



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
MISC. CIVIL APPLICATION NO. 251 OF 2009

NAOMI SONGOK & 6 OTHERS APPLICANTS

VERSUS

GEOFFREY C. KOECH RESPONDENT

RULING

Before court for consideration is the Notice of Motion dated 5th May, 2009 taken out pursuant to the provisions of Sections 3 and 3A of the Civil Procedure Act and Order XLI Rules 4 and 5 and Order XLIX Rule 5 of the Civil Procedure Rules and all enabling provisions of the Law. The applicant prays that there be stay of execution of the decree issued in Kapsabet PMCCC. No. 77 of 2000 and for leave to file appeal out of time. It is brought on the grounds that judgment was delivered in the absence of the applicant and now the respondent is in the process of execution and unless he is stopped the applicant will suffer loss and damage. Naomi Songok swore the affidavit in support of the application deponing that their previous counsel abandoned them and so they were not aware of what was going on in court until they saw the eviction order and that they have prepared what they think is an arguable appeal and hence they pray that the orders sought do issue.

The Respondent swore the Replying Affidavit. He deponed that it was untrue that the applicant's previous counsel abandoned them but that he applied for leave to cease acting for lack of instructions which leave was granted in the presence of the applicants. That although the applicants were always represented by counsel, such counsel never attended court to prosecute the applicants' case. That the present application has been brought after inordinate delay and without justifiable reasons. The applicants are described as being vexatious litigants who have previously filed Kapsabet Application No. 5/2000; Kapsabet PMCCC No. 77/2000, Eldoret Misc. Appl. No. 187 of 2000, Eldoret Misc. Appl. No. 696 of 2008 all of which have either been dismissed, struck out or withdrawn with costs. The respondent swears that he will be greatly prejudiced and suffer great loss and irreparable damage if the application is allowed. A further affidavit was sworn and filed by the respondent.

The counsel for the applicants submitted that proceedings in the court below were irregular as the applicants were not served and hence an eviction in those circumstances would be wrongful.

Counsel for the respondent submitted that delay was inordinate the applicants' counterclaim having been dismissed four years ago and that there was always service on the applicant's counsel or on the applicants in person.

I have perused the proceedings and the present application affidavits and annexures and have considered the same. It appears clear that contrary to the averments by the applicants that they were never served, there was always service. Indeed on at least two occasions the applicants were present in court. The court cannot come to the aid of a party who chooses not to attend at a hearing(s) only to rush to that court on an application to stop what was done when the party, though served, absented himself from court.

As to compliance with Order 41 I find that over 1 ½ years delay before bringing the present application is undue delay for which there is no plausible explanation or at all. Changing counsel after counsel cannot aid the applicant herein, even though such change of counsel be the applicants' absolute right. No substantial loss is shown to be suffered by the applicants whilst there is a successful respondent who is being unduly kept away from the fruits of his judgment. And no security is offered and the court will not order one in the circumstances of this case fraught with undue delay and lack of reasons for that delay. The applicants did not exhibit leave of the lower court to come to this court. I find this application without merit. I dismiss it with costs. It is accordingly so ordered.

DATED AND SIGNED AT ELDORET THIS 31ST DAY OF DECEMBER 2010.

**P.M. MWILU
JUDGE**

DELIVERED AND SIGNED AT ELDORET THIS 25TH DAY OF JANUARY, 2011.

**F. AZANGALALA
JUDGE**

In the presence of;

Advocate for Applicant
Advocate for Respondent
Court Clerk

**F. AZANGALALA
JUDGE**