



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. 263 OF 2014
BENSON M. KIBIA
PATRICK M. KAGUNDU
CHRISTOPHER W. KAGOTHO.....APPELLANTS
VERSUS
FRANCIS MAINA KANUMBI
JULIUS M. GITHINJI
NGUGI MWANGI
(Suing as the officials of
MWANZO SELF HELP GROUP).....RESPONDENT

R U L I N G

1. Before me is the Chamber Summons dated 8th August, 2014. The application is expressed to be brought under Sections 3A and 63 of the Civil Procedure Act (Cap 21) Laws of Kenya and Order 42 Rule 6 of the Civil Procedure Rules, 2010. The Applicants essentially seek an order for stay of execution of the order and ruling delivered on 24th June, 2014 in Milimani Commercial Court CMCC No. 1910 of 2014 pending the hearing and determination of the intended appeal.

2. The grounds for which the application was brought were set out both in the body of the summons and in the supporting affidavit of Benson M. Kabia Patrick M. Kagundu and Christopher W. Kagotho sworn on 8th August, 2014. They deponed that; the ruling dismissed their application dated 25th June, 2014 in which they sought orders for stay of execution pending hearing and determination of the application and the intended appeal; that the order dated 24th June, 2014 restrained them from purporting to exercise the functions of the officials of Mwanzo Self Help Group, receiving money on behalf of the group or in any manner dealing with the Self-Help Group's land parcel No. Donyo Sabuk Komarock Block 1/7794 and also issued an interlocutory mandatory injunction compelling them to surrender title No. Donyo Sabuk Komarock Block 1/7794 and all documents and records belonging to Mwanzo Self Help Group to the current officials of the Group; that the dismissal of the application dated 25th June,

2014 exposed the Applicants to execution and/or compliance of the orders.

3. The Applicants further contended that if the said order is not stayed, the Applicants who are officials of the said group and the custodians of the group's documents and registered trustees of title No. Donyo Sabuk Komarock Block 1/7794 are likely to suffer substantial loss as the Respondents who are no longer members of the group having been suspended and dismissed are likely to deal with the said land and documentation of the group in a manner detrimental to the group; that the Respondents have in the past developed on portions of the said land without authority despite warning from the Applicants who are the group officials; that the Applicants have been in the office for the past fourteen (14) years and the Applicants' continuance in office pending hearing and determination of the appeal will not prejudice the Respondents in any manner and that the intended appeal has high chances of success and will be rendered nugatory in the event the orders sought in this application are not granted.

4. Mrs. Ochieng, Learned Counsel for the Applicants relied on the supporting affidavit and submitted that the intended appeal has overwhelming chances of success and may be rendered nugatory if the orders sought are not granted. On substantial loss, she submitted that the Applicants may lose their offices which they lawfully occupy and that the Respondents may deal with the property in question in a manner detrimental to the group. He submitted that the Applicants have been in office for fourteen years (14) years thereby no prejudice will be suffered by the Respondent if they stay in the office pending determination of the appeal. Finally, Mrs. Ochieng submitted that since the 1st and 3rd Respondents are no longer members of the group having been dismissed and suspended respectively, they may carry out activities detrimental to the group.

5. The Respondents opposed the applications vide their replying affidavit filed on 22nd August, 2014. They contended that; the Applicants have deliberately refused to obey a lawful court order while there is no stay order and therefore do not deserve to be heard unless they comply with the order; that the Applicants' term of fourteen (14) years in office was not in any way fruitful to the members hence the members agitating and holding a successful election through guidance of their relevant Ministry and Government officials; that the actions of the Applicants have grounded the operations of the group and their continued refusal to release the records of the welfare will force the group to collapse again which seems to be their intention; that it would be unfair and unjust to halt the operations of the welfare until the determination of the appeal all for the benefit of former officials who adamantly refuse to vacate office; that no substantial loss will be suffered by the Applicants rather the welfare stands to suffer substantial loss as its operations would be totally grounded; and the appeal cannot be rendered nugatory since the court can reinstate the Applicants back to office in the event the appeal succeeds.

6. Mr. Gatumuta, Learned Counsel for the Respondents submitted that the Applicants having disobeyed the court order do not deserve the orders sought; that no substantial loss will be suffered by the Applicants since they were voted out of office. He urged that in the event the appeal succeeds, the Applicants can be reinstated or fresh elections can be held thereby the appeal not being rendered nugatory. He finally submitted that the issue of membership can only be argued in the main appeal.

7. I have considered the depositions and submissions tendered in respect of the application. This is an application for stay of execution pending appeal. In such an application, three essentials have to be met by an Applicant, thus:

- a. he/she must show that the application has been brought timeously;
- b. he/she must show that if the stay orders are not granted he/she will suffer substantial loss; and
- c. he/she must give security for the performance of the decree or order that will ultimately be binding on him/her.

8. I shall address the issues seriatim. To be said to be timeous, I hold the view that an application for stay should be filed within the statutory time given for lodging an appeal in the High Court, that is, within thirty (30) days of the order sought to be appealed against. The ruling that the Applicants intend to appeal

against was delivered on 24th June, 2014 and this application was filed on 11th August, 2014 that is nineteen (19) days after the prescribed period. The question is whether that delay is unreasonable. To my mind, unreasonable delay is that which is likely to prejudice the Respondent beyond monetary compensation. In the instant case, the delay of 19 days is not inordinate as to occasion the Respondent any prejudice.

9. On substantial loss, the Applicants stated that they may lose their offices which they lawfully occupy and that since the 1st and 3rd Respondents are no longer members of the group having been dismissed and suspended respectively, they may carry out activities detrimental to the group. They held the position that they have been in office for fourteen years (14) years thereby no prejudice will be suffered by the Respondents if they stay in the office pending determination of the appeal. The Respondent are on the other hand of the opinion that that no substantial loss will be suffered by the Applicant rather the welfare stands to suffer substantial loss as its operations would be totally grounded.

10. The court in **Mukuma –v- Abuoga (1988) KLR 645** held that:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

It follows therefore that other than demonstrating that that execution has commenced or is likely to commence, the Applicants should establish that execution will irreparably affect them as the successful parties in the appeal. In view of the fact that the Applicants no longer hold the groups’ office and may be reinstated in the event the appeal succeeds, I find and hold that substantial loss has not been established. I am satisfied that if the appeal succeeds, the Appellants can be re-instated or fresh elections called.

11. In this regard, I find that the Applicants have not satisfied the essentials for grant of the stay sought. Accordingly, the application is dismissed with costs to the Respondents.

.....

A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 26th day of November 2014

.....

D. A. ONYANCHA

JUDGE