



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 139 of 2012

NTUYOTO MARASUA.....1ST APPLICANT

JOSHUA LENGETE SARBABI.....2ND APPLICANT

JOHN NKAITOLE MORORO.....3RD APPLICANT

MASIKONDE OLOLKEWEUA.....4TH APPLICANT

MAILUA GROUP RANCH.....5TH APPLICANT

VERSUS

AMBOKO OLE LAIMERI.....1ST RESPONDENT

PARMERES OLE NINA LALOGO.....2ND RESPONDENT

SUMPETI OLE KERETO KEGUTU.....3RD RESPONDENT

SUMARE OLE LEMONKOR.....4TH RESPONDENT

(Being an appeal from the original Ruling and Order in Kajiado Senior Resident Magistrate's Court

Civil Case No.15/2012 by Hon. P.A Olengo, PM On 8/8/2012)

RULING

The application dated 4th September, 2012 is brought pursuant to provisions of Order 42 rule 6(1), Order 51 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

It seeks stay of execution of orders in the Kajiado CMCC No. 15 of 2012 dated 9th August, 2012, pending hearing and determination of appeal.

It is premised on grounds set out in the body of the application and supported by an affidavit sworn by Ntuyoto Marasua, the 1st applicant having been authorised by his co-applicants.

In a reply thereto, Parmeres Ole Nina Lalogo, the 2nd respondent having been authorised by the 1st and 4th respondents swore a replying affidavit asking the court to dismiss the application arguing that the applicants had not satisfied the requirements for staying execution of the orders granted.

The application was canvassed by way of written submissions.

I have carefully considered the submissions alongside cited authorities.

Order 42 rule 6 (1) (2) grants this court the power to issue an order sought herein where it seems just. However, this order can only be granted if the court is satisfied that substantial loss may result if the order sought is not granted. Secondly, the application should have been made without unreasonable delay.

Issues we must consider are hence:-

- i. Whether the application was made without unreasonable delay.
- ii. Whether the applicant will suffer substantial loss if the order sought is not granted.

The order of the lower court was granted on the 9th August, 2012. The following day, the 10th August, 2012, the applicants' advocate applied for copies of the proceedings and the order. The letter was received on the 15th August, 2012. The application for stay of execution of proceedings in the matter was made and filed on 15th August 2012. It was then scheduled for hearing on the 30th August, 2012. According to the order dated 9th August, 2012, the applicants were compelled to produce subject documents on 30th August, 2012. Their quest to be heard prior to that date would hence be defeated. They moved and filed a Memorandum of Appeal on the 29th August, 2012.

Taking the circumstances into consideration, it is evident that the application was filed without unreasonable delay.

On the issue of substantial loss, the respondents herein notified the applicants to produce documents they were in possession of in court on the hearing date. Pursuant to the notice issued, the court ordered them to produce the documents as notified in court or suffer penal consequences.

This is the order the applicants wants reviewed and/or set aside. The Memorandum of Appeal outlines details of errors allegedly made by the trial magistrate. This is what this court will be addressing.

I am persuaded by the holding by A. Mabeya, J in *Joseph Paul Mwangovya vs Kewal Contractors Limited* HCC No. 1017/2010 Nairobi -where he stated as follows:-

“The law is that where it is shown that execution will render an appeal nugatory thereby subjecting the appealing party to substantial loss, then a stay can properly be granted. But parallel with that is equally the important principle that a successful litigant should not be deprived of the fruits of a judgment in his favour without a just cause”

This is a case where the applicants have demonstrated that they have an arguable case. If orders sought are not granted it means that the applicants would have to comply with the order of the court prior to their appeal being heard, the appeal would be rendered nugatory. Justice would call upon this court to ensure they are heard prior to complying with the order.

It has been shown that they will suffer loss if orders sought are not granted.

In the result, I do allow prayers 4 and 5 of the application. Costs of the application will be in the cause.

DATED, SIGNED and DELIVERED at MACHAKOS this 24TH day of JANUARY, 2013.

**LILIAN MUTENDE
JUDGE**