



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 323 OF 2014

GODFREY M. ONYALLA.....PLAINTIFF/RESPONDENT

VERSUS

CHRISTOPHER OPAKA.....DEFENDANT/APPLICANT

RULING

This application is dated 1st August, 2018 and is brought under section 3A and order 40 rule 1 & 6 and order 50 rule 1 of the Civil Procedure Rules and seeks the following orders:-

1. That the present application and deserves to be heard during the vacation and exparte in the 1st instance.
2. That this honourable court be pleased to grant leave to the applicant/defendant to act in person.
3. That this honourable court be pleased to grant a stay of execution of the judgment of this court made on 26/7/2017 pending the hearing and final determination of the intended appeal.
4. That the plaintiff/respondent's advocates be compelled to hand over the original copies of the Notice of Appeal and decree to the applicant herein which copies were taken by them from court file.
5. That this honourable court be pleased to issue an order for extenuation of time limit for applicant to file appeal out of time.

It is premised upon the following principal grounds that, the applicant/defendant was aggrieved by the order/judgment of 26/7/2017 in the ELC No. 323 of 2017 at Kakamega High Court. That the applicant had instructed the firm of M/s. Luchivya & Co. Advocate to file appeal in court of appeal in on his behalf but did not proceed with it without communication with him at all. That the defendant/applicant had filed his Notice of appeal pending compiling appeal record. That the respondent/defendant's advocates took the notice of appeal and decree thus paralyzing the whole process of compiling record of appeal in time. That the respondent/plaintiff has already initiated execution process of the said orders and/or judgment of 26/7/2017 and the applicant can be evicted anytime from now. That the applicant/defendant cannot suffer due to the negligence, laxity and/or slackness of his advocates. That the respondent/applicant has high chances of success to his appeal. That if the judgment is executed without the present applicant being heard the respondent/applicant stands to suffer irreparably and the intended appeal shall be rendered nugatory.

The respondent submitted that, the application is destitute of any merit, it is in bad in law and it is brought in bad faith with the aim of delaying the cause of justice. That he never took or caused to be taken a notice of appeal from the court file in any case the alleged appeal is already bad in law for non-compliance of the mandatory provisions of the law. That this court has no jurisdiction to grant the applicant leave to file an appeal in the court of appeal out of time. That the intended appeal is frivolous with no chances of succeeding. That the applicant is guilty of latches.

The respondents did not file any papers in opposition. The application is supported by the annexed affidavit of Solomon Munyasi Atianyi, 2nd defendant/applicant and the grounds that the applicants were dissatisfied with the ruling of this court delivered on 11th July, 2018 and have preferred an appeal. That the appellants' appeal has high chances of success and the appellants stand to suffer substantial loss unless the orders sought are made. That this application has been made without unreasonable delay. That the applicants are ready and willing to provide any such security for the performance of the decree. That it will be in the interest of justice if this application is allowed.

This court has carefully considered the application and the submissions herein. The principles for granting stay of execution are provided for under **Order 42 rule 6 (1)** of the **Civil Procedure Rules** as follows:

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42, rule 6 states:

“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.”

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd– Civil Appl. No. Nai. 93/02 (UR)**, thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. *That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
2. *That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in **Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others eKLR** where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of **Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR**, the court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by this court’s decision in **Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4** as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

From the grounds, the applicant/defendant was aggrieved by the order/judgment of 26/7/2017 in the ELC No. 323 of 2017 at Kakamega High Court. That the applicant had instructed the firm of M/s. Luchivya & Co. Advocate to file appeal in court of appeal in on his behalf but did not proceed with it without communication with him at all. That the defendant/applicant had filed his Notice of appeal pending compiling appeal record. That the respondent/defendant’s advocates took the notice of appeal and decree thus paralyzing the whole process of compiling record of appeal in time. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. Indeed the appeal has not been filed and it is not for this court to grant an extension. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH DAY NOVEMBER, 2018.

N.A. MATHEKA

JUDGE