



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Appeal 662 of 2002

NAHASHON NJENGA NG'ANG'A. 1ST APPLICANT

AMOS GAKUYA. 2ND APPLICANT

JOHANA KIMANI. 3RD APPLICANT

VERSUS

KINYUA NG'ANG'A. 1ST RESPONDENT

PETER MBURU NG'ANG'A. 2ND RESPONDENT

RACHAEL WANJIRU NGARIHU. 3RD RESPONDENT

(Being an appeal from the judgment and Order of Senior Principal Magistrate F F Wanjiku in SPMCC no. 46 of 1994 Dated 7th December, 2001 at Muranga Law Court)

RULING

The application before the court is dated 7th March, 2012. It seeks a stay of execution pending the hearing and final determination of an appeal purportedly filed by the Applicants to the Court of Appeal by a Notice of Appeal dated 2nd June, 2010. The judgment to be appealed from was dated 15th December, 2007.

The record shows and it is equally confirmed by the Applicants herein that on 2nd March, 2012 an application filed by them and dated 6th April 2011 seeking leave to file an appeal Record to the Court of Appeal, was dismissed by Okwengu, J, (as she then was). This is because the Applicants wanted to file the said record out of time. The Applicants then appealed to the Court of Appeal and the Applicants assert that their said Appeal is pending in the Court of Appeal and that their appeal against the High Court refusal to allow appeal record to be filed out of time both lie pending in the Court of Appeal.

The Applicants argued that the application is competent despite the fact that the advocate who originally acted for them has not been served for this application for stay. However, they stated that they filed their Notice of Change of Advocate dated 22nd March 2012 and that all the Applicants were in court during the hearing of this application.

The Applicants also argued that the appeal concerns land which is a sensitive matter in the Kenya society. That they did not offer any security because in such cases there is no suitable security. The Applicants however, further asserted that this court has jurisdiction to grant stay at the stage when the Court of Appeal is not yet seized of the matter.

On the other hand, the Respondents opposed the stay application. Mr. Mbutia appearing for them argued that this application was filed by the Applicants themselves without first lawfully easing out their advocates who under order 9 rule 9, are still presumed to be on the record. That they would only be removed from acting as advocates in the matter through a formal application properly served on the Advocates, which was not done in this application.

Mr. Mbutia further argued that this application is being brought too late in the day and should not be allowed. That the Applicants failed to file a record of appeal within the prescribed time by the court that gave them leave to do so. Mr. Mbutia also argued that an application to extend time to file the record of appeal was rejected rendering the appeal automatically incompetent. In the circumstances, Mr. Mbutia added, there is no valid pending appeal upon which a stay could be granted.

I have carefully considered the arguments from both sides. I have also considered the merits of this application. I am aware that this court's discretion should not be hand-on-strings of technicalities. As much as the court can allow, a matter should rather be based on substantive issues, especially in a matter like this where a party seeks access to the seat of justice. More so during this era of reform and transformation in this sector of justice.

However, our system has not altogether discarded the necessity of rules and regulations which alone put in place and maintain orderliness in the manner justice should be meted out. Hence the existence of Civil Procedure rules which are tended and regulated to keep up with all round development and necessary change.

In the circumstances of this case, the Applicants obtained leave of court in the court's exercise of a favourable discretion towards them. They however, went ahead to abuse the favour by failing to file the record of appeal within the time prescribed by court. Thereafter an application to extend the time to file the said appeal record was, rejected rendering the appeal in the Court of Appeal, incompetent. Although the Notice of Appeal still pends in that court, the same has no substance and cannot be seriously considered as a pending appeal.

In the above circumstances, it is not far from the truth to assert that there is no valid pending appeal in respect of which a stay of execution could be granted to protect it, pending its disposal. I am not oblivious of the fact that the Applicants have also filed an appeal to the same Court of Appeal against the rejection of leave to extend the time to file the appeal record. However, in my view, such second appeal does not change the position that there is really, no substantive appeal pending any hearing. All the second appeal does is to recreate a mere possibility of existence of an appeal, not good enough to persuade this court to consider a grant of the stay sought.

There is also the fact that the Applicants are technically, irregularly acting on their own behalf while their original advocate, M.s Mbaruka & Co. are still technically but legally on record. This is because they never properly withdrew from acting nor did the Applicants' notice of change of advocates, effectively remove the advocate from acting as provided under Order 9, rule 9.

Furthermore, the Applicants have failed to persuade this court that they have an arguable appeal pending, whose substratum requires protection to avoid rendering it nugatory. In addition, the Applicants failed to offer any kind of security pending the final determination of the appeal. They did not offer even the security for costs to the Respondent, in this old appeal of 2002, leave alone the fact that the original suit was first filed in 1994. It is proper, nay, imperative that litigation should have a timely end.

In the above circumstances, this court finds no merit in this application for stay of execution. The same is dismissed with costs to the Respondents. Orders accordingly.

Dated and delivered at Nairobi this day 24th of September, 2012.

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JUDGE