



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC CASE NO.613 OF 2009**

**ASHIT PATANI.....1<sup>ST</sup> PLAINTIFF**

**SELINA PATANI.....2<sup>ND</sup> PLAINTIFF**

**RAMABEN PATANI.....3<sup>RD</sup> PLAINTIFF**

**=VERSUS=**

**DHIRAJLAL PATANI.....1<sup>ST</sup> DEFENDANT**

**VIJYA DHIRAJLALA PATANI.....2<sup>ND</sup> DEFENDANT**

**AZIZ DEVELOPERS LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of a Notice of Motion dated 25<sup>th</sup> May 2018 brought by the plaintiff/applicants. The application seeks stay of execution pending appeal. The applicants had filed a suit against the respondents. The applicants' suit was dismissed on 24<sup>th</sup> July 2014 with costs to the 3<sup>rd</sup> defendant/respondent. The applicants moved to the Court of Appeal against the judgement of 24<sup>th</sup> July 2014. The appeal was dismissed on 30<sup>th</sup> June 2017.
2. The applicants moved once more to the Court of Appeal where they filed an application seeking review of the judgement of the Court of Appeal so that they could be heard on fresh ground that the Judge who delivered the judgement of 24<sup>th</sup> July 2014, had no jurisdiction to handle the case.
3. As the appeal which the applicants preferred to the Court of Appeal was pending, the respondent had its bill of costs taxed at **Kshs.1,456,225/=** on the 29<sup>th</sup> March 2016. The respondent is now in the process of executing for costs. The applicants argue that if there is no stay granted, the application before the court of appeal will be rendered nugatory.
4. The applicants' application is opposed based on a replying affidavit sworn on 13<sup>th</sup> June 2018. The respondent contends that the applicants have come to court with unclean hands. The application seeking to set aside the judgement of the Court of Appeal was filed on 17<sup>th</sup> August 2017 but it was not served until 23<sup>rd</sup> May 2018.
5. I have considered the applicants' application as well as the opposition thereto by the respondent. The conditions for grant of stay of execution pending appeal are clear. First an application has to be brought without unreasonable delay. Second, an applicant has to demonstrate that he will suffer substantial loss should stay not be granted. Third, there has to be security given for the due performance of the decree as may ultimately be binding upon the applicant.
6. In the instant case the applicants are seeking review of the judgement of the court of appeal delivered on 30<sup>th</sup> July 2017. The application which seeks stay of execution for costs was filed on 31<sup>st</sup> May 2018. The application for review of the judgement of the court of appeal was filed on 17<sup>th</sup> August 2017. This application for stay was made nine months after the application for review was filed. The application for review was not served until after nine months. There is no explanation given for the delay which I find unreasonable.
7. The respondent has taxed its costs. It seeks to execute the same. The applicants are not saying that if they pay the costs, they will be unable to recover it from the respondent. There was an earlier stay of execution which had been granted pending appeal. That stay was spent after

the applicants' appeal was dismissed. The applicants are trying a second chance by raising another ground of appeal which is now that the judge who delivered the judgement had no jurisdiction.

8. Whereas an appellant is entitled to apply for review or appeal against a decision, the successful litigant is also entitled to the fruits of the judgement. I see no grounds upon which I can order stay of execution of costs. I find no merit in the applicants' application which is hereby dismissed with costs to the respondent.

It is so ordered.

**Dated, signed and delivered at Nairobi on this 4<sup>th</sup> day of October, 2018**

**E.OBAGA**

**JUDGE**

In the presence of :

M/s Wanjiku for Mr Gachie for plaintiffs

M/s Chichi for 3<sup>rd</sup> defendan

Hilda : Court Assistant

**E.OBAGA**

**JUDGE**