



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL APP NO. 79 OF 2007

ISABELLA MUTHONI ITUGU.....APPELLANT/RESPONDENT

VERSUS

PETER MUGO KABIRU.....1ST RESPONDENT

JOSEPH GITHINJI KIMARU.....2ND RESPONDENT/APPLICANT

R U L I N G

A. Introduction

1. This is a ruling on an application dated 10th June 2017 brought by 2nd respondent/applicant seeking the following orders;

- a) That the Honourable Court be pleased to review and set aside the order made on 31/7/2007 and confirmed on 4/6/2008.*
- b) That costs of the application be provided for.*

2. The application is not opposed by the 1st respondent. The parties herein consented to argue the matter by written submissions. The 2nd respondent was to put in a supplementary affidavit.

B. The 1st Respondent's Case

3. The 1st respondent Peter Mugo Kabiru supported the application by the applicant/2nd respondent that the orders in question be reviewed. He stated that it is now 6 years since Ong'udi J. made the orders which were not complied with by the appellant. Further that the existence of the orders has delayed execution of orders in Kerugoya Succession Cause No. 582 of 2014.

C. 2nd Respondent/Applicant's Case

4. The 2nd respondent/applicant has deponed in support of his application that on 31/7/2007 the court granted an order for stay of execution of order issued on 24/2/2006 that authorized the sub-division of L.R. INOI/MBETI/191. The order for stay was confirmed on 4/6/2008.

5. He further submitted that the aforementioned order was duly registered against L.R. INOI/MBETI/191.

6. He further submitted that subsequently on the 12/5/2015 the High Court sitting in Kerugoya in Succession Cause 582 of 2014 granted orders for execution of the orders of the court by the Deputy Registrar signing all relevant documents.

7. He further submitted that the orders granted by the Kerugoya Court are currently incapable of being executed as there are pending orders from this court staying subdivision of L.R. INOI/MBETI/191.

8. In his further affidavit deponed dated 2nd January 2018, the applicant deponed that the appellant/respondent was using the pending appeal as a delay to stop execution of orders granted in his favour which was greatly prejudicing him.

9. He further deponed that when granted leave to appeal the court directed that the same be ready for hearing within 90 days, which had since lapsed.

D. Appellant/Respondent's Case

10. She deponed that she had filed Civil Appeal No. 6 of 2008 against the judgement of the magistrate court and successfully got orders of stay of execution on the 4/6/2008.

11. She further deponed that she has not been able to prosecute her appeal as she has been sick and as such, the applicant's application was immature.

E. 2nd Respondent/Applicant's Submissions

12. He submitted that the Appellant/Respondent had failed to act on her appeal which was on the verge of being dismissed as he had been served with a notice for dismissal of the said appeal.

13. He further submitted that the continued existence of the orders of stay was a gross injustice, which prejudice him and urged the court to set aside the orders of stay.

14. The 1st respondent herein in support of the 2nd respondent/applicant's case submitted the Appellant/Respondent had failed to act on her appeal for 11 years and the same ought to be quashed.

F. 2nd Respondent's Submission

15. The respondent submitted that the application dated 10th June 2017 was frivolous, vexatious and an abuse of court process as were it not for numerous applications filed by the 2nd respondent/applicant, the appeal could have ended by now.

16. Further that the appeal she had filed was ready for hearing and should be heard.

G. The Determination

17. The application dated 10th June 2017 was brought under Order 45 Rule 1(a) of the Civil Procedure rules seeking review or setting aside of orders of stay granted by this court.

18. The jurisdiction of the Court for review of orders is provided for in **Order 45 Rule 1 (1) of the Civil Procedure Rules** provides:

"1. Application for review of decree or order

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

19. The basis for an application for review, variation or setting aside of an order may be the recovery of new and important matters or evidence which after due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. An application may also be made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

20. The 2nd Respondent/Applicant has not placed any new and important matter or evidence before this Court for consideration. He has not demonstrated that there is an error apparent on the face of the record.

21. The 2nd Respondent/Applicant has however demonstrated the indolence of the Appellant/Respondent to prosecute her appeal. This appeal, Civil Appeal No. 6 of 2008 has not been prosecuted for 11 years.

22. I have perused the record and noted that the orders referred by the applicant herein were issued on 31/07/2007 but not 31/07/2017 as indicated in this application. The orders were confirmed on 4/06/2008. The orders were for stay of execution pending filing and determination of an appeal by the respondent Isabella Muthoni.

23. The applicant/2nd respondent applied for the orders to be discharged in his application dated 27/05/2011 on grounds that no appeal was ever filed following the granting of the orders in this miscellaneous application.

24. In her ruling, Ong'udi, J. confirmed that an appeal had been filed bearing the number HCA No. 6 of 2008. The judge disallowed the application to discharge the stay orders and gave the following orders on 6/11/2012: -

a) That the respondent/appellant Isabella Muthoni was given 90 days to have her appeal ready for hearing failure to which the

orders would automatically be vacated.

b) That this file Misc. App. No. 79 of 2007 is hereby closed and that any other application be filed in HCA No. 6 of 2008.

c) That the security receipt of Kshs. 10,000/= be filed in HCA No. 6 of 2008.

25. It is not in dispute that despite the orders of the court made on 6/11/2012, the appellant did not make her appeal ready for hearing.

26. The applicant herein has never been served with the memorandum of appeal and the record of appeal. The appellant Isabella Muthoni did not comply with the order of the court of 6/11/2012.

27. The court clearly stated the orders for stay would lapse automatically in the event that the appeal was not made ready for hearing.

28. My take is that the orders for stay made on 31/07/2007 and confirmed on 4/06/2008 automatically lapsed within 90 days from the date of Ong'udi, J. ruling made on 6/11/2012 for failure to comply by the appellant in HCA No. 6 of 2008. The 90 days expired on 5/01/2013.

29. I find that no orders exist in this file to be reviewed. This file was ordered closed by the judge who directed that no further pleadings should be filed herein.

30. The application dated 10/07/2017 is incompetent and not properly before the court.

31. It is hereby dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Abubakar for 2nd respondent

Ms. Maina for A.P. Kariithi for the Applicant

1st respondent present in person