



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI

MISC. CIVIL APPLICATION NO. 204 OF 2019

PETER NJOROGE.....1ST APPELLANT/APPLICANT

ANDREW KAMAU NJOROGE.....2ND APPELLANT/APPLICANT

ANTONY WAWERU NJOROGE.....3RD APPELLANT/APPLICANT

VERSUS

PETER MUCHIRI NDUNGU.....RESPONDENT

RULING

This is an application by way of Notice of Motion seeking an order for stay of execution of the lower court order given on 21st February, 2019. The application is grounded on reasons set out on the face of the application alongside an affidavit sworn by one Andrew Kamau Njoroge who is one of the applicants herein. The application is opposed and there is a replying affidavit sworn by the respondent.

Both counsel have addressed the court orally on the application. However, I observe at this stage that some of the arguments advanced related either to the proceedings that took place in the lower court, or the intended appeal by the applicants. What I am supposed to address at this stage is whether or not the applicants have met the conditions for granting the orders sought in the application under the cited provisions of law.

Order 41 Rule 4 (2) may not be relevant in this application. The applicants have cited Order 42 Rule 6 of the Civil Procedure Rules among other provisions upon which such applications are considered.

If the record before me is correct, the orders of the lower court were granted on 21st February, 2019 and this application was filed on 28th February, 2019. It can be concluded therefore that the application was filed timeously. The other condition is that the applicants must show substantial loss may be incurred if the stay is not allowed.

It behoves this court to go back to the genesis of this dispute and in so doing also consider whether or not there is an arguable appeal in the circumstances of this case. The ruling of the lower court was based on admission of indebtedness of the applicants to the respondent. There were supporting documents upon which that ruling was premised, and the court having been persuaded that the applicants were indeed indebted to the respondent, made the order that is now sought to be stayed.

I have looked at Order 13 of the Civil Procedure Rules upon which judgment may be entered on admission. I agree, with respect, that the said provisions do not limit admission to pleadings only. In that regard it is important to set out the entire Order 13 Rule (1) and (2) of the Civil Procedure Rules. It reads as follows,

“1. Any party to a suit may give notice by his pleading, or otherwise in writing that he admits the truth of the whole or part of the case of any other party.

2. Any party may at any stage of a suit, where admission of facts have been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order or give such judgment, as the court may deem just.”

I have looked at the annexures in the form of correspondence and in particular “PMN6”. This was an email dated 25th February, 2019 by the counsel for the applicants. There is also the letter dated 19th July, 2018 by the same counsel addressed to the respondent. These two

documents show an unequivocal admission of the sum due by the applicants to the respondent and an undertaking to settle the same.

The applicants have not shown to the satisfaction of the court what substantial loss they are likely to suffer if the orders they have sought are not granted. On the other hand, going by the facts of this dispute, in the event the intended appeal succeeds, the respondent shall be in a position to refund the money subject to the decree.

I am not deciding the appeal at this stage, but what is clear is that, the applicants have not demonstrated an arguable appeal and are bent on postponing an obvious eventuality. This court is mandated under Sections 1A, 1B of the Civil Procedure Rules to facilitate determination of civil disputes in a just, expeditious and proportionate manner. If I were to allow the prayer for stay of execution, I will be going against the said objectives. The application cannot be allowed without resultant injustice on the part of the respondent.

If the applicants are serious in their quest to challenge the lower court order, they are hereby granted leave to file the appeal within 14 day from the date of this ruling.

Other than this, the application is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 30th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE