



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 95 OF 2014

(Being an appeal from the ruling of Hon. Principal Magistrate B. M. Kimemia (P.M.) delivered on 19th June, 2014 at Kitui in Civil Suit No. 89 of 2008)

JAPHETH MWANZIA MULE.....1ST APPELLANT

KATULU MUENDO.....2ND APPELLANT

VERSUS

PENINAH MUTUTE.....RESPONDENT

RULING

1. The application dated 25th June, 2014 seeks orders that there be a stay of execution of the judgment delivered in Kitui SRMCC No. 89 of 2008 pending the hearing and determination of the Appeal No. 95 of 2014.
2. The application seeks further orders that the judgment delivered on 23rd September 2008 and the consequential decree be set aside and the Applicants be given unconditional leave to defend suit No. 89 of 2008.
3. It is stated in the affidavit in support that the Applicants entered appearance and filed a statement of defence through the firm of Ms. Gertrude Matata & Co. Advocates who were instructed by their insurer, Standard Assurance Co. Ltd. That the suit proceeded ex-parte in the absence of the Appellant's counsel who did not inform them of the hearing date. The Applicants subsequently filed an application seeking orders of stay of execution and the setting aside of the ex-parte judgment but their application was dismissed, hence the appeal herein.
4. It is further averred that the Applicants were thereafter served with a notice to show cause why execution should not issue and specifically why they should not be committed to civil jail. That the Applicants stand to suffer substantial loss if they are committed to civil jail. The Applicants are apprehensive that their appeal which they say has high chances of success will be rendered nugatory. They are ready to deposit security for the due performance of the decree. The Applicants have further deponed that the Standard Assurance Co. Ltd has been placed under statutory management.
5. The application is opposed. It is deponed in the affidavit in support that there is no ex-parte judgment entered. That the counsels for the parties herein entered a consent judgment. It is

further stated that there is no stay of the proceedings or execution and that in any case the Applicant can clear the debt to avoid the committal to civil jail.

6. The Applicants filed a supplementary affidavit stating that the consent judgment was entered into without this consent. The Applicants blamed their woes on the placing of their insurance company on statutory management. It is further averred that the decretal sum of Ksh 131,853/= as at 13th February, 2014 is beyond their means.

7. The Application was canvassed by way of written submissions which I have duly considered.

8. Although the Applicants have applied for the setting aside of all the consequential orders and that the Applicants be given unconditional leave to defend the suit, granting the same would be tantamount to dismissing of the appeal at this interlocutory stage. The said prayers will therefore be dealt with during the hearing of the appeal.

9. Under **Order 42 rule 6(2)** of the **Civil Procedure Rules 2010** –

“(2) No order for stay of execution shall be made under subrule (1) unless –

- a. ***the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
- b. ***such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

10. The ruling that is the subject of this appeal was delivered on 19th June, 2014. The appeal herein was filed on 20th June, 2014. The appeal was therefore filed timeously.

11. On whether the Applicants stand to suffer substantial loss, it is noted that the entry of the consent judgment is not denied. The consent judgment was entered on 23rd September, 2008. It was not until the 24th March, 2014. That the application for the setting aside the decree was filed. This was rather late in the day.

12. Execution is a due process of the law. Whether or not the Applicants can be committed to civil jail is a matter to be decided upon by the lower court in the first instance. The substantial loss to be suffered by the Applicants has therefore not been established. There are no averments that the Respondent is unable to refund the decretal sum. With the foregoing, I find no merits in the application and dismiss it with costs.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 18th day of June, 2015

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B. THURANIRA JADEN

JUDGE