



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO. 114 OF 2016

MALULA MAVUTI.....1ST APPLICANT
CHRISTINA MUTIE.....2ND APPLICANT
CATHERINE MAVUTI.....3RD APPLICANT
COSMUS MAVUTI.....4TH APPLICANT

VERSUS

PAUL MUSANGO MAVUTI.....1ST RESPONDENT
PHILIP JUMA MAVUTI.....2ND RESPONDENT
MESHACK MUTUNGI MAVUTI.....3RD RESPONDENT
JEREMIAH WAMBUA MAVUTI.....4TH RESPONDENT
JUSTUS NGUYO MAVUTI.....5TH RESPONDENT

*(Being an appeal from the Ruling of the Hon. M.M. Nafula, Senior Resident Magistrate
at Tawa Civil Case No. 72 of 2015 made on and dated 21st September, 2016
and al subsequent orders emanating therefrom)*

RULING OF THE COURT

The application

1. The Notice of Motion application before the court is dated and filed herein on **24th October, 2016** by the applicants. The application is brought pursuant to **Sections 1A, 3 and 3A of the Civil Act Rules 2 and Order 42 Rule 6 of the Civil Procedure Rules**. The application prays for the following orders;

- a. That the application be certified urgent and on the first instance be heard *ex-parte*.
- b. That the honourable court be pleased to issue an order staying further execution of the ruling

dated 21st September, 2016 in Tawa SRMCC No. 72 of 2015 and all orders emanating there from pending the hearing and determination of this application.

c. That the Honarouable court be pleased to issue an order staying further execution of the ruling dated 21st September, 2016 in Tawa SRMCC No. 72 of 2015 and all orders emanating there from pending hearing and determination of the appeal herein.

d. The costs of this application be provided for.

2. The application is premised on the grounds that the applicant has filed an appeal challenging the ruling dated **21st September, 2016**; that the applicant has an arguable appeal with chances of success; that the appeal shall be rendered nugatory if the application is not allowed and finally that it is in the interest of justice and fairness for the application to be allowed.

3. The applicants' case is that on 7th October, 2016, they were sentenced by the subordinate court at Tawa to serve jail term of five (5) days and pay Kshs. 50,000/- on basis of a ruling that the court had delivered on 21st September, 2016. The aforesaid ruling was based on proceedings that had proceeded *ex-parte* on the ground that the court was satisfied that the application and certificate of urgency dated 28th April, 2016 had been served upon the applicants by one **Alphonse Kyalo Kasimu**. The applicants allege that the said Alphonse Kyalo Kasimu never served the applicants on the alleged date or at any other date and is not known to them. The said Alphonse Kyalo Kasimu confirmed that he never served the applicants and on basis of that the applicants instructed their advocates to file an application to seek that the subordinate court sets aside its ruling and grant them a hearing on the application dated 28th April, 2016. The applicants' advocates on record, filed the application dated 11th October, 2016 on 12th October, 2016. Despite the process server having sworn an affidavit in which he confirmed he never served the applicants, the subordinate court declined to set aside the ruling and instead maintained that the applicants' only option was to appeal. As a result of the irregular proceedings the applicants' rights have been violated and they have already served jail on basis of proceedings that the applicants were not aware of. On top of serving the jail the applicants' are also condemned to pay a fine of Kshs. 50,000/= and which fine they have so far been unable to raise. The applicants' case is that they have already filed an appeal which has chances of success, and it is in the interest of justice and fairness that the court do stay the said orders. The applicants are apprehensive that since so far they have been unable to raise the fine the subordinate court may go ahead to substitute the fine with a jail term.

