging it in the Court of Appeal.
4. It was contended that she had resided on the suit property for over 40 years and had developed it extensively and that she had no other home. In her view, she would be rendered homeless upon eviction before her intended appeal is heard and determined. She further contended that the Defendant would not suffer any prejudice if the application were allowed.
5. The Defendant filed a replying affidavit sworn on 6<sup>th</sup> April 2018 by himself in opposition to the said application. It was contended that the Plaintiff had failed to demonstrate any grounds which would justify the granting of a stay. It was also contended that the current advocate for the Plaintiff was not properly on record since no leave had been granted for change of advocates under the **Civil Procedure Rules**. It was further contended that this court had no jurisdiction to grant a stay under **Rule 5 (2) (b) of the Court of Appeal Rules**. Finally, it was contended that no notice of appeal had been filed or served upon the Defendant as required by law.
6. When the said application was listed for hearing on 12<sup>th</sup> April 2018, the advocates for the parties agreed to canvass it through written submissions. The Plaintiff was granted 7 days within which to file and serve her written submissions whereas the Defendant was to file and serve his within 7 days upon service. The record, however, shows that the Plaintiff's submissions were filed on 23<sup>rd</sup> May 2018 whereas the Defendant's submissions were filed on 4<sup>th</sup> June 2018.
7. The court has considered the Plaintiff's said application, the Defendant's response thereto as well as the respective submissions of the parties. The court is of the opinion that there are 4 main issues which arise for determination, namely;
  - a. Whether the firm of Momanyi Gichuki & Co Advocates is properly on record for the Plaintiff.
  - b. Whether the court has jurisdiction to entertain an application for stay of execution pending the lodging, hearing and determination of the intended appeal.
  - c. Whether the Plaintiff has demonstrated the grounds for granting such stay.

d. What is the appropriate order to make on costs of the application.

8. The court record shows that the Plaintiff's advocates at the time of hearing and delivery of judgement were Ms Rose W. Njeru & Co Advocates. The current firm of Momanyi Gichuki & Co Advocates appeared in the proceedings for the first time when they filed the notice of appeal and instant application for stay. There is no indication that leave of court was sought and obtained for the Plaintiff to change advocates under **Order 9 of the Civil Procedure Rules**.

9. The provisions of **Order 9 Rule 9 of the Civil Procedure Rules** provide that;

**“9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court**

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**a. Upon an application with notice to all the parties; or**

**b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

10. It is, therefore, evident that the firm of Gichuki Momanyi & Co Advocates is irregularly on record for the Plaintiff. They came on record after judgement and without the consent order or leave of court as required by the Rules. The court is, however, of the view that such irregularity is curable by the said firm taking appropriate remedial measures. The court shall set down the period within which remedial action shall be taken.

11. The court is further of the view that in the meantime, the Plaintiff should not be denied access to justice due to procedural lapses occasioned by his legal advisors. The court is obliged under **Article 159 (2) (d)** to administer justice without undue regard to procedural technicalities. The court is also under similar obligation under **section 19 (2) of the Environment and Land Court Act (Cap 12A)**. The court shall, therefore, proceed to consider the merits of the Plaintiff's application notwithstanding the said irregularity in legal representation.

12. The 2<sup>nd</sup> issue relates to the court's jurisdiction to entertain the instant application. The court has noted that it was brought under the wrong provisions of the law. To make matters worse, it was brought under **section 5(2) of the Appellate Jurisdiction Act** which only empowers the Court of Appeal to make rules regulating the right of practice and legal representation before that court. It has nothing to do with stay of a decree. The Plaintiff's counsel probably intended to refer to **Rule 5 (2) (b) of the Court of Appeal Rules** which grants jurisdiction to the Court of Appeal to entertain an application for stay and injunction pending the hearing and determination of an appeal to the court. The court agrees with the Defendant that this court would have no jurisdiction to entertain an application for stay under that Rule.

13. It is, however, clear that the Plaintiff's application was merely brought under the wrong provisions of the law. It ought to have been brought under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules**. In the opinion of the court, such a defect is not fatal. It has not misled or prejudiced the Defendant in any way. The Defendant was fully aware of the nature of the application before court and competently responded thereto. The provisions of **Order 51 Rule 10 of the Civil Procedure Rules** provide as follows in relation to the titling of applications.

**“10 (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**

**(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”**

14. The court is of the view that the defect in the Plaintiff's application is not fatal. It is curable under the provisions of **Order 50 Rule 10 of the Civil Procedure Rules, section 19 (1) of the Environment and Land Court Act and Article 159 (2) (d) of the Constitution of Kenya**. Accordingly, the court shall proceed to consider the substance of the said application under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules**.

15. The provisions of **Order 42 Rule 6 (2)** provide as follows;

**“6 (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.**

16. The Court of Appeal of Kenya in the case of **Kenya Shell Ltd Vs Kibiru & Another [1986] KLR 410** held, *inter alia*, that;

**“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).**

17. In the case of **Butt Vs Rent Restriction Tribunal [1979] eKLR** where the court was dealing with stay of proceedings it was held, *inter alia*, that;

**“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful, from being nugatory. Per Brett LJ in Wilson Vs Church (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:**

**“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”**

18. The court has considered the material evidence on record and the circumstances of the case. The court has noted that the Plaintiff is currently in occupation of the suit property. She had been in occupation for a long period of time. She has undertaken some developments on the suit property. She resides there with her family. The court is of the opinion that if she is uprooted from the suit property before her intended appeal is heard and determined, she would suffer substantial loss. The court is of the opinion that the Plaintiff has demonstrated substantial loss within the meaning of **Order 42 Rule 6 of the Civil Procedure Rules.**

19. The court is also satisfied that her intended appeal may be rendered nugatory should the eviction take place at the moment. Once the Plaintiff is out of the suit property, the Defendant may put another person in possession or deal with it in such manner as to make it impossible for the Plaintiff to re-occupy the suit property should she succeed on appeal. The court is, therefore, satisfied that substantial loss has been demonstrated. The Plaintiff should be able to exercise her right of appeal without the risk of the outcome being rendered nugatory or a mere academic exercise.

20. The court is also satisfied that the instant application was filed without unreasonable delay. The judgement herein was delivered on 1<sup>st</sup> March 2018 whereas the instant application was filed on 4<sup>th</sup> April 2018 after a change of advocates, irregular as the change may be. The Plaintiff has, therefore, satisfied the requirements for the grant of a stay pending appeal.

21. The last issue is on costs of the application. It has long been the practice that when such application for stay is dismissed, it is usually dismissed with costs to the Respondent. Where, however, the application is allowed, the usual practice is for the costs to abide the outcome of the intended appeal or to abide the order for costs to be made in the appeal. There is no reason to depart from such practice.

22. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 4<sup>th</sup> April 2018 and makes the following orders;

- a. The notice of motion dated 4<sup>th</sup> April 2018 is allowed in terms of prayer No. 3 thereof for a period of 24 months.
- b. The firm of Momanyi Gichuki & Co Advocates shall regularize their representation within 45 days.
- c. The proceedings herein shall be typed and made available to the Plaintiff within 30 days for the purpose of the intended appeal.
- d. Costs of the application abide by the order for costs to be made in the intended appeal.

23. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 25<sup>th</sup> day of OCTOBER, 2018.**

In the presence of Mr Momanyi for the Plaintiff and Mr Mogusu for the Defendant.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**25.10.18**