

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 89 of 2012

WINNIE WANGARI NJAU. 1ST APPELLANT

ROBINSON KINUTHIA. 2ND APPELLANT

VERSUS

ZACHARIA MUCHUNGU MWAURA. RESPONDENT

R U L I N G

The application before the court is a Notice of Motion dated 17th September, 2012. It was filed by the Appellants/Defendants and seeks stay of execution of the decree of the lower court pending the determination of this appeal.

The lower court decree includes an order of specific performance against the Applicants/Appellants to discharge their contractual obligations to transfer to the Respondent a part of L.R. No. Dagoretti/Kinoo/4307 to the extent of 1/8 sold to him and in default the transfer to be executed by an Executive Officer of court.

The judgment was delivered in February, 2012 while this application was filed in September, 2012 after negotiations for a settlement failed.

It is the Applicant's case that unless the stay is granted, the appeal will be rendered nugatory especially since the Respondent is in advanced stage of executing the lower court decree.

The Respondent on the other hand says that the Applicants/Respondents will not suffer any damage since they received 90% of the sale price with the remaining balance of Ksh.50,000/- being deposited in court. That he purchased the piece of land in question and was allowed by the Appellants to develop it immediately by putting up a residential home where he has since resided. That if he loses the appeal, he nevertheless will be able to repurchase the land with the development and the Appellants will lose nothing.

The Respondent further averred that the Appellants have lost similar applications for stay before but have failed to disclose the same to this court. That those seven months of delay to file this application has not been satisfactorily accounted for by the Appellants. And finally, that the Appellants' such conduct makes them unlikely candidates for an exercise of court's favourable discretion since they come with dirty hands.

I have carefully considered the application after perusal of the file record. I note that this appeal arises from the lower court's refusal to review its judgment under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, as well as setting aside an ex parte judgment entered after the Appellants with their counsel, failed to attend court although properly served to do so.

The ruling aforesaid also reveals that the Appellants thereafter filed three applications to set aside several dismissals of applications one after another, but the court for reasons explained in the Rulings, dismissed them all, even after taking into account the provisions of Section 1A of the Civil Procedure Act. In respect to the latter law provision, the trial court expressed its view that it was enjoined to give effect to the overriding objective of the court of facilitating a just, expeditious, proportionate and

affordable resolution of civil disputes.

Having also further carefully perused the record with the same purpose, I have formed the impression that the Appellant's conduct in this matter from the beginning, is impressive only for wrong purposes. Their chances of success, on the face of the record and without prejudice, is not as argued by them, and without saying more, is not that high or impressive. The appeal in my view, does not stand to be rendered nugatory as compensation can be paid by the losing Respondent. Furthermore, the Respondent was given possession of the land by appellants. He developed the land and himself, occupies it. The Appellants can wait until their appeal is determined. It is upon them to hasten process to that end and the court is not willing to embolden them to delay the final resolution of the appeal by granting them a stay which, looking at their past conduct, they can easily convert into a horse upon which to ride at their own pace at the expense of the Respondent.

In the above circumstances, this court is not persuaded that a stay of execution of the lower court decree would at this juncture, be a good or necessary idea. I accordingly find that this application has no merit. It is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 28th November, 2012.

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D A ONYANCHA
JUDGE