



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 83 OF 2018**

**FREDRICK KARIUKI MUNENE.....1<sup>ST</sup> APPELLANT/APPLICANT**

**MUUSI KIITI KHIO.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**JOSEPH MUSYOKA NZAVU.....RESPONDENT**

**R U L I N G**

1. The Applicants approached this Court by way of Notice of Motion seeking stay of execution pending hearing and determination of the Appeal. This Court considered the Application and granted a conditional stay. The Applicants were required to deposit part of the decretal sum in a reputable financial institution in the joint names of the respective Advocates of the parties within 30 days from the **9<sup>th</sup> day of January, 2019**.

2. On the **11<sup>th</sup> day of February, 2019**, the Applicants filed an Application dated the **7<sup>th</sup> day of February, 2019** seeking orders thus:

- That this Honourable Court be pleased to review or vary its orders made on **9<sup>th</sup> January, 2019** with regard to the deposit of the decretal sum and do allow such alternative security as will not be oppressive or prohibitive and will not inhibit access to justice.
- That in the alternative, this Honourable Court be pleased to extend the time within which to comply with the order to deposit security from 30 days to 12 months.
- That there be stay of execution of the decree pending the hearing and determination of this Application.

3. The Application is premised on grounds that: The security ordered by the Court is too high such that the Applicants/Appellants cannot afford it; The Applicants have responsibilities to their children and the requirement to deposit the sum ordered was oppressive; Execution may involve being committed to Civil Jail which will render the Appeal nugatory.

4. The Respondent filed a Replying Affidavit where he averred that the 1<sup>st</sup> Applicant told the Court that he is a High School Teacher and Pastor while the 2<sup>nd</sup> Applicant is a motor-cycle dealer and a former civic aspirant therefore people with means but have shown no intention of complying with the order issued.

5. **Ms. Muatha**, learned Counsel for the Applicants urged that the Appellants have failed to get the money to deposit therefore seek review or variance of the order dated the **9<sup>th</sup> January, 2019** and time within which they should deposit the money to be extended from 30 days to 12 months. That the Applicants are unemployed therefore do not have regular income.

6. **Mr. Mwalimu**, learned Counsel for the Respondent who opposed the Application argued that the Application was not done within the stipulated time as it was done after 30 days lapsed. And that they have not stated how much they wish to deposit in Court. Secondly that they had not exhibited anything to prove that they have children in school. He dismissed the Application as being *res judicata*.

7. The Applicants herein being aggrieved by the order of this Court have sought review. This Court had the discretion to grant or not the order sought. In doing so it must act judiciously. After this Court delivered the Ruling dated **9<sup>th</sup> February, 2019** the Applicants waited until the time within which they were to furnish security lapsed prior to seeking review. They are not alleging that there was an error on record or that a new matter arose therefore they came up with the Application for some other reason which must be sufficient to make this Court grant orders sought. And in doing so it must be remembered that the Respondent should not be deprived of what he is entitled to in respect of the order made.

8. It is alleged that the Applicants are unable to comply with the order made but there is no proposal of what should be deposited.

9. The Court is duty bound to do justice and to ensure proceedings are disposed of in a timely manner. Asking a Court to review an order that has lapsed by granting a party time to comply with an order within a duration of 12 months will be delaying dispensation of the matter.

10. What the Applicants have demonstrated is lack of seriousness on their part. They have also failed to endeavor to show how they will comply with the order. Consequently, I find the Application lacking merit. Accordingly, it is dismissed.

11. It is so ordered.

**Dated, Signed and Delivered at Kitui this 15<sup>th</sup> day of May, 2019.**

**L. N. MUTENDE**

**JUDGE**