



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 184 OF 2019

SAMUEL NGUMI.....1ST APPELLANT

MARTIN NJUGUNA KURIA.....2ND APPELLANT

-VERSUS-

RACHEL GAKII NYAGA.....RESPONDENT

RULING

1. The appellants have filed the Notice of Motion dated 29th November, 2019 and pray for stay of execution in **CMCC Gatundu No. 95 of is 2018** of the judgment of 8th May, 2019. Additionally, they seek a stay of release of funds deposited in Gatundu court.

2. The application is supported by an affidavit of appellant's advocate, *Mutua Emmanuel Bara*.

3. Brief facts of this matter is that before the Gatundu court, the respondent obtained *ex parte* judgment on 8th May, 2019. The appellant by their application applied to set aside the said *ex parte* judgment. That court by a ruling of 24th July, 2019 set aside that judgment by giving timelines within which the appellants were to file a defence, and on condition the appellants would pay the respondent's advocate his throw away costs and on condition the appellants would make a deposit into that court of Kshs.370,907.50. It would seem that the appellants failed to abide by the timelines set by that court and the stay orders were vacated. The appellants applied before the Gatundu court, by an application dated 6th September, 2019, to reinstate the stay orders. The Gatundu court by its Ruling dated 20th November, 2019 dismissed the application. This appeal is against that Ruling. That Ruling was not provided to this Court.

4. The application is opposed by the respondent. The respondent has argued that the appellants have not met the conditions for stay pending appeal in Order 42 Rule 6 of the Civil Procedure Rules.

ANALYSIS

5. I have considered the affidavit of the appellant's advocate. I have also considered the parties' submissions. The present application will not be decided by the in-depth consideration of those submissions, nor the affidavit. It will be decided on the basis of the prayers.

6. The appellants' prayer, in the Notice of Motion dated 29th November, 2019 before this court, for stay of execution of the judgment of Gatundu court and for stay of release of money deposited by appellants in that Gatundu court is sought "pending the hearing and determination of this application. In other words, those prayers would be spent once the application is heard and determined. It follows that there remains no prayer for determination, once this ruling is delivered, since the stay of execution is sought pending determination of this Ruling, and also because the other two prayers sought final orders, which are same orders sought in the substantive appeal. Final orders cannot be granted on an interlocutory application. It follows that the application before court is incompetent for the reasons set above.

DISPOSITION

7. The application dated 29th November, 2019 for reasons stated above is dismissed with costs.

8. At the reading of this Ruling, a date shall be fixed for direction on the hearing of the appeal.

RULING DATED and DELIVERED at KIAMBU this 17th day of FEBRUARY, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

For Appellants: - No appearance

For Respondent: - Mr. Wanyama HB Ayieko

RULING delivered virtually.

MARY KASANGO

JUDGE