



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCC. MISC APPLICATION NO. E293 OF 2020

PATRICK KINYUA JAMES.....1ST APPLICANT

EUNICE NJERI WAMBUGU.....2ND APPLICANT

AMOS MWANGI MACHANGA.....3RD APPLICANT

VERSUS

DAVID KILUNGU MWAMBIA.....RESPONDENT

RULING

There is before me an application dated 5th and filed on 14th August, 2020 seeking an order that the proceedings in the lower court be stayed pending the hearing of an Appeal from the decision of the lower court.

The application which is by way of Notice of Motion under the cited provisions of law is supported by grounds set out on the face of the application and the supporting affidavit sworn by Mandela Chege advocate.

The application is opposed and there is a replying affidavit sworn by Wachira James Ichaura, the advocate for the respondent. Both counsel have filed submissions which I have on record.

The parties in the lower court had entered into a consent which the applicants herein sought to set aside. The lower court declined to set aside the said consent leading to the appeal filed herein. The authorities cited by the parties have sufficiently addressed the subject of setting aside a consent order, while at the same time addressing the subject of stay of execution.

From the facts, it is clear the application was filed timeously because, the applicants were made aware of the lower court ruling on 3rd August, 2020 which had been delivered on 21st July, 2020. This application was filed on 14th August, 2020 which was about 10 days from the date the applicants became aware of the ruling. In deciding applications of this nature courts have been guided by several decisions.

In the case of **Board of Trustees, National Social Security Fund vs. Michael Mwalo (2015) e KLR**, the court had the following to say,

“A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of Court.”

See also **Kenya Commercial Bank Limited vs. Specialised Engineering Company Limited (1982) KLR 485**.

The ruling of the lower court which is the subject of the appeal has not been annexed so as to guide the court in this application. I have noted the submission that no litigant should be locked out of the seat of judgment, and that every party has a right to have his day in court. Justice however looks at both sides. Whether or not the appeal is arguable is another point to look at in such applications.

In the supporting affidavit paragraphs 5, 6 and 7 there is *prima facie* evidence that the documents relied upon to arrive at the consent now being contested are not consistent. That alone is sufficient to justify this court giving the applicants an opportunity to challenge the consent order recorded based on the said material.

The foregoing being the case, there shall be a stay of execution in terms of prayer 3 and leave granted to file the appeal out of time within

30 days from the date of this ruling. The memorandum of appeal shall be deemed to be filed on payment of requisite fees within seven (7) days of the date of this ruling. Costs shall be on appeal.

Dated and delivered at Nairobi this 25th day of February, 2021.

A.MBOGHOLI MSAGHA

JUDGE