



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
(NAIROBI LAW COURTS)

Civil Appeal 156 of 2009

BENEDICT KARIUKI.....1ST APPELLANT

DR. JOHN KARUNGA NYAMU.....2ND APPELLANT

VERSUS

JAMES MBURU
KARWIMU.....RESPONDENT

R U L I N G

1. By a notice of motion dated 26th March, 2009, filed on 30th March, 2009, Benedict Kariuki and Dr. John Karunga Nyamu, (hereinafter referred to as 1st and 2nd appellants), have moved this court for an order of stay of execution pending the hearing and determination of an appeal which was lodged simultaneously with the application. What is sought to be stayed, is the decree and orders made by the Cooperative Tribunal in the ruling delivered on 17th March, 2009 in Tribunal Case No.179 of 2007.
2. A copy of the ruling of the Tribunal dated 17th March, 2009, has been availed to this court, from which it is apparent that the Tribunal dismissed chamber summons dated 29th January, 2009 in which the appellants sought to have time enlarged for them to pay thrown away costs ordered by the Tribunal on 8th May, 2008, whose payment was conditional to setting aside the interlocutory judgment.
3. The grounds upon which the appellant's current application is anchored are as follows:
 - (i) The ruling delivered by the Cooperative Tribunal on 17th May, 2009 confirming default judgment in Tribunal case No.179 of 2007 is irregular.
 - (ii) The said interlocutory judgment is not capable of enforcement having been entered irregularly.
 - (iii) The applicants have an arguable appeal with high chances of success.
 - (iv) The respondent will not suffer any prejudice.
 - (v) The applicants are willing to provide security as the honourable court may direct.
 - (vi) The interlocutory default judgment is selective, discriminative and biased.

4. The 1st appellant has sworn an affidavit, in which he reiterates the fact that the interlocutory judgment entered against them was irregular and ought to have been set aside without any conditions.

5. James Mburu Karwimu who is the respondent to the appeal and the motion has sworn a replying affidavit objecting to the application. The respondent maintains that there is no judgment or decree that was issued on 17th March, 2009 and the application is therefore an abuse of the court process.

6. I have carefully considered the motion which is before me. The conditions under which the court can issue an order for stay of execution pending appeal are clearly provided under Order XLI Rule 4 of the Civil Procedure Rules. Such an application must first be anchored on the fact that the applicant will suffer substantial loss unless the order for stay of execution is granted.

7. In this case, the order sought to be stayed is one dismissing an application for stay of execution and enlargement of time to enable the appellants pay thrown away costs to the respondent. The thrown away costs were a mere 10,000/= which were to be paid in 14 days. The appellants have not shown in what way they stand to suffer substantial loss, if time is not enlarged for paying the thrown away costs. Secondly, the order made by the Tribunal dismissing the chamber summons dated 29th January, 2009, is not one capable of execution. In actual fact, what is being executed is the previous order which was made by the Tribunal on 8th May, 2008, which in turn brings into effect by way of default the decree of 27th November, 2007.

8. For these reasons, I concur with the respondent that the application for stay of execution pending appeal is an abuse of the court process. Accordingly, it is dismissed with costs.

Dated and delivered this 25th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Achoki H/B for Getange for the appellant

Ombati H/B for Kariuki for the respondent