



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 526 OF 2019

KIHIA MWANGI.....1ST APPELLANT/APPLICANT

MISTER DELIVERY LIMITED.....2ND APPELLANT/APPLICANT

-VERSUS-

HENRY WACHIRA NJERI.....1ST RESPONDENT

PAUL MUNGAI NYOTA.....2ND RESPONDENT

RULING

1. The appellants/applicants brought the Chamber Summons dated 9th January, 2020 supported by the grounds set out on its face and the facts stated in the affidavit of the 1st applicant. The following are the orders being sought in the aforesaid application:

(i) Spent.

(ii) Spent.

(iii) THAT the firm of M/S COL Advocates LLP be granted leave to come on record for the 1st and 2nd appellants/applicants.

(iv) Spent.

(v) THAT this Honourable Court be pleased to stay execution of the judgment delivered on 20th August, 2019 pending hearing and determination of the appeal.

(vi) THAT costs of the application be provided for.

2. In his affidavit, the 1st applicant stated that he is a director of the 2nd applicant and that the trial court entered judgment in favour of the 1st respondent and against the applicants and the 2nd respondent jointly and severally in the sum of Kshs.2,000,000/ on general damages and Kshs.163,000/on special damages plus costs of the suit and interest thereon. The said judgment now forms the subject of the appeal.

3. The 1st applicant contended that in the meantime, the 2nd respondent sought for and was granted an order for review of the aforementioned judgment, with the trial court setting aside its judgment and directing that the matter be heard *de novo* before a different magistrate from the one who heard the suit.

4. It was the 1st applicant's assertion that notwithstanding its decision to set aside its judgment, the trial court soon thereafter ordered the applicants to pay the sum of Kshs.1,000,000/ to the 1st respondent and to deposit a further sum of Kshs.1,000,000/ in a joint interest earning account within 21 days from the 17th of December, 2019.

5. The 1st applicant further stated that unless an order for stay of execution is granted, the applicants will not be able to recover the decretal sum from the 1st respondent once the same is paid to him and the appeal succeeds, since he is a man of straw. In this regard, the 1st applicant emphatically stated that there lies an imminent danger of the 1st respondent moving to execute the decree.

6. He also averred that the applicants are willing to provide security for the due performance of the decree by way of a bank guarantee.

7. The 1st applicant lastly stated that a consent is in place between his erstwhile and current advocates, allowing the current advocates to come on record for the applicants in the appeal.
8. *Mbiti Musili* advocate for the 1st respondent swore a replying affidavit to challenge the application. Therein, he categorically stated that the application is an abuse of the court process, intended to hinder his client from realizing the fruits of his judgment.
9. The deponent mentioned that the suit against the 2nd respondent has since been withdrawn hence there is a lawful judgment in place against the applicants.
10. It was the deponent's viewpoint that the applicants must comply with the conditions for stay issued earlier on by the trial court, stating in the alternative that if at all the applicants were aggrieved by the aforementioned conditions set by the trial court in granting a stay of execution, they ought to have challenged the same by way of an appeal.
11. The 2nd respondent similarly put in a replying affidavit in answer to the application, reiterating the averments made by the applicants that the trial court reviewed its earlier judgment and ordered that the suit be re-opened for fresh hearing.
12. It was the 2nd respondent's contention that consequently, there was no decree to be executed to begin with.
13. In making his oral submissions on the application, *Mr. Otieno* learned advocate who indicated that he was representing both the applicants and 2nd respondent stood by the grounds featured in the application except for the additional argument that the application was timeously filed and a further argument that the applicants only came to learn of withdrawal of the suit against the 2nd respondent through the replying affidavit filed on behalf of the 1st respondent.
14. In retort, *Mr. Munyoki* counsel for the 1st respondent reiterated the facts deponed in the replying affidavit of *Mbiti Musili* save for the submission that since the appeal lies solely against quantum, then the question on whether his client is in a position to refund the decretal sum should not arise. The counsel also contended that his client is amenable to having the decretal sum deposited in a joint interest earning account.
15. I have considered the grounds featured in the application, the facts deponed in the affidavits supporting and resisting the application and the rival oral arguments made before me.
16. Before I address the substance of the application, I must briefly address an issue which notably arises from the facts as presented to me by the parties.
17. Upon my study of the record, more specifically the trial court documentation annexed to the application, I noted that two (2) distinct applications were filed before the trial court: the first was filed by the applicants and is dated 13th September, 2019 wherein they sought for an order for stay of execution pending appeal; the second application dated 18th September, 2019 is that of the 2nd respondent seeking an order for review and setting aside of the judgment so that the suit can be heard *de novo* to enable the 2nd respondent participate in the proceedings.
18. Both applications were heard simultaneously with the trial court granting the 2nd respondent's application for review and further allowing the applicants' application for stay on the conditions laid out hereinabove.
19. From my comprehension of the foregoing, it is apparent that the trial court set aside its judgment and consequently, the resulting decree.
20. It therefore follows that there is no execution to be stayed neither is there any judgment/decree to be appealed against. In any event, none of the parties has availed any documentation or evidence to controvert this position. As it stands, both the appeal against the now former judgment and the application for stay of execution currently before this court are unfounded and unmerited and any execution levied would therefore be illegal.
21. Consequently, the application is dismissed with no order on costs.

Dated, Signed and Delivered at Nairobi this 13th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellants/Applicants

..... for the 1st Respondent

..... for the 2nd Respondent