



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPL. NO. 165 OF 2016

ALBERT SIMON MWAMBO..... 1ST APPLICANT

MGANGA ALBERT..... 2ND APPLICANT

V E R S U S –

MARTIN MULWA MUENI & BONIFACE ANGINA

Suing as administrators of the estate of the late

JOSEPH MUENI KATUMA (DECEASED).....RESPONDENT

RULING

1. The applicants took out the motion dated 17th May 2016 and 23rd June 2016. In the first application, the applicant sought the following orders

1. THAT this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.

2. THAT the Order of the Honourable Serгон Judge made on the 16th day of May 2016 dismissing the application dated 18th day of April 2016 for non-attendance be set aside

3. THAT application dated 18th April 2016 be reinstated.

4. THAT this honourable court be pleased to stay all and /or any further proceedings in the subordinate court CMCC No. 4569 of 2014 and particularly execution of the judgment and decree therein dated 8th March 2016 pending the hearing and determination of this application.

5. THAT the costs of this application be in the cause of the appeal.

2. In the second application dated 23rd June 2016 they sought

orders to effect that

1. THAT this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.

2. THAT there be stay of execution of the judgement of the Honourable Magistrate E. Usui in

Nairobi CMCC No. 4569 of 2014 delivered on 18/03/2016 pending the hearing and determination of this application.

3. THAT there be stay of execution of the judgement of the Hon. Magistrate E. Usui in Nairobi CMCC No. 4569 of 2014 delivered on 18/03/2016 pending the hearing and determination of this application and the application dated 17/05/2016 coming up for hearing on 04/07/2016.

4. THAT the costs of this application be in the cause.

3. The matter came up for interpartes hearing on 15th July 2016 and I directed that the two applications be heard together. The parties agreed to have the two applications disposed by way of written submissions, which submissions I have considered. I have also perused the affidavits filed for and against the application and considered the facts deponed therein.

4. In the first application the applicant is praying for reinstatement of the application dated 18th April 2016 which application I had dismissed for non attendance and also for stay of execution orders pending the hearing and determination of the application. The applicant's counsel claims that he was not present in court on 16th May 2016 due to unfortunate and inadvertent error on his part and that he highly regrets his actions. He claimed further that his absence in court was caused by human error in the office diary where the matter was diarized as the lower court matter CMCC 4569 of 2014 and that upon realizing the error he rushed to court only to find that the application had been dismissed. He argued that the mistakes of a counsel should not be visited on the litigant and that the applicants should not be driven away from the seat of justice owing to the lapse of the counsel.

5. On their part the respondents argued that no excusable reason has been given for failure to attend court by the applicants especially given that the applicants have depicted a behaviour of filing mention and hearing notices and also appeal when time is up. They averred that these actions are not coincidental but intentional efforts to delay justice in the matter. They further stated that the applicants are not being truthful with the court with the alleged misdiarising of the matter since the page of diary attached reads that HC Misc 165/2016 an application pending appeal was coming up.

6. Having considered the explanation given by the applicants advocate for being absent when his application came up for hearing, I am inclined to believe the advocate's explanation that the matter was wrongly diarized as a trial court matter, which error is humanly possible. In the case of **Belinda Murai & Others – v – Amos Wainaina (1978) LLr 2782(CALL)** Madan J. A stated that the "door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. Moreover, I don't see what prejudice the respondents will suffer should the application be reinstated, heard and determined. As such, I hereby reinstate allow the applicants application and reinstate the application dated 18th April 2016.

7. Moving on to the 2nd application dated 23rd June 2016 where the applicants are seeking orders of stay of execution pending the hearing of this application and the one dated 17/5/2016. The applicants argues that on the principle of making the application without unreasonable delay, they are pursuing reinstatement of the application seeking to file the appeal out of time. On the principle of substantial loss, they submitted that the respondents are not in a position to repay the decretal sum should it be paid to them since they have not shown evidence of their willingness or ability to repay the decretal sum should the intended appeal be successful. They further contended that their motor vehicle registration number KBS 063 has been proclaimed by auctioneers and that the same is being disposed off and if disposed, then the appeal will be rendered nugatory.

8. On his part, the respondent submitted that the prayers sought in the current application are similar to those sought in the dismissed application dated 18th April 2016 which is an abuse of the court process and that the same should be struck out as provided in Order 2 rule 15 of the Civil Procedure Rules. They prayed that the two applications subjected of this ruling be dismissed.

9. This 2nd application has been brought under order 42 Rule 6 of the Civil Procedure Rules. The principles highlighted under that rule includes the fact that the applicant must be at risk of suffering substantial loss or the orders of stay of execution will fail to issue. The application must also have been brought without undue delay and the provision of security must also be considered.

10. On the first limb of suffering substantial loss, the applicant claims that the respondents are not in a position to repay the decretal sum. In their affidavit in support of the motion, they deponed that in case of execution, their motor vehicle registration no. KBS 063R will be sold yet it's their only means of earning a living hence if sold it will deny them their main source of income. The respondents on the other hand admit to sending auctioneers to proclaim the motor vehicle since there was no stay of execution order in place. Despite the allegations by the applicants that they are not people of means who can refund the decretal sum if the appeal succeeds, the respondents have not attached an affidavit of means. Once the applicant claims that the respondent is not a person of means hence not capable of refunding the decretal sum should the appeal succeed, then the burden of proof shifts to the respondent to illustrate to the court that they are persons of means by attaching an affidavit of means. That was not done in this case. The respondent chose to ignore these averments and solely based their arguments on striking out the application for lack of merit.

11. The applicants on their part have argued that the motor vehicle registration no. KBS 063R is likely to be disposed yet it's their only source of earning a living. The respondent has not disapproved this claim and I am convinced that indeed if the motor vehicle is disposed off, then the applicants will suffer substantial loss.

12. On the second principle, of filing the application without unreasonable delay, the applicants have intimated that the same is explained in the application dated 18th April 2016 that was dismissed. Given that I have reinstated the said application and will subsequently hear the same at another time, I will exercise my discretion and allow this application without further reference to this principle, which principle will by default be decided in application to avoid making a decision that will have some effect on the decision of the application.

13. On the third principle where the applicant is required to offer security. The applicants in the supporting affidavit deponed that they are willing to furnish security. I therefore grant orders of stay on condition that the applicant deposits the full decretal sum in an interest earning account in the joint names of advocates and or firms of advocates from both sides within 30 days from the date hereof. In default the motion will be treated as having been dismissed. Costs of the motion to await outcome of the application dated 18th April 2016.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent