

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS APPLICATIONS NOS. 154, 155 AND 156 OF 2019

(Formerly Bungoma HC Misc. Nos. 67, 68 and 69 of 2019)

DAVID MUCHELE.....1ST APPLICANT

PHYLIS NAFULA.....2ND APPLICANT

VERSUS

SILAS WAFULA BARASA.....1ST RESPONDENT

EZEKIEL ANZAI BUNYOGA.....2ND RESPONDENT

RULING

1. The miscellaneous causes herein were initiated by way of Notices of Motion, dated 12th July 2019. The applications sought stay of execution of decrees that had been passed against the applicants in Butere SRMCCC Nos. 23, 24 and 25 of 2015. The judgements in all three suits were said to have been delivered on 25th November 2016. From the affidavits, sworn in support, the applicants express themselves to be aggrieved with the outcomes of those proceedings and would like execution of the decrees stayed, to await the outcome of appeals that they intend to file. The three Motions have not been consolidated, but I shall determine them simultaneously.

2. Although the prayers sought in the Motions refer to judgments delivered on 25th November 2016, copies of the said judgements are not attached, so I have nothing before me, by way of evidence, that any such judgments were ever delivered on the dates indicated. I can, however, see copies of decrees, dated 25th November 2016, and certificates of stated costs of even date. There are also warrants of attachment, whose dates of issue are not indicated. Then there is a proclamation by the auctioneers, dated 2nd May 2019, and an invoice.

3. The decrees date back to November 2016, while stay is being sought in July 2019, roughly two and a half years later. Under section 79G of the Civil Procedure Rules, Cap 21, Laws of Kenya, an appeal, from a subordinate court to the High Court, should be filed within a period of thirty days, from the date of the decree appealed from. It is two and half years and no appeal has been filed, or, put differently, there is no evidence that an appeal has been filed. There is also no evidence that any steps have been taken towards filing one, if one has not been filed yet. There is equally no evidence that extension of the time for filing appeal has been sought or granted by the court.

4. Stay of execution pending appeal is available only where an appeal has been filed. It would, therefore, be idle for a party, against whom a decree was passed two and half years ago, to purport to move the court for stay of execution pending appeal, when he has not filed any, and when he is hopelessly out of time for filing one. This is a classic example of what abuse of court process is about. No explanation has been given at all for the failure to file appeal. Ideally, the stay should have sought simultaneously with an application for extension of time to appeal.

5. Additionally, copies of the judgments, and of the proposed memorandum of appeal, have not been attached to enable the court assess whether or not there could be some ground of appeal, from which to gauge whether a proposed appeal, based on the same, would stand some degree of success. The court is left to largely swim in the dark. The applicants appear to harbour this notion that the mere existence of a decree and evidence of initiation of steps to enforce it, without more, would be sufficient to move the court to grant stay. That view, to say the least, is misguided. Stay orders are discretionary, and exercise of the discretion must be founded on some factual background, beyond existence of a decree and the fact that execution is imminent. The applicants have to justify grant of stay.

6. In this case, I am not persuaded that the applicants deserve grant of stay of execution of decree. Firstly, they have not demonstrated that they have filed appeal, yet the decree, whose execution they seek to stay, was passed over two years ago. Secondly, they have not demonstrated that they have taken steps towards filing an appeal, by obtaining leave to appeal out of time. Thirdly, they have not sought to explain their delay. Fourthly, they have made no offer at all on security for costs. And, finally, they appear to be merely reacting to the steps that the decree-holders have taken to levy execution of the decrees that they had obtained in their favour. Equity frowns on indolence, and the applicants have demonstrated that they have been gravely indolent.

7. I agree with the decision in *Suleiman Sumra & another vs. Said Mohamed Said* (2018) eKLR, that the court lacks jurisdiction to grant an order of stay before an appeal is filed. See also *Halia & another vs. Thornton & Turnpin (1963) Ltd* (1990) eKLR, *Benson Ngugi Muiruri vs. Kenya National Capital Corporation Limited* HCCC No. 1981 of 1993 and *Ujagar Singh vs. Runda Coffee Estates Ltd* (1966) EA 263, for the proposition that where no appeal is filed the court has no jurisdiction to entertain an application for stay of execution.

8. Jurisdiction is at the heart of any class of proceedings before a court of law. The position on the impact of lack of jurisdiction was articulated by the Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, in the following terms:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. I need not say more. The Notices of Motion in Kakamega HC Miscellaneous Applications Nos. 154, 155 and 156 of 2019, dated 12th July 2019, are wholly without foundation, and I hereby strike them out with costs. It is so ordered

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF FEBRUARY 2020

W. MUSYOKA

JUDGE