



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E235 OF 2020

KIHIA MWANGI.....1ST APPELLANT

PAUL MWANGI NYOTA.....2ND APPELLANT

MISTER DELIVERY LIMITED.....3RD APPELLANT

VERSUS

HENRY WACHIRA NJERI.....RESPONDENT

RULING

1. In the Notice of Motion dated 22nd October 2020, the appellants/applicants principally seek orders of stay of execution of the ruling of *Hon. DO Mbeja (MS)* delivered on 25th September 2020 and any consequential orders pending hearing and determination of their appeal.
2. The application is supported by the grounds set out on its face and the depositions made in the supporting affidavit sworn by *Mr. Kihia Mwangi*, the 1st applicant on his own behalf and on behalf of the other two applicants.
3. On the date the application was scheduled for hearing, the respondent though served with a hearing notice did not attend the court's virtual session and had not filed any response to the application. The application thus proceeded for hearing *ex parte*.
4. In his oral submissions, learned counsel for the applicants *Mr. Otieno* urged me to allow the application mainly on grounds that the application was unopposed and secondly and most fundamentally, he invited me to note that there was no valid judgment capable of being executed as in his view, the judgment the respondent seek to execute was reinstated after a second application for review and was thus illegal; that the illegality of the judgment was confirmed by this court (*Hon. Njuguna J*) in proceedings in which the respondent participated in.
5. Counsel further argued that in entertaining the second application for review, the trial court contravened the provisions of *Order 45 Rule 6* of the *Civil Procedure Rules*. He also informed the court that the applicants were ready to deposit a bank guarantee as security for due performance of the decree.
6. I have carefully considered the application, the averments in the 1st applicant's supporting affidavit and the oral submissions made before me by learned counsel *Mr. Otieno*. I have also read the ruling delivered by *Hon. Njuguna, J* on 13th February 2020 and the annexures to the applicants supporting affidavit.
7. From the ruling delivered on 13th February 2020, it is clear that *Hon. Njuguna, J* was determining an application which sought stay of execution of a judgment delivered on 20th August 2019 which the learned trial magistrate subsequently set aside and re-opened the suit filed in the lower court for fresh hearing. The judgment was set aside vide the trial court's ruling dated 17th December 2019 but by this date, the 1st and 2nd applicants who were some of the defendants in the suit had already filed an appeal to the High Court challenging the said judgment and an application for stay of execution of the judgment pending disposal of the appeal.
8. As the impugned judgment had been set aside by the time the application for stay was heard, the Hon. Judge correctly dismissed the application on grounds that there was no judgment whose execution could be stayed or appealed against and that any execution levied against such a judgment would be illegal.

The Hon. Judge in her ruling did not make any reference to the judgment which was subsequently reinstated following the ruling dated 25th

September 2020 which is the subject of this appeal.

9. In urging me to allow the application, the 1st applicant deponed that the reinstated judgment was the product of an illegality since *Order 45 Rule 6* of the *Civil Procedure Rules* expressly prohibited subsequent applications for review; that given the existence of the reinstated judgment, execution was now imminent; that if stay was not granted, execution would proceed and the applicants will suffer substantial loss since the respondent was a man of straw and if their appeal succeeded, it will be impossible to recover any monies paid to the respondent.

10. In my view, the issue regarding whether or not the learned trial magistrate contravened the law in entertaining a second application for review and whether or not the reinstated judgment was illegal goes to the merits of the appeal and it would be inappropriate for me to delve into the issue at this interlocutory stage lest I prejudice hearing of the appeal. What is clear from the record is that there is a judgment dated 20th August 2019 which is in force and although its legality is questioned in this appeal, it can nevertheless be executed against the applicants before the appeal is determined if the stay orders are not granted.

11. The question that this court must now resolve is whether the applicants have demonstrated that they are deserving of the exercise of the court's discretion in their favour by granting them the orders sought.

12. As stated earlier, the instant application was not opposed by the respondent. It then automatically follows that the respondent did not dispute the applicants claim that he was a man of straw and he was incapable of refunding the decretal amount if paid in the event that the applicants' appeal is successful.

13. I have noted that the decretal amount is in excess of KShs.2,000,000. This is no doubt a substantial amount and given the applicants undisputed claim that the respondent is incapable of refunding this money if the appeal succeeds, I am persuaded to find that the applicants have demonstrated that they are likely to suffer substantial loss if the stay orders are not granted.

14. In view of the foregoing and noting that the application was filed without unreasonable delay and the applicants have pledged to offer security for the due performance of the decree, I find that the applicants have met the threshold for grant of orders of stay pending appeal as stipulated in *Order 42 Rule 6 (2)* of the *Civil Procedure Rules*.

15. Having found as I have above, am satisfied that the application is merited and it is hereby allowed on condition that the applicants will provide a bank guarantee for the decretal amount from a reputable bank within the next 60 days failing which the stay orders granted will automatically lapse.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 26th day of November 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Otieno for the applicants

No appearance for the respondent

Ms Carol: Court Assistant