



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 180 OF 2014

JOSEPH GICHUHI T/A GAITARA SAW MILLS.....1ST APPELLANT

GERALD NJUGUNAT/A GAITARA SAW MILLS.....2ND APPELLANT

VERSUS

AGNES MWENESI SITEKAH(Suing on on behalf of the estate of

KADASI MASHETI(DECEASED)RESPONDENT

(Being an appeal from the Ruling of Hon. Nyagah - Molo Senior Principal Magistrate Court Case No. 394 of 2004 delivered on 25th November, 2014)

RULING

1. The Applicants who are the Appellants herein, by their application dated 27th May 2015 sought that this court do restore and extend interim orders issued to the Applicants in their Application dated 15th January, 2015 that was dismissed for want of prosecution. The applicants application dated 15th January 2015 was brought by the Appellants under the provisions of Order 42 rule 6 of the Civil Procedure Code and Section 3A and 63(e) of the Civil Procedure Act. It sought an order of stay of execution of the Judgment in Molo SPMCC No. 394 of 2004 pending the hearing and determination of the application and hearing of the appeal.
2. On the 16th January 2015, the court granted the applicants interim orders of stay of execution. When the application came up for interpartes' hearing, on the 21st May 2015 the applicants and/or their advocates failed to attend court and the application was dismissed for want of prosecution. The applicants thereafter filed another application dated the 27th May 2015 seeking reinstatement of the dismissed application dated the 15th May 2017 and stay of execution of the Molo SPMCC case No. 394 of 2004 under certificate of urgency the court declined to issue interim orders and a date for interpartes' hearing was taken for the 22nd June 2015. The court however stood over the hearing over to the 23rd June 2015.
3. Mr. Ngamange for the Applicants/appellants in his submissions relied on the applicants supporting affidavit sworn on the 27th May 2015 and the grounds on the face of the application. The main grounds in support of the application are that the applicants advocates then did not attend court when the application was listed for hearing leading to the dismissal, and that if application is not reinstated for hearing, the applicants shall suffer irreparable loss as a result of their advocates failure to attend court.
4. The Application is opposed by a replying affidavit sworn on the 18th June 2015 by the Respondent Agnes Mwenesi Sitekah.

Counsel for the Respondent relies fully on the said affidavit.

A chronology of the applicants attempts to obtain a stay of execution of the judgment is given, that at all times, it is the applicants who through change of Advocates whenever the application was listing for hearing with a view to getting adjournments and other dates given as it is very evident from the chronology appearing herebelow.

The Judgment, subject of the application was delivered way back in 2006-in favour of the Respondent.

The following applications were filed by the appellant since judgment was delivered.

1. Petition No. 24 of 2012 in the High Court at Nakuru Petitions failed to attend court. It was dismissed.
2. Misc. Application No. 243 of 2014 at High Court Nakuru filed on the 20th July, 2012.
3. A similar application was filed on 12th November 2012 by different advocates. Both were dismissed for want of prosecution.
4. Application filed on 13th March, 2014 by the firm of Macharia Mukini Advocates.
5. Change of advocates filed by the firm of Kiarie Kabita, Kihinyu Associates for the applicants on the 20th March 2014, for want of prosecution.
6. On 30th April 2014, the application was withdrawn.
7. Another application was filed in this court and the said application was dismissed on the 11th March, 2014, for want of prosecution.
8. 1st December, 2014 the applicants filed another application and before it could be heard, it was withdrawn and another filed on the 16th January, 2015. On the 21st June 2015, it was dismissed for want of prosecution. The applicants now have come seeking that their application dated 1st December, 2014 be reinstated for hearing, through a different firm of Advocates.

5. As urged by the Respondent the applicants have been filing a multiplicity of applications and change of advocates to buy time. I find that the applicants have not been serious as evidenced in their manner of filing what I would term as frivolous and vexatious applications and numerous changes of Advocates. Litigation must come to an end. The respondent has suffered in the process. Justice must be dispensed fairly to all parties and equally in each special circumstance.

6. The Applicants in this application did not urge the court on the multiple applications filed, and on the numerous changes of Advocates whenever the Applications were listed for hearing. Advocates for the Applicants invoked the courts discretion in granting orders of stay of execution, that the applicant must establish sufficient cause, furnish security and show substantial loss if stay orders are not granted. None of the above were substantiated. Mere allegations of the substantial loss cannot suffice. Evidence must be provided. The applicants have not furnished security for the due performance of the decree.

7. The applicants having not shown any satisfactory reasons to persuade the court to exercise its discretion in their favour, the application dated 27th May 2015 is found to be devoid of merit and is dismissed with costs to the Respondent. It is so ordered.

Dated, signed and delivered in open court this 24th day of June 2015.

JANET MULWA

JUDGE

In the presence of:

Ngamange for Appellant/Applicant

Ms. Kerigo for Respondent

Court clerk – Linah.