



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Miscellaneous Civil Application 195 of 2009

JAMES KINYUA1ST APPLICANT

JUSTUS NJERU.....2ND APPLICANT

VERSUS

JOSEPH MUTWIRI RICHARD.....RRESPONDENT

RULING

Judgment was delivered in Nkubu CMCC No. 46 of 2008 in favour of the respondent on 14th October 2009. Parties agreed that costs in that case be taxed by consent at Kshs. 52,055/=. Parties also agreed that stay of execution be granted for 30 days. The applicants have now brought to this court a Notice of Motion dated 2nd December 2009 brought under Section 79(G) of the Civil Procedure Act and Order XXI Rule 22 and Order XLI X Rule 5 of the Civil Procedure Rules. By that application, the applicant seeks orders for temporary stay of execution of the judgment and decree of Principal Magistrate Court Nkubu No. 46 of 2008 delivered on 9th October 2009 and also seeks that leave be granted to the applicant to file their appeal out of time. The applicants as at the time of filing the present application had not filed an appeal. That being so, this court cannot entertain a stay pending a non existent appeal. Additionally, the application is brought under Order XXI Rule 22. That Rule states as follows:-

“The court to which a decree has been sent for execution shall, upon sufficient cause being shown stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court or first instance, or appellate court. If execution has been issued thereby, or if application for execution has been made thereto.” (Underling mine).

Looking at that Rule, it is clear that stay is granted by a court where a decree has been sent from one court to another court for execution. That is not the case here. In this case, the decree is being executed in the Nkubu Magistrate Court file. The wording of the prayer seeking stay suggests that the stay sought is temporary but the applicants do not state it is temporary to await what. In other words, it does not show that the order when granted will be pending what circumstances. For that reason, the prayer for stay is incompetent and is rejected. The other prayer that the applicant seeks for leave to file an appeal out of time. It is premised on the basis that counsel for the applicants received instructions to file an appeal on 29th October 2009. In the affidavit in support of the application, it is deponed that the draft memorandum of appeal was forwarded to counsel in Meru who was holding brief for the applicant’s counsel. It was presented to Court according to the deposition, on 11th November 2009. It was however rejected according to those deposition by the High Court Registry staff on the basis that the appeal was being filed out of time. There is no explanation why the memorandum took 13 days to arrive at Meru High

Court registry. There is also no explanation why when judgment was delivered on 9th October 2009 it took the applicants 20 days to instruct their counsel to file an appeal. Although the court has unfettered discretion to extend time to file an appeal out of time, such discretion ought only to be exercised judicially. The applicants have failed to satisfactorily explain the delay in filing their appeal. The explanation given that the registry staff denied the applicant the right to file the memorandum of appeal is not satisfactory nor excusable since counsel for the applicants could have sought assistance of the Executive Officer or the Deputy Registrar in respect of the alleged obstruction by the court registry staff. I find that there is no material before me which persuades me to exercise my unfettered discretion to extend the time to file an appeal out of time. Accordingly, the application dated 2nd December 2009 is dismissed with costs being awarded to the respondent.

Dated and delivered at Meru this 21st day of May 2010.

MARY KASANGO
JUDGE