



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 60 OF 2015

PETER KITHINJI.....APPELLANT

VERSUS

MOSES MURIUNGI M'BWIRIARESPONDENT

R U L I N G

This Ruling is dated 19th January, 2016 and seeks orders: -

- a. ***THAT the Honourable Court be pleased to certify this application urgent and the same be heard ex-parte in the 1st instance.***
- b. ***THAT the Honourable Court be pleased to issue an order of stay of execution of the decree/judgment dated 30th November, 2015 in Githongo SRMCC 24/2015 pending the hearing and determination of this application.***
- c. ***THAT the honourable Court be pleased to issue an order of stay of execution of the decree/judgment dated 30th November 2015 in Githongo SRMCC 24/2015 pending the hearing and determination of the appeal herein.***
- d. ***THAT the Honourable Court be pleased to issue an interim order of injunction restraining the respondent by himself, his agents, assigns and or persons claiming under him from entering into, remaining in LR. ABOTHUGUCHI/IGANE/2449 pending the hearing and determination of this application inte-parties.***
- e. ***THAT the Honourable Court be pleased to issue an interim order of injunction restraining the respondent by himself, his agents, assigns and or persons claiming under him from entering into, remaining in LR. ABOTHUGUCHI/IGANE/2449 pending the hearing and determination of the appeal herein.***
- f. ***THAT the Honourable Court be pleased to issue such other and better orders as may meet the ends of justice.***
- g. ***That the costs be costs in the cause.***

The application is supported by the affidavit of PETER KITHINJI and has the following grounds:-

1. ***THAT the appellant being aggrieved by the judgment/decision by the trial Magistrate in Githongo SPMCC 24 of 2015 has preferred this appeal.***

2. ***THAT the impugned judgment/decision amounts to a wanton miscarriage of justice.***
3. ***THAT the trial Magistrate utterly failed to make a determination of the issues before him.***
4. ***THAT this appeal has been filed expeditiously.***
5. ***The appellant stands to suffer immeasurable /irreparable loss and damage unless stay is ordered.***
6. ***THAT the appeal has overwhelming chances of success.***

At the exparte stage, this Court, in the interest of justice, granted prayers b and d.

The application was heard interpartes through Oral Submissions on 29/02/2016.

The applicant told the Court that in the intended Civil Appeal, as elaborated in his Memorandum of Appeal, he was challenging the judgment of the Honourable Mayamba, Senior Magistrate at Githongo Law Courts. He submitted that if stay of execution was not granted, he would suffer irreparable damages and the suit would be rendered nugatory. It was proffered by Mr. Mokua, his Advocate, that he was ready to deposit security as directed by the Court.

The Respondent opposed the application and submitted that what was at issue was a money decree lawfully obtained by the respondent. He said that the applicant/appellant received a sum of Kshs. 560,000/= from the Respondent in accordance with their agreement but failed to offer specific performance. He said that the appellant/applicant had retained the money since 2014. Mr. Muthamia for the Respondent opined that this amounted to unjust enrichment. He urged the Court to find that the application for stay of execution was not meritorious.

Having perused the judgment of the Hon. Magistrate in the lower Court, I find that the Appellant's/Applicant's prayers for an order of Injunction are not meritorious as the judgment being impugned is a money judgment.

The defendant does not deny having received at least the sum of Kshs. 560,000/= from the respondent. At this stage, I do not wish to delve into matters which can only be determined after the hearing of the intended appeal, if it is eventually admitted to hearing. I, however, do not intend to reinvent the wheel. At the interlocutory stage, I am guided by the approach adopted by the Court of Appeal in *Mbuthia versus Jimba Credit Corporation* [1988] KLR 1. The Court opined as follows:-

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge had gone beyond his proper duties and made final findings of fact on disputed affidavits.”

As what is being challenged is a money judgment, having weighed the relative weight of the parties' propositions, and as I have already indicated, I am inclined to deny the applicant/appellant the Injunctive Orders he has prayed for.

I do note that the judgment which is being challenged awarded the Respondent the sum of Kshs. 560,000 and interest to be calculated with reference to specified time frames. I will grant an order for Stay of execution of the judgment subject to the following condition:-

1. ***The Applicant/Appellant must deposit in Court the sum of Kshs. 600,000/= as security within 30 days of the delivery of this ruling failing which execution of the Judgment will proceed.***

For avoidance of doubt, I dismiss the prayers for injunctive orders sought by the Applicant/Appellant.

Costs shall be in the cause.

It is so ordered.

Delivered in open Court at Meru this 23rd day of March, 2016 in the presence of:-

CC: Daniel/Lilian

P.M. NJOROGE

JUDGE