The Response

4. The application is opposed vide a Replying Affidavit sworn on **3rd November, 2016** by **Philip Juma Mavuti** on his own behalf and on behalf of the other respondents. The respondents' case is that this matter is extremely urgent and pleads for dispensation within the shortest time possible to alleviate anguish and trauma to many parties involved in it. The respondents' case is that this application like others before it, is mischievous calculated at defeating justice by avoiding and refusing to carry out legal orders issued by a lawful court in this country. The contempt of court matter arose out of blatant defiance and failure by the applicants to carry out a lawful court's order issued on the 11th November, 2015 by the lower court at Tawa that they to date continue to disobey and disrespect without any justifiable reason. The applicants are attempting to dupe this court by not disclosing ruling at Machakos High Court Civil Appeal Case No. 178 of 2014 where their application of stay of execution of the above order was dismissed on 29th March, 2016 and they were ordered to execute the lower court's order their intention to appeal notwithstanding. The claim and contention by the appellant that the application for contempt of court was heard *ex-parte* is false since the said application dated 28th April, 2016 was lodged under a certificate of urgency but the Senior Resident Magistrate at Tawa was satisfied that this was not an urgent matter and ruled as such, directing both parties to appear before her for an *inter-parties* hearing and which was heard in the open court on the 20th July, 2016. The respondents' case is that the applicants have willfully disobeyed to carry out a lawful order issued by the honorable Senior Resident Magistrate Nafula and directions for dispensation of the same is necessary to bring the matter to conclusive end. The

objective of contempt jurisdiction is calculated to protect the due administration of justice and maintenance of law and order which should never be in doubt whatsoever. The respondents pray that the court reminds the applicants of their responsibility and obligation to carry out the orders of Senior Resident Magistrate Nafula dated 11th November, 2015 of the Lower Court, Tawa.

Submissions

5. Parties made oral submission in court which I have considered.

6. The only issue that this court raises for determination is whether the applicants are in contempt of court with regard to the ruling issued on 11th November, 2015 by the Lower Court at Tawa. If the answer to that question is yes, then it is the considered view of this court that the applicants cannot be given audience by this court, and that their application must be stood over until such a time that they shall comply with court order.

7. The parties to this suit are all family members from different mothers but the same father. A dispute arose between them on the burial place of their father. That dispute was taken to court and in **SRMCC NO. 72 of 2015** at Tawa. A judgment was rendered by M.M. Nafula on 11th November, 2015 which directed the applicants to re-exhume the deceased body and the same be reburied in the previous grave as was previously ordered on 8th May, 2015 by Hon. Willy Cheruyiot. The applicant's were dissatisfied with the said judgment which they sought to appeal, and at the same time sought a stay of execution of the judgment in the court vide a Civil Appeal No. 178 of 2015. The application for stay was rejected by Justice Muriithi on 29th March, 2016. The appeal has never been heard.

8. The applicants have to date never complied with the court order issued on 11th November, 2015, and this is what led to the contempt proceedings whose affect this application seeks to stay.

9. To my mind, the cardinal rule of the law is that it has to be obeyed in equal measure by both the mighty and the lowly. There are express court orders in this matter which the applicants have, with impunity disobeyed. The applicants must know that as long as an order exists, it is lawful and must be obeyed. Even if the applicant don't like the order, they still must obey it first until such a time that they are able to vary it, review it, set it aside or successfully appeal it. While the applicants appealed the said ruling, their application for stay of execution was rejected by the court, leaving them with no option but to obey the court order. If they do not obey that order, it means that the applicants have no respect for the law or court, and so the court will not give them any audiences in this matter.

10. In the circumstances, the application by the applicants under consideration dated 24th October, 2016 is stayed and shall remain pending until the applicants comply with the judgment of the lower court in Tawa issued on 11th November, 2015.

11. In the upshot, the interim orders herein issued on 8th November, 2016, are herewith lifted and set aside, and the applicants barred from canvassing their application dated 24th October, 2016 in this court or in any other court with similar jurisdiction until such a time as the applicants shall have obeyed the judgment delivered on 11th November, 2015 by the Tawa Court.

12. The costs of these proceedings shall be for the respondents.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 8TH DAY OF DECEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Mr. Mutia for Appellants/Applicants

In person – Respondent

Court Assistant – Mr. Munyao