



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC MISC APPLICATION NO. 17 OF 2014

MARGARET KANINI 1ST APPELLANT
SIMON KIVUTI KIURA 2ND APPELLANT
JUSTA WAWIRA KIURA 3RD APPELLANT
JOHN MURIITHI KIURA 4TH APPELLANT
PETER NJERU KIURA 5TH APPELLANT
IRENE MUTHONI KIURA 6TH APPELLANT
ERNEST MWANGI NJOROGE 7TH APPELLANT

VERSUS

ALICE MUTHONI MURICHI RESPONDENT

BEING AN APPEAL FROM THE RULING DELIVERED ON 26TH AUGUST, 2013 BY HON. MRS WACHIRA – C.M AT EMBU CHIEF MAGISTRATE’S COURT CIVIL CASE NO. 242 OF 2012)

RULING

On 31st March 2014, this Court delivered a ruling in KERUGOYA ELC Civil Appeal No. 717 of 2013 dismissing an application by the applicants herein seeking stay of proceedings in Embu Chief Magistrate’s Civil Case No. 242 of 2012 pending an appeal against the ruling of Mrs Wachira Chief Magistrate Embu dated 26th August 2013. In dismissing that application, this Court found that no leave had been sought from the trial magistrate as required under **Order 43 Rule 3 of the Civil Procedure Rules** since the ruling sought to be appealed from arose from a ruling relating to lack of jurisdiction by the trial Court. It would appear that following that ruling, the applicants appeared before A.G Munene acting Senior Resident Magistrate Embu on 4th April 2014 who then proceeded to grant them leave to appeal against the ruling made by Mrs. Wachira Chief Magistrate on 26th August 2013.

Having obtained that leave, the applicants have now moved this Court by a Notice of Motion dated 16th April 2014 and filed herein on 22nd April 2014 seeking the following orders:-

1. *Spent*

2. *That the applicants be granted leave to file this appeal out of time*
3. *The applicants be granted stay of proceedings in the lower Court pending the hearing and determination of this application*
4. *That the applicants be granted stay of proceedings in the lower Court pending the hearing and the determination of the intended appeal*
5. *The costs of this application be provided for.*

The application is supported by the affidavit of JUSTA WAWIRA KIURA the 3rd defendant/applicant herein.

The application is opposed and grounds of opposition have been filed.

I have considered the submissions by both Mbuthia Kinyanjui advocate for the applicants and Njeru Nyaga advocate for the respondent.

The thrust of the submissions by counsel for the applicant is that a party should not be punished due to the mistake of his advocate. There is a long line of authorities in support of that argument including MURAI VS WAINAINA 1982 K.L.R 38 and PHILIP CHEMWENO & ANOTHER VS AUGUSTINE KUBENDE 1982 – 88 KAR 103 among others.

What has agonized this Court is whether infact the order of A. G Munene Ag. Senior Resident Magistrate dated 14th April 2014 granting the applicant leave to appeal against the ruling of Mrs Wachira, Chief Magistrate dated 26th August 2013 was infact proper leave as envisaged under Order 43 Rule 3 of the Civil Procedure Rules. That order reads as follows:-

“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the Court making the orders sought to be appealed from either orally at the time when the order is made, or within fourteen days from the date of such order” – emphasis added.

As no application was made orally before Mrs Wachira, Chief Magistrate on 26th August 2013 when she delivered the ruling subject of the intended appeal, such an application could only thereafter be made within 14 days with notice to the other side. That was not done. Instead, the applicant approached A.G. Munene Ag. Senior Resident Magistrate and obtained ex-parte orders granting leave to the applicants to appeal against the order of Mrs Wachira dated 26th August 2013. That was some eight (8) months later which is well beyond the time prescribed by law. That would be improper. It would mean that a party who required leave to appeal but who did not seek such leave as required in law would simply walk into the Court several months later and on an ex-parte application informs the trial Court:-

“I did not seek leave six months ago to appeal against the Court’s ruling. Give me leave”

I do not think that would be proper. Having not sought and obtained leave from Mrs Wachira, Chief Magistrate on 26th August 2013, the applicant could only obtain leave thereafter with notice to the other side as provided for under the provisions of Order 51 Rule 1 of the Civil Procedure Rules. I therefore find that the leave granted by A.G. Munene Ag. Senior Resident Magistrate on 14th April 2014 was improperly obtained and cannot therefore form the basis of this application to appeal out of time and to stay the proceedings in the lower Court.

Even assuming that there was a proper application before me, the applicants seek to halt the proceedings in the lower Court citing that Court’s want of jurisdiction. Those proceedings are on-going subject to what this Court will rule. No final decrees have been made therein because no judgment has been delivered and therefore it cannot be suggested that if no stay is granted, the applicants will suffer any substantial loss and neither has any sufficient cause been shown to warrant a stay of those proceedings. If anything the stay orders granted in KERUGOYA ELC APPEAL NO. 717 OF 2013 have only succeeded in delaying the determination of Embu Chief Magistrate’s Court Civil Case No. 242 of 2012. That is not in keeping with the provisions of the Constitution that justice shall not be delayed nor with

the overriding objectives of the Civil Procedure Act and Rules that cases be heard expeditiously. Issues of want of jurisdiction could form grounds of appeal if the applicant loses the case in the lower Court. This Court therefore declines to stay the proceedings in the lower Court.

Ultimately therefore, , this Court finds no merit in the application dated 16th April 2014 and filed herein on 22nd April 2014 and dismisses the same with costs. The Court further makes the following orders:-

1. ***The stay orders issued in KERUGOYA ELC CIVIL APPEAL NO. 717 OF 2013 staying the proceedings in Embu Chief Magistrate's Court Civil Case No. 242 of 2012 are hereby vacated and that case to proceed to hearing expeditiously***
2. ***For avoidance of doubt, KERUGOYA ELC CIVIL APPEAL NO. 317 OF 2013 is ordered struck out.***

It is so ordered.

B.N. OLAO

JUDGE

26TH JANUARY, 2015

26/1/2015

Before

Hon. Justice R. Limo

CC – Mbogo

Miss Ooga holding brief for Kinyanjui for Applicant – present

Respondent – absent

COURT: Ruling delivered in the presence of Miss Ooga holding brief for Kinyanjui for the Applicant and in the absence of the Respondent.

R. LIMO

JUDGE

26TH JANUARY, 2015