



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 172 OF 2002

JEREMIAH KIMIGHO MWAKIO 1ST PLAINTIFF

PATRICK MULISHO 2ND PLAINTIFF

MOHAMED GODHANA 3RD PLAINTIFF

AMOS AMITAI 4TH PLAINTIFF

V E R S U S

TANA AND ATHI RIVERS DEVELOPMENTS AUTHORITY..... DEFENDANT

RULING

1. Reading the Plaintiffs' Notice of Motion dated 19th June 2014 one gets the idea that the Plaintiffs are indeed a frustrated lot as far as this matter is concerned.
2. The Notice of Motion seeks the following order-

“The orders of stay of execution pending appeal be discharged and set aside forthwith.”

BACKGROUND

3. Plaintiffs who were all employees of Defendant obtained judgment against the Defendant for Kshs. 4,969,440/- on 8th June 2005. Defendant filed on 15th June 2005 a Notice of Appeal and obtained stay of execution on 13th June 2005. The matter rested there until I believe Plaintiff became exasperated and filed an application dated 22nd November 2011 seeking orders that the Court do direct the Deputy Registrar to explain delay or to supply copies of proceedings to the Defendant to enable it file the appeal. That application was heard by me and I delivered a Ruling on 15th December 2011 and granted the following orders-

- a. **I direct the Deputy Registrar of this Court to supply the Defendant with certified copies of the proceedings for purpose of appeal within 20 days from today on payment of necessary fees.**
- b. **The stay of execution granted to the Defendant herein shall automatically be vacated within 30 days of such supply of those proceedings if the Defendant does not file and serve on the**

Plaintiff the appeal or an application for leave to file an appeal out of time in the Court of Appeal.

- c. **The costs of the Chamber Summons dated 22nd September, 2011 shall abide with the outcome of the pending appeal.**

PLAINTIFFS' SUBMISSIONS

4. The arguments in support of Plaintiffs' application are best captured by considering the depositions in the affidavit of their advocates Mr. Kinyua. He deponed-

- **By a Ruling delivered by this Court on 15.12.2011 the Court stated that the stay of execution shall automatically be vacated within 30 days if the Judgment Debtor failed to file and serve on the Plaintiff the Record of Appeal or an application for leave to file an appeal out of time.**
- **The excuse given by the Judgment Debtor is that the Judgment Debtor has not obtained proceedings from the Deputy Registrar. The proceedings have been on the file for more than 2 years. The Decree Holders have been able to file and prosecute 2 applications in the Court of Appeal using the same proceedings from the Court file.**
- **The Judgment Debtor refuses to collect the proceedings from the Court file to file the Record of Appeal on the excuse that the proceedings have not been certified.**
- **The Decree Holders have maintained that under the Court of Appeal Rules there is no requirement for certification of proceedings. The Judgment Debtor insists on obtaining certified proceedings only for its own purposes which include the delay of the filing of the Record of Appeal.**
- **Insisting on certified proceedings which are unnecessary for the purposes of an appeal amounts to a violation of Article 159(2)(b) and (d). As a matter of fact there is no technicality at all relating to certification of proceedings. The technicality is introduced by the Judgment Debtor for purpose of delaying justice and violating Article 159(b) of the Constitution.**
- **The Decree Holders have a right to a fair trial under Article 25(c) of the Constitution. That right has been violated by the refusal on the part of the Judgment Debtor with a blessing of the Court to file the Record of Appeal. A delay of more than 9 years to file the Record of Appeal amounts to a violation of that right.**

ANALYSIS

5. Although the Defendant filed Replying Affidavit on the very day that I entertained Plaintiffs' application, it was not brought to the attention of Plaintiffs' Learned Counsel and it was placed in the Court file after I had reserved my Ruling for today. That act of filing a Replying Affidavit the day of hearing and not serving it on Plaintiffs' Learned Counsel seems to me to be *modus operandi* of Defendant in this matter. Defendant has in my view delayed this matter for now nine (9) years. It is not entirely without blame. I will therefore not consider that Replying Affidavit since it was not served on the Plaintiffs' Learned Counsel.

6. I have perused this file and I have seen that by letter dated 20th February 2014 Defendant's Counsel wrote to Deputy Registrar inquiring about the certification of the proceedings. The Deputy Registrar by letter dated 7th July 2014 informed Defendant's Counsel that the proceedings were ready for collection. The typed certified proceedings are indeed on the Court record ready for collection. The Defendant has not, as far as I can tell collected those proceedings. Defendant needs to understand that it has obligations to ensure there is no further delay in this matter.

7. The orders that commend themselves are as follows-

- a. **The Defendant shall collect the proceedings within fourteen (14) days from this date hereof in default the stay of execution granted to the Defendant shall be lifted and the Plaintiff shall have the leave of this Court to proceed with execution without further application to this Court.**

- b. **The Plaintiffs are awarded costs of Notice of Motion dated 19th June, 2014.**

DATED and DELIVERED at MOMBASA this 28TH day of AUGUST, 2014.

MARY KASANGO

JUDGE