



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 48 OF 2014 (OS)

ALICE MUHONJA KIRAMBI.....PLAINTIFF/RESPONDENT

VERSUS

REDEMPTA SUSAN CHETAMBE.....1ST DEFENDANT/APPLICANT

BARCLAYS BANK OF KENYA LIMITED.....2ND DEFENDANT

RULING

1. The plaintiff's application dated **16/8/2018** seeks an order there be a stay of execution of the judgment of the honourable court delivered on the **14th June, 2018** pending the hearing and determination of the Eldoret Court of Appeal.
2. The grounds upon which the application is brought are that on the **14/6/2018**, judgment was entered herein in favour of the plaintiff against the 1st defendant; that the 1st defendant/applicant is aggrieved by the aforesaid judgment and has filed an appeal in the Court of Appeal, which appeal has very high chances of success and/or raises serious issues of law and/or arguable grounds and that the 1st defendant/applicant is ready and willing to give such security.
3. The application is brought under **Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 9 Rule 9, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010.**
4. The plaintiff/respondent opposed the application vide replying affidavit sworn by her counsel on **27/8/2018** in which he deponed that the judgment herein was delivered on the **14th day of June, 2018**; that the date for delivery of the said judgment had been given by the learned trial judge in open court and in the presence of both parties and/or their advocates; that he has never been served with any Notice of Appeal and he was not aware of any having been filed; that the respondent has not been served with any copy of any letter requesting/applying for certified copies of the proceedings and judgment; that he has read the supporting affidavit of **Redempta Susan Chetambe** and that contrary to what is deposed to in **paragraph 4** thereof, no Notice of Appeal has been annexed thereto and that to the best of his knowledge, understanding and information there is no appeal pending in the Court of Appeal and the application herein is frivolous, vexatious and an abuse of the process of this honourable court.
5. The 1st defendant/applicant filed her submissions on **11/10/2018** and the plaintiff/respondent filed on **25/10/2018**.
6. The respondent argued the application before court orally on **29/10/2018** where she reiterated the contents of her replying affidavit.
7. The 1st defendant/applicant adopted his submissions as filed.
8. I have considered the rival submissions on the application of the plaintiff/respondent.
9. The provisions of **Order 42 rule 6(2)** of Civil Procedure Rules provides as follows:-

“(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”.

10. It must first be verified that there is an appeal in place before the court delves into any other issue in an application of this nature.
11. A valid notice of appeal is in practice considered to be an appeal for the purpose of an application for stay of execution. That is the import of **Order 42 rule (4)** of the **Court of Appeal** rules.
12. I have noted that there is a notice of appeal that was annexed to the application and that it was filed on **28/6/18**, well within time as required by **rule 75(2)** of the **Court of Appeal Rules 2010**.
13. The Notice of Appeal has to be served. The response to the application is that there is no notice of appeal that was served upon the respondent of her counsel in this matter.
14. The case of **MSK vs SNK Civil Appeal (Application No 277 of 2005 eKLR)** was cited by the respondent in support of the submission that there was no appeal. In the cited case a notice of appeal that had not been served upon all the parties directly affected by the appeal was struck out. In that ruling the court stated as follows:

“... rule 76(1) is a mandatory requirement and provides that all persons directly affected by the appeal must be served with a notice of appeal or the court is requested upon an application by the appellant which may be ex parte, to direct that service need not be effected on any person who took no part in the proceedings in the superior court.”
15. **Rule 77(1)** requires that a notice of appeal be served upon the persons directly affected by the appeal within 7 days after it is lodged. There is no evidence on the face of the notice that it was ever served upon the respondent or her counsel within the stipulated time or at all. There is also no averment in the supporting affidavit that the notice was served. Finally is no response to the replying affidavit from the applicant showing that the said notice of appeal was served as required by law.
16. There is also no evidence that a record of appeal has been filed. **Rule 82** provides that an appeal has to be filed within **60** days. The filing and service of a request for certified copies stops the stipulated **60** days from running.
17. However, no application for certified copies of the proceedings have been exhibited in the application and the stipulated period under **rule 82** has expired.
18. I agree with the decisions cited by the applicant that is consolidated **Marine Vs Nampijja & Another Civil Application NO. 93 of 1989 and Absalom Dova VS Tasibo Transporters (2013) eKLR** on the need to preserve the subject matter in an appeal.
19. The upshot of the above is that I find that there is no evidence of service of the notice of appeal and request for proceedings and hence the notice of appeal may not have complied fully with **rule 77(1)**.
20. However I am alive to decisions of a court of equal status in which the validity of a notice of appeal was said to be the preserve of the Court Of Appeal.
21. In the case of **Samwel Kimutai Korir (Suing as Personal and Legal Representative Of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School & Nyanchwa Adventist College [2017] eKLR** the court stated as follows:

“In the instant case, the Notice of Appeal complained of is a creation of the Court of Appeal Rules embodied in the Appellate Jurisdiction Act Cap 9 of the Laws of Kenya and therefore I find that this court lacks jurisdiction to determine the validity of a Notice of Appeal issued pursuant to the provisions of the Appellate Jurisdiction Act. A similar position was taken by Murgor JA in the case of David Simiyu Wanyonyi vs John Silakwa & Another [2016] eKLR when she observed that Rule 53 of the Court of Appeal Rules stipulates that the validity of a Notice of Appeal are a preserve of the full bench of the court.

Having found that the validity of the Notice of Appeal is a matter that can only be determined by the Court of Appeal, I will now proceed to determine the other issue for determination which is whether the application meets the threshold of the provisions of Order 42 Rule 6 of the Civil Procedure Rules.”
22. This court will therefore not pronounce itself on the validity of the notice of appeal for the above reasons. That ground of opposition therefore fails.
23. Consequently this court must deal with the issue of substantial loss and security. Would substantial loss arise if the orders sought were not granted or if security has been offered.
24. I find that the matter concerns land. There is no evidence of likelihood of disposal of the same by the plaintiff that has been brought before this court. The land has been in the hands of the plaintiff for a long time. I find that the defendant has not demonstrated that she would suffer irreparable loss if the orders sought are not granted.
25. On the issue of security she has offered another unidentified title deed for security without giving its relevant details. This court is not able to decipher the value of the security, if at all it exists, and if it is fit for the occasion. This court would not be in error if it found that no security has therefore been offered.
26. For the foregoing reasons the application dated **16/8/2018** has no merit and the same is dismissed with costs.

Dated, signed and delivered at Kitale on this 21st day of November, 2018.

MWANGI NJOROGE

JUDGE

21/11/2018

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi holding brief for Khayo for defendant

Mr. Kidiavai holding brief for Omolo for plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

21/11/2018