



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 141 OF 2014

GLADWELL WANGECHI KIBIRU.....PLAINTIFF

V E R S U S

LORD MELVIN JOHN BLACKBURN

LADY KATHLEEN BLACKBURN.....RESPONDENTS

RULING

(Being an appeal against the Ruling of the Honourable M.N. Gicheru, Chief

Magistrate delivered on 29.10.2014 in Mombasa CMCC No. 1078 of 2006)

1. GLADWELL WANGECHI KIBIRU, the appellant, previous to this appeal had filed another appeal being Mombasa HCCA No. 72 of 2011 against the judgment of 13th April 2011 in Mombasa CMCC No. 1078 of 2006. To the observant it will be clear that this appeal and the previous appeal are predicated on the same magistrate's Court file.
2. Appellant withdrew appeal No. 72 of 2011 and filed in CMCC No. 1078 of 2006 an application to review the judgment of 13th April 2011.
3. Before the appellant withdrew the appeal No. 72 of 2011 this court had considered and Ruled on application for stay of execution of the judgment in CMCC No. 1078 of 2006 of 13th April 2011. That Ruling was delivered on 17th October 2013.
4. Appellant having failed in her application to review the judgment in CMCC No. 1078 of 2011 filed this appeal against that decision. Now in this appeal appellant again seeks to stay the execution of the judgment of 13th April 2011 in CMCC No 1078 of 2006, pending the hearing and determination of this appeal.
5. Order 42 Rule 6 (2) of the Civil Procedure Rules sets out the conditions which an appellant must meet for stay of execution pending appeal to be granted. The conditions to be met are:

applicant must satisfy the court substantial loss will be occasioned if stay is not granted;

the application for stay of execution must be filed without unreasonable delay

the court can order the applicant to provide security for the due performance of the decree.

6. Those being the conditions to be met by an applicant they were then the subject of this court's Ruling of 17th October 2013 and for the appellant to again request the court to reconsider them is misconceived and against the principle of res judicata. Section 7 of the Civil Procedure Act prohibits a court to try an issue which issue has been heard and fully decided. The appellant from her affidavit evidence and from her submissions does not show any change of circumstances that would lead this court to reconsider the application for stay. The Notice of Motion dated 7th November 2014 therefore is res judicata.

7. It is for the above reason that I decline to reconsider the application for stay of execution and I adopt the orders made in Mombasa HCCA No. 72 of 2011 to apply to this appeal.

CONCLUSION

8. I make the following orders:

a. **There shall be a stay of further execution of Mombasa CMCC No. 1078 of 2006 pending the hearing and determination of this appeal on condition that the appellant does within 14 days provide a bank guarantee whereby the bank will give an undertaking to pay Kshs 5,500,000 if this appeal is determined in favour of the respondents.**

b. **In default of provision of a bank guarantee as set out in (a) above the stay shall automatically be vacated.**

c. **The 2nd respondent is awarded the costs of the Notice of Motion dated 7th November 2014.**

d. **Since the 1st respondent is said to be deceased appellant should apply to substitute him with his personal representatives if any.**

DATED and DELIVERED at MOMBASA this 21ST day of AUGUST, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A

For Appellant:

For 2nd Respondent:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE