



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 453 OF 2019

IRENE WAKENI MUTHEE.....1ST APPLICANT

GEORGE GITHEHU KARIUKI.....2ND APPLICANT

VERSUS

GRACE NYAMBURA.....1ST RESPONDENT

PURPLE ROYAL AUCTIONEERS.....2ND RESPONDENT

RULING

1. In their Notice of Motion application dated and filed on 19th June 2019, the Applicants herein sought leave to file an appeal out of time and an order of stay of execution pending the hearing and determination of the Appeal herein. On the same date, the 1st Applicant swore an Affidavit on her own behalf and on behalf of the 2nd Applicant herein. She also swore a Supplementary Affidavit on 6th December 2019. The same was filed on 9th December 2019.

2. The Applicants contended that the Learned Trial Magistrate entered a Summary Judgment against them for the sum of Kshs 100,000/= plus interest at twelve (12%) per cent following concealment and/or suppression of material facts and misrepresentation. They denied ever having been served with a Hearing Notice. They added that the proclamation was unlawful as the Respondents attached the 2nd Applicant's goods yet he was not party to **Civil Suit No 5588 of 2014** and thus urged this court to grant them an order for stay of execution pending appeal because if the said order was not granted, their Appeal would be rendered nugatory.

3. They further averred that they were never aware of the hearing dates given in court and hence the delay in not filing their appeal out of time was inadvertent and excusable and could not be attributed to negligence and/or recklessness on their part. She also denied ever having instructed the firm that filed List of Documents.

4. It was their contention that their application had been made in good faith and that if the same was granted, it would not be prejudicial to the Respondents herein. They thus urged this court to allow their application as prayed as it was in the interests of justice to do so.

5. In opposition to the said application, the 1st Respondent swore a Replying Affidavit on 24th October 2019. The same was filed on 30th October 2019. They termed the present application as defective, irregular, unlawful, unprocedural, scandalous, frivolous, vexatious and an abuse of the court process. It was her contention that the present application was brought under the wrong provisions of the law.

6. It was her averment that on 19th September 2019, the court confirmed that parties had complied with Order 11 of the Civil Procedure Rules and that despite having been served with a Hearing Notice, she did not attend the hearing on 14th November 2018. She stated that she took out execution proceedings as the 1st Applicant did not appeal against the summary judgment that was entered in her favour. She therefore urged this court to dismiss the present application with costs to her.

7. As a preliminary issue, this court found it prudent to address the 1st Respondent's assertion that since judgment had already been entered, the Applicants' advocate came on record irregularly without seeking leave of the court to come on record and hence the entire application ought to be struck out. The Applicants did not address this issue as the same was raised for the first time in the 1st Respondent's Written Submissions.

8. A perusal of the Applicants' application showed that their advocates had sought leave to come on record after judgment. It was evident that when the matter was certified urgent and directions given to fix a hearing date at the Registry, leave for the firm of M/S Gichuki Karuga & Co Advocates to come on record was not granted. This leave was granted on 8th October 2019 and the matter listed for inter partes hearing and/or for further orders and/or directions.

9. As at the time the Applicants filed the present application, their previous advocates on record were M/S Goretti Munialo Mwimali & Co Advocates. Notably, M/S A. N. Ndambiri & Co Advocates filed the suit in the lower court. This information was brought to the attention of the court when the Respondent filed her Replying Affidavit. It was therefore not true as the 1st Applicant's advocate told the court that she was acting in person. It was on that basis that the court granted her said advocates to come on record.

10. In view of the non-disclosure of material facts, this court agreed with the Respondents that the coming on record of M/S Gichuki Karuga & Co Advocates for the Applicants was irregular and null and void *ab initio*. Indeed, the present application seeking leave to file an appeal out of time and an order for stay of execution pending appeal was incompetent and defective.

DISPOSITION

11. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Notice of Motion application dated 18th June 2019 and filed on 19th June 2019 erroneously intimated to court by the Respondents advocates on 28th July 2020 as having been dated 8th December 2019 and filed on 9th December was incompetent *ab initio* and the same is hereby dismissed with costs to the 1st Respondent herein.

12. The status quo order issued on 8th October 2019 be and is hereby set aside and/or vacated as the said order would not have been granted had the Applicants disclosed all the facts on the said date.

13. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of October 2020

J. KAMAU

JUDGE