



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 123 OF 2016

GEOFFREY KAMAU1ST APPLICANT

MUTISYA MATHEW MUTHINI2ND APPLICANT

VERSUS

SARAH MBETE MUTHOKA.....RESPONDENT

RULING

1. The application dated 22nd September, 2016 principally seeks orders that the orders herein dated 18th August, 2016 dismissing the Appellants application dated 8th April, 2016 for non- attendance be set aside and the said application be reinstated.

2. The application is based on the grounds stated on its face and is supported by the affidavit of Dominic Njuguna Mbigi, counsel for the Applicant. The failure by the Applicants side to attend court is blamed on the failure by the court clerk from the Advocates firm to diarize the date taken for the hearing of the application. That the said court clerk left employment and it was only when attempts were made later to fix the application for hearing that they were informed of the dismissal orders. It is further averred that the failure to attend court was not deliberate and that the Applicants are desirous of prosecuting the application. The Applicants are apprehensive that if the proceedings in the declaratory suit in the lower court are not stayed, the Respondent will thereafter commence execution proceedings.

3. The application is opposed. The Respondent, Sarah Mbeti Muthoka has stated that the application is an abuse of the court process. According to the Respondent, the Applicants have frustrated her efforts to execute the decree for close to five years now. It is further stated that the Applicants obtained an order of stay of execution in the primary suit on 28th October, 2014 following *interpartes* hearing of an application dated 24th February, 2014 on condition that the decretal sum be deposited in court within 30 days. That the decretal sum was not deposited and the subsequent application for stay and enlargement of time within which to deposit the decretal sum was dismissed. In the meantime the Respondent filed a declaratory suit and the Applicants filed the application dated 8th April, 2016 which was dismissed, hence the instant application.

4. The application was argued by way of written submissions. I have considered the said submissions.

5. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

6. Order 22 Rule 22 (1) of the Civil Procedure Rules provides as follows:

“22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof,

for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

7. Sufficient cause is established if the conditions set out in Order 42 rule 6(2) are met. (See for example the following persuasive authorities: **Tabro Transporters Ltd v Absalum Dova [2012] eKLR, Wachira Karani v Bildad Wachira [2016] eKLR**).

8. Turning back to the application at hand, from the material before the court, it is noted that judgment was entered in the previous suit on 7th November, 2011. It is not in dispute that the said judgment was set aside on conditional terms which were not met by the Applicants and the application for enlargement of time failed in the lower court, hence the appeal herein which was filed on 18th March, 2016 and thereafter the application dated 8th April, 2016 was filed. The application dated 8th April, 2016 sought orders of stay of execution of the decree and the enforcement proceedings pending the determination of the Appeal. Interim orders were granted on 8th April, 2016 and the application fixed for hearing on 28th April, 2016. However the application did not proceed on that date and the interim orders were extended for a further 21 days.

9. The Applicants fixed the application for hearing on 18th August, 2016. In the meantime the Applicants filed the application dated 24th June, 2016 seeking the extension of the interim orders. By then the interim orders had lapsed and the application failed. On 18th August, 2016 when the application came for hearing *inter partes* before me, there was no attendance by any of the parties. The application was dismissed, hence the present application.

10. Although the Applicants blame the court clerk for failure to diarize the application, no excerpt of the diary has been exhibited herein. It is also noteworthy that the Applicants returned to this court on 28th April, 2016 under a certificate of urgency and were granted an extension of interim orders for 21 days and thereafter took a hearing date in the registry for 18th August, 2016. There is no explanation to show whether the registry was not able to give them a hearing date within the 21 days. There is also no explanation why the extension of the interim orders was not applied for within the 21 days.

11. This court is not convinced that the Applicants handled this matter diligently. There is no satisfactory explanation given for the manner in which they have handled the application before this court. Indeed the Respondent’s complaints of delay by the Applicants in order prevent her from enjoying the fruits of her judgment appear justified.

12. With the foregoing, I find no merits in the application and the same is dismissed with costs.

Dated, signed and delivered at Nairobi this 21st day of June, 2017

B.THURANIRA JADEN

JUDGE