



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

MISC. CIVIL APPLICATION NO. 4 OF 2016

JULIUS MACHIRA MWANGI

JAMES GITHAINGA HARUN.....APPLICANTS

-VERSUS-

JAMES MUHAMI WANAIKUA

AARON MWANGI MUTHAMI

SAMUEL NJOGU MUHAMI

NANCY WAMUYU MUHAMI

JOYCE WAMAITHA MUHAMI.....RESPONDENTS

RULING

1. James Githaiga Harun, hereinafter referred as “the applicant”, brought the notice of motion dated **24th November 2015** seeking the following orders:

a) Certification of the application as urgent and deserving to be heard *ex parte* in the first instance;

b) Stay of execution of the order issued by Hon. W. Kagendo PM on 7th August, 2012 in Mukurweini CMCCC No.32 of 2012 pending the hearing and determination of the application;

c) Admission of his intended appeal out of time;

d) Stay of execution of the order issued by Hon. W. Kagendo PM on 7th August, 2012 in Mukurweini CMCCC No.32 of 2012 pending the hearing and determination of the his intended appeal;

e) Costs of the application to abide the outcome of the appeal.

2. The applicant contends that he has good grounds for lodging the appeal and that the delay in filing the appeal is excusable.

3. Vide the affidavit he swore in support of the application, the applicant has, *inter alia*, deposed that he was not aware of the order dismissing their application which is the subject matter of the intended appeal, dated 26th July, 2012 and amended on 31st July, 2012; that he got to know that the application was dismissed after he was served with a notice to show cause why he should not be arrested and committed to civil jail for failure to satisfy the decree for costs issued against him in that application.

4. The applicant explains that he was not actively involved in the application and points out that his brother (the 1st applicant) who was actively involved in the prosecution of the application passed away on 28th May, 2015.

5. Arguing that the intended appeal is arguable, the applicant avers that unless the orders sought are granted, the respondents may proceed with the threatened execution to his detriment.

6. In support of the averments contained in his application, the applicant has annexed to his affidavit the notice to show cause issued against him, death certificate of the 1st applicant, the order sought to be appealed from and the intended memorandum of appeal.

7. The application is opposed through the affidavit (replying) of the 2nd defendant/respondent (Aaron Mwangi) sworn on 28th November, 2015 on grounds that the application is a nullity in law. The following reasons are given in support of the respondent's contention that the application is a nullity:-

i) The application is said to be predicated on a none existent suit (the suit on which the intended appeal is predicated has since been dismissed);

ii) One of the applicant's to wit, Julius Machira Mwangi, has since passed on hence incapable of bringing the application, unless through an administrator or legal representative; and

iii) That the order sought to be stayed is incapable of being stayed as it is a negative order (order of dismissal). That is to say, save for payment of the advocate's costs, the order did not require the applicant to do anything else that is capable of being stayed).

8. When the matter came up for hearing, counsel for the applicants, Mr. Bw'onwonga, relied on the grounds on the face of the application and the supporting affidavit of the applicant and argued that no prejudice will be occasioned on the respondents if the application is allowed.

9. In opposing the application, counsel for the respondents, **Mr. Mahinda**, reiterated the respondent's contention that there is no pending appeal on which the order of stay can hinge. Terming the application fatally defective, counsel for the respondent pointed out that the application seeks both stay and leave to extend time within which to file the intended appeal under **Order 42 Rule 6** of the Civil Procedure Rules.

10. Arguing that the applicant has not demonstrated that unless the orders sought are granted, he will suffer substantial loss, Mr. Mahinda, reiterated that the orders sought to be appealed from were negative orders (orders of dismissal) hence incapable of forming the subject matter of the intended appeal. Mr. Mahinda further argued that the appeal lacks substratum because it is hinged on a none existent suit.

11. He relied on the case of **Samuel M' Magua v. Barclays Bank of Kenya Ltd (2012) eKLR** where it was observed:

"... As there is no positive order against him capable of being executed, save for costs, it is doubtful whether the court would be amenable to grant a stay of execution in such circumstancesthe appellant has sought to go round this by seeking stay of the main decree and therein lies another obstacle. The appellant has not stated that he is aggrieved by the decree itself and is not appealing against the same. His application to the extent that it seeks a stay of execution of the decree itself instead of execution against himself further renders the application incompetent. A party cannot seek to stay an order against which an appeal is not directed."

12. Arguing that the application is meant to frustrate execution for costs awarded to the respondents, Mr. Mahinda, urged the court to dismiss the application with costs to the respondents.

Analysis and determination

13. Having carefully considered the pleadings filed in this matter I find as a fact that the orders sought to be stayed relate to orders issued in the main suit. The applicant is not challenging the orders dismissing the main suit or applying for reinstatement of the main suit which has since been dismissed.

14. There being no pending suit, I agree with counsel for the respondent that the intended appeal lacks substratum.

15. The application is also fatally defective as the applicant has not sought to enlarge time within which to lodge the appeal. It is only through an application for enlargement of time within which the applicant ought to have appealed where the court would have jurisdiction to determine whether or not to enlarge time to file the intended appeal.

16. The intended appeal also appears to be misadvised as it is premised on negative orders.

17. The upshot of the foregoing is that the application has no merit and is dismissed with costs to the respondents.

Dated, signed and delivered at Nyeri this 31st day of May, 2017.

L N Waithaka

JUDGE

In the presence of:

Mr. Gatihi h/b for Mr. Muchiri wa Gathoni for the respondent

Mr. Ombongi for the applicant

