



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANOUS CIVIL APPLICATION NO. 105 OF 2014

ONESMUS WAMBUA MUTISO.....1ST APPLICANT

JACINTA MUENI WAMBUA.....2ND APPLICANT

VERSUS

LAWRENCE MUMO KYELI.....1ST RESPONDENT

WAMBUA MUTUA.....2ND RESPONDENT

MUTUKU REUBEN.....3RD RESPONDENT

WAMBUA REUBEN.....4TH RESPONDENT

KIOKO MWILU.....5TH RESPONDENT

RULING

The Application

The Applicants are seeking orders from this Court that they be granted leave to appeal against the ruling of the lower court issued on 27th day of June 2014 in the Principal Magistrate Court at Kangundo Civil Suit No. 129 of 2007, and that pending the hearing and determination of the intended appeal an order do issue staying of execution of the said judgment and decree of the lower court. The application is in a Notice of Motion they filed dated 7th July 2016, which is supported by an affidavit and further sworn on 17th December 2016 and 6th May 2016 respectively by the 1st Applicant.

The main ground for the Applicant's application is that the judgment delivered in a suit before the Senior Principal Magistrates Court at Kangundo being Civil Suit No. 129 of 2007 was being executed against the 1st Applicant, and the two Applicants herein were not parties to the said suit. To support this, the Applicants annexed copies of the Plaint that instituted the suit in the lower court and also copies of the Defence in the said suit

The Applicants contend that leave to appeal is required under Order 43 of the 2010 Civil Procedure Rules, since the order sought to be appealed against is not one of those orders that is appealable as of right and prior leave of the court is required to enable the applicants to appeal. The Applicants are apprehensive that the Respondents might execute the decree during the pendency of this application which may render the application and the intended appeal nugatory. The Applicants relied on the provisions of Article 50(1) of the Constitution on their right to a fair hearing, and on the decision in **Stephen Muchiri Njuguna vs Mueni Wambua & 5 Others, [2016] eKLR** where leave to appeal

was granted.

The Applicants submitted that they had met the conditions set out in the provisions of order 42 Rule 6 of the Civil Procedure Rules, and that they have an arguable appeal. Several judicial decisions were cited in support of this position.

The Response

The Respondents opposed the Appellant's application in a replying affidavit sworn on 21st July, 2014 by the 1st Respondent, while the 2nd – 4th Respondents response is in a Replying Affidavit sworn on 1st August 2016 by the 3rd Respondent. The 1st Respondent averred that the 1st Applicant has been a party to this suit from the beginning and was the 1st Defendant in the Kangundo Senior Principal Magistrates Court Civil Case No. 129 of 2007, and that he paid Kshs 90,000/=, which is part of the decretal amount, through his advocates on record in the lower Court. Further, that the Applicants' should deposit amounting to Kshs. 502,015/- into court before stay pending the determination and the appeal is granted

The 2nd–4th Respondents on their part stated that they were sued together with Wambua Mutua in the lower Court, and that the judgment at Kangundo was delivered against Wambua Mutua, and they are not part of the case.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The issue before the Court is firstly, whether leave to appeal should be granted to the Applicants, and secondly, whether the judgment and decree of the trial Court in Kangundo Senior Principal Magistrates Court Civil Case No. 129 of 2007 should be stayed pending the hearing of the appeal herein.

On the first issue, section 75 of the Civil Procedure Act provides as follows as regards orders from which appeals lie:

(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) an order under section 64;

(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

Order 43 of the Civil Procedure Rules provides for appeals that lie as of right from orders and rules under the provisions of Section 75 of the Civil Procedure Act. I have perused the ruling that was delivered by the lower Court in Kangundo Senior Principal Magistrates Court Civil Case No. 129 of 2007 on 27th June 2014, that was annexed by the Applicants to their supporting affidavit. I note that the ruling was on an application made therein by the Applicants pursuant to Order 22 Rules 51 and 52 of the Civil Procedure Rules. This is not one of the Orders provided for in Order 43 Rule 1 of the Rules from which appeals lie as of right, and leave to appeal is therefore required as stated in Order 43 Rule 2 of the said Rules.

Order 43 Rule 3 of the Civil Procedure Rules in this regard provides that an application for leave to appeal under section 75 of the Act shall be in the first instance be made to the court making the order sought to be appealed from, either orally or at the time when the order is made or within 14 days from the date of such order. The Applicant ought to have made their application for leave to appeal in the lower Court, and their Notice of Motion is therefore incompetently filed before this Court.

The second issue for determination on stay of execution pending appeal accordingly becomes moot as no leave to appeal can be granted to the Applicants by this Court.

The Applicants' Notice of Motion dated 7th July 2016 is therefore struck out with costs to the Respondents.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 2nd day of August, 2017.

P. NYAMWEYA

JUDGE