



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 72 OF 2017

GITHUKU NANCY.....1ST APPELLANT/APPLICANT

DANIEL KINYUA GAKUU.....2ND APPELLANT/APPLICANT

VERSUS

LILIAN MWIKALI MBALUKA (Suing as Administrator of the estate of the late

Eric Ndambuki (deceased).....1st RESPONDENT

KENNEDY JAMES NDAMBUKI (Suing as the administrator of the estate of the late

Eric Ndambuki) deceased).....2nd RESPONDENT

RULING

This is an application by way of Notice of Motion dated 20th, November 2019 seeking the substantive order that there be a stay of execution of the judgment and or decree of the lower court cited therein.

The applicant had earlier by an application dated 16th February, 2017 sought a stay of execution of the same judgment of the lower court.

In a ruling delivered on 17th May, 2018 the application was allowed on condition that the applicants paid the respondents a sum of Kshs.2,000,000/= and deposit the balance of the decretal sum in an interest earning account in the joint names of the advocates on record for the parties within 30 days from the date of that ruling. Compliance thereof would have been by 18th June, 2018.

It has now transpired that there was no compliance with the conditions set in that ruling for reasons that have been stated in the present application.

In the present application, the applicants also seek extension of time within which to comply with the conditions given on 17th May, 2018 by 21 days to enable them deposit Kshs. 1,000,000/= in court as opposed to a joint earning account. Alongside the said prayer, the applicants sought the variation of the order.

I have read the supporting affidavit and the replying affidavit. I have also considered the cited authorities. The applicants in both the earlier application dated 16th February, 2017 and the present application cited Order 42 Rule 6 of the Civil Procedure Rules relating to stay of execution.

The order made on 17th May, 2018 was specific and unequivocal. The decretal sum, going by the record is Kshs. 5,014,212.80. It is not clear why the applicants have stated the balance was Ksh. 1,000,000/=.

The cheques forwarded to counsel for the respondent amounting to Kshs. 2,000,000/= are dated 11th October, 2018 almost five months from the date the ruling was delivered. The present application was filed over one year from the date of expected compliance. The delay in complying with the court order, and filing of the application has not been sufficiently explained to the satisfaction of the court. The applications have also, on their own motion, purported to extend the court order in relation to the balance of the decretal sum to be deposited.

The applicants have sought the same order in the two applications. Having addressed the issue of stay of execution in the ruling of 17th May, 2018 the prayer in the present application is res judicata.

The applicants failed to comply with the conditions given for stay of execution within the set time lines. That time expired and what has expired may not be extended.

The applicants are not deserving of the orders sought and therefore, the application dated 20th November, 2019 is dismissed with costs to the respondent.

Dated and delivered this 7th day of May, 2020

MBOGHOLI MSAGHA

JUDGE