



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC MISC APP. NO. 2 OF 2017

MARY MUTIE 1ST APPELLANT

DANIEL K. MUTIE 2ND APPELLANT

GIDEON MUTIE KIMANTHI 3RD APPELLANT

-VERSUS-

AYUB MWANIKI MWALILI RESPONDENT

RULING

1. The Applicants seek stay of the Execution of a Decree of **25/06/2014** issued by the **Makindu Resident Magistrate** pending hearing and determination of the Appeal. They also seek to file an Appeal out of time.
2. The court essentially is moved via **Order 42(6) (2)** and **Order 50 Rule (6) of CPR 2010**.
3. The Application is based on the grounds that the Notice To Show cause has been issued against Applicants.
4. The 1st Applicant is a single parent and applicants no 2 and 3 are her 2 sons.
5. The Applicants had filed an Appeal but it was dismissed for incompetence.
6. The Application is supported by the Affidavit of **Daniel Mutie** sworn on **07/02/2017**.
7. The same grounds are restated in the said Affidavit sworn by the Applicant No. 2.
8. In response to the instant Application, the Respondent via **Advocate Elizabeth K Isika** states that the application dated **07/02/2017**, is incompetent as similar Application was dismissed in **Machakos HCA 138/2015**. The decree remains unsatisfied.
9. Further the delay in filing of the Appeal is unexplained since the Appeal was dismissed on **09/11/2015**.
10. There is no demonstration that the Respondent cannot refund the Decretal amount in event the amount is paid and Appeal succeeds. No security is offered.
11. In any event, the Deponent has no authority to swear Affidavit for other Applicants.

12. When the matter came for hearing on **28/09/2017** only the Respondent Advocate attended.
13. Earlier on **08/03/2017**, the court gave directions that the parties to canvass the Application via Written Submissions and set the time lines for filing and service of the same.
14. As by **28/09/2017** none of the party filed the same submissions as directed. However the court fixed the Ruling date and gave a window of **14 days** for the parties to file and serve the same.
15. As by the time of preparing the instant Ruling, no party had complied with the said time lines.
16. The court thus opted to proceed without the benefits of the parties submissions.
17. On merit, the court finds that in the year 2014, the Applicant lodged **HCA 138/2014** together with a Notice of Motion dated **12/11/2014** for Stay of Execution of the decree pending Appeal.
18. After hearing the said motion, the orders of **Mutende J.** of **09/11/2015** were to the effect that **“.....the application is incompetent. Consequently it is struck out with costs to the Respondent.”**
19. There is no evidence that the **Appeal No. 138/2014** was struck out. In absence of any order striking or dismissing the same, the same is deemed to be still alive and pending.
20. The court thus rejects the Application to extend time to file an Appeal.
21. The Application sought for Stay of Execution is being sought in Miscellaneous Application while the Appeal is still pending in **Machakos HCA 138/2014**.
22. This renders the same Application inappropriate and incompetent for not being lodged in the pending Appeal file.
23. In any event the delay between **09/11/2015** when the Application for Stay was truck out to **08/02/2017** when the instant application was filed is not explained.
24. The end result is that the entire application herein is incompetent and struck out with costs.

SIGNED DATED AND DELIVERED THIS 18TH DAY OF OCTOBER, 2017.

C. KARIUKI

JUDGE

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