



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 783 OF 2016

NELSON I NJUGUNA KANINI.....APPELLANT/APPLICANT

VERSUS

ELIKANAH KAGUNDA KANGETHE.....RESPONDENT

RULING

1. This ruling seeks to determine a Notice of Motion dated 28th September, 2017, filed under the provisions of Article 159 (2) d of the Constitution, Order 42 Rule 6 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act seeking orders that there be stay of execution of the ruling/orders delivered on 16/12/2016 and 1/9/2017 in CMCC No. 2345 of 2015 pending the hearing and determination of the Appeal and that the costs of the Application be provided for.

2. The Application is premised on the grounds on the body of the application and the Supporting Affidavit dated 28th September, 2017 sworn by **the Applicant**. From the grounds advanced in support of application, the ruling/orders delivered on 16/12/2016 were appealed against by the Applicant whom at the same time made an application for stay of execution of the orders. The Application was heard in the lower court and a ruling delivered on 1/9/2017 granting the Applicant stay of execution on condition that he deposits the entire decretal amount in a joint interest earning account with a reputable bank within 30 days of the ruling to be operated by the parties' Advocates. The Applicant being aggrieved by the ruling intends to appeal against the same and also seeks a stay of execution of the same. It is deponed in the supporting affidavit that the subject matter of the suit is the property in question and the Applicant depones that depositing the title deed of the suit property would be more reasonable than depositing the decretal amount. He avers that rather if he is not allowed to deposit the title deed and the Respondent proceeds to execute, the Appeal would be rendered nugatory as the suit property would be sold. The Applicant is apprehensive that if the suit land is sold to satisfy the decretal amount, he shall not be able to recover the land in case the Appeal succeeds.

3. The Respondent filed Grounds of Opposition dated 1st November, 2017 on the grounds that the application is an abuse of the court process, vexatious and that the Applicant has not shown that the Respondent is not in a position to repay the decretal sum once the decree is satisfied.

4. This Application was canvassed by way of oral submissions in court. The Applicant pleaded that he is a peasant farmer who is not able to deposit the decretal sum in lump sum and that he also takes care of his aged mother with whom they reside in the subject property. The Respondent submitted that the Applicant's Advocate is not properly on record in that he did not seek leave to come on record after judgment in accordance with the provisions of Order 9 Rule 5 and 6. On merits, it was the Respondent's argument that the decree sought to be executed is a monetary decree and therefore the issue of the title does not arise. It was also submitted that the Applicant is a man of means with rental properties.

5. I have considered the Application, the grounds advanced by the Respondent and the submissions by both Counsels. It has been argued that the Applicant's advocate is not properly on record and that is an issue I would like to deal with first. The Respondent's argument ought to have been advanced under the provisions of Order 9 rule 9 and not order 9 rule 5 and 6. Order 9 rule 9 provides that;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

6. Therefore, it is true that the Applicant's Advocates ought to have filed a consent or sought leave of the court to come on record.

7. From the record, it is clear that the Memorandum of Appeal was filed by the firm of Geoffrey Monyanyi Sore Associates. The firm of V.

H. Awour & Co. Advocates filed a notice of change of Advocates on the 29/9/2017. No leave was sought by the said firm of Advocates to come on record in the matter.

8. In the premises, I find that the firm of V. H. Awour & Co. Advocates is not properly on record. The application is therefore struck out with costs.

Dated, Signed and Delivered at Nairobi this 19th Day of April, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*