



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL 28 OF 2008

STEPHEN MUCHIRI NJUGUNA.....APPELLANT/JUDGEMENT DEBTOR

VERSUS

MUENI WAMBUA.....RESPONDENT/JUDGEMENT CREDITOR

AND

DANIEL WACHIRA NJUGUNA

DAVID KARIMI MUCHIRI

PETER KARIUKI MUCHIRI

TABITHA WAGATWE NJUGUNA

ROSEMARY NYAGUTHI KABIRU.....OBJECTORS/APPLICANTS

RULING

1. This is an application for stay of execution brought under Orders 22 and 43 Rule 1 (2) of the 2010 Civil Procedure Rules. The applicants have also sought leave to appeal against the ruling dated 18th April 2013. Finally, they seek an order that the costs of this application to be provided for.

2. The applicants have raised three grounds in support of their application. The first ground is that they intend to file an appeal against the magisterial ruling or order dismissing their objection to the attachment and sale of the suit land. The second ground is 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. Prior leave of the court is required to enable the intending applicants/objectors to appeal. The third ground is that the applicants are apprehensive that the respondent might execute the decree during the pendency of this application. They say that this may render the application and the intended appeal nugatory.

3. In addition to the grounds in support of the application, the applicants' application is anchored in the supporting affidavit of Daniel Wachira Njuguna, being the 1st applicant. He has deponed that he is authorized to make this affidavit to which he has annexed a copy of the authority to plead dated 11th July 2012, which is made pursuant to Order 1 Rule 13 of the 2010 Civil Procedure Rules. He has also deponed that they are dissatisfied with the ruling of the court dated 16th April 2013 and that they intend to appeal against that ruling. Furthermore, he has deponed that they have been advised by their advocate, which advice they have believed that leave to appeal is a mandatory requirement under Order 43 of the

2010 Civil Procedure Rules, in respect of the magisterial ruling that dismissed the applicants' objection to attachment and sale of the suit land reference No. LR Mutira/Kaguyu/4708.

4. The applicant has further deponed that their intention to appeal may be defeated if the respondent executes the decree and this may render nugatory the ruling which they intend to appeal against. Finally, he has deponed that it is in the interests of justice that the court grants an order of stay of execution and thereafter grant them leave to appeal. Counsel for the applicants has filed written submissions in support of their application, which I have considered.

5. The respondent has opposed the applicants' application. In support of the opposition of the applicants' application 31st July 2013, the respondent has deponed to a nine paragraph replying affidavit. In that affidavit, amongst other matters, she has deponed to the following matters. The first one is that the application is frivolous, vexatious and an abuse of the court process in that the same is dated 31st July 2013 and was filed in court on 2nd September 2013 and yet it was not until 25th November 2015, that the applicants prosecuted it *ex-parte*. Additionally, they got orders of stay of execution against the respondent during those *ex-parte* proceedings.

6. Secondly, she has deponed that the applicants are not honest and they merely want to frustrate her from enjoying the fruits of her judgement, which was delivered by the trial court on 5th February 2008. Furthermore, she has deponed that the appeal which they filed was dismissed on 29th November 2011 with costs. It is also her affidavit evidence that the application is made in bad faith. And finally she has deponed that she believes her counsel's advice that the application is fatally defective in law and is brought under the wrong provisions of the law.

7. I have considered the affidavit evidence of both parties. I have also considered the rival submissions of both counsel. I find that there is conflict of interest between the rights of the decree holder and those of the applicant/objectors. As a decree holder, the respondent has a right to enjoy the fruits of the judgement. And as a judgement debtor or objectors they have a right to have the order appealed against reviewed. It is therefore clear that there is tension arising out of the conferment of those legal rights on the decree holder and the applicant/objectors. The court is therefore required to strike a balance between these conflicting interests of the decree holder and the applicant/objectors in this case.

8. After considering the affidavit evidence and the submissions of both counsel, I find that there is merit in the application of the applicants. It is important to point out that unless stay is ordered, the respondent may execute the decree in her favour thus rendering the intended appeal nugatory. As regards leave to appeal out of time, I find that under Order 43 of the 2010 Civil Procedure Rules, prior leave of the court is required to enable the applicants/objectors to appeal against the order of the magisterial court. I therefore grant leave to the applicants/objectors to enable them to appeal against the order. The reason for this is that the two orders sought by the applicants are intertwined and inseparable.

9. In the circumstances, I grant prayers 1 and 2 of the applicants'/objectors notice of motion dated 31st July 2013, on condition that the applicants/objectors deposit in court the decretal sum of Kshs 882,200/- and the taxed costs in the sum of Kshs 105,000/- within 30 days failing which the orders granted herein will lapse.

10. Costs of this application will be costs in cause.

RULING DELIVERED, DATED and SIGNED in open court at **EMBU** this **10th** day of **AUGUST 2016**.

In the presence of Ms Muriuki holding brief for Mr. E. Njiru for the applicant/objectors and in the absence of both Ms Rose Njeru for the Appellant/judgement debtor and Mr. Kiguru Kahiga for the Respondent/judgement creditor

Court clerk Njue

J.M. BWONWONGA

JUDGE

10.08.16