



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & ASIKE-MAKHANDIA, J.J.A.)

KISUMU CIVIL APPLICATION NO. 148 OF 2018

BETWEEN

THOMAS MASEKO OPIYO.....1ST APPLICANT

PETER OUMA MBAJA.....2ND APPLICANT

AND

ALFRED OYOKO OLUNJE.....RESPONDENT

*(An application for stay of execution of the judgment, decree and*

*or orders of the Environment and Land Court of Kenya at Kisumu*

*(S. M. Kibunja, J.) made on 7th February, 2017 in ELC Case No. 51 of 2015)*

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RULING OF THE COURT

1. By a Notice of Motion dated 22nd July 2019, pronounced to be brought under **Rule 5(2)(b)** of the Court of Appeal Rules (the Rules); **Section 3A** and **3B** of the Appellate Jurisdiction Act (Cap 9), and **Article 159** of the Constitution of Kenya 2010, **Thomas Maseko** (the 1st applicant) seeks in the main an order that pending the hearing and determination of **Civil Appeal No. 148 of 2018**, the Court issues an order of stay of execution of the decree/order/judgment dated 7th February, 2017. In what the applicant refer to as “Grounds of Appeal” listed on the face of the application, the applicant states that his pending appeal is arguable; that they will suffer irreparable loss or damage if the order is not granted; that there is a notice to show cause which has been issued against the 1st applicant and he risks being committed to civil jail, and finally that if the orders sought are not granted, their appeal will be rendered nugatory. The 1st applicant also states that he is willing to provide sufficient security pending the hearing and determination of the appeal.
2. The application is supported by the 1st applicant’s affidavit sworn on 22nd July, 2019 in which he repeats the grounds on the face of the application verbatim. At paragraph 2 of the said affidavit, he deposes that he filed the Notice of Appeal on 16th February, 2018 against the judgment which was delivered on 7th February, 2017, almost one year late.
3. The application is opposed vide grounds of opposition filed by Maurice Carlos Ouma, learned counsel for the respondent in which he states that the application is misconceived, bad in law, incurably defective and that the same amounts to abuse of the court process. Counsel states that there is no competent appeal pending before the Court as the Notice of Appeal was filed out of time without leave of the Court. These grounds are reiterated in counsel’s short submissions in which he urges the Court to dismiss the application.
4. We have considered the application along with the affidavit in support, the grounds of opposition and the brief submissions. We have also considered the applicable law. Jurisdiction of this Court to hear applications under **Rule 5(2) b** of the Rules of this Court such as the one before us, is derived from a Notice of Appeal filed under **Rule 75** of the Rules. This rule requires an aggrieved party who intends to appeal to file a Notice of Appeal within 14 days of delivery of the judgment/ruling appealed from. Where a party fails to file the notice of appeal on time, then such party can always move the court for extension of time under **Rule 4** of the Rules.
5. As submitted by learned counsel for the respondent, the Notice of Appeal herein was filed out of time. From what we can decipher from the face of the application, the judgment appealed from was delivered on 7th February, 2017. The Notice of Appeal was filed on 16th February, 2018 over one year after delivery of the judgment. There has been no application for extension of time and no leave to file the appeal out of time has been granted by the court. Furthermore, the applicant has not even attempted to explain why the Notice of Appeal was

filed late or even responded to that issue. We agree with the respondent that the application before us is incompetent.

6. Even if the Court would be inclined to look at the merits of the application, we note that the impugned judgment is not attached, nor is the draft memorandum of appeal. No material has been placed before us to demonstrate arguability or the nugatory aspect. Indeed, we cannot even tell what the intended appeal is all about. For these reasons, we find that this application falls way too short of the threshold set for applications of this nature. We dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 29th day of January, 2021.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**ASIKE - MAKHANDIA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**