REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 17 OF 2019

FREDRICK KARIUKI MUNENE.....1ST APPELLANT/APPLICANT

MUUSI KIITI KIIO.....2ND APPELLANT/APPLICANT

VERSUS

JOSEPH MUSYOKA NZAVU.....RESPONDENT

R U L I N G

1. **Fredrick Kariuki Munene** and **Muusi Kiiti Kiio,** the 1st and 2nd Applicants respectively, seek stay of the order of arrest issued by the Trial Court on the **3rd April, 2019** together with all consequential orders and warrants of arrest arising out of that order pending hearing and determination of the Appeal.

2. The Application is premised on grounds that the Court disregarded an Application challenging a Notice to Show Cause and summarily issued orders of arrest against the Applicants without hearing them, orders that may be executed thereby frustrating the Appeal that has high chances of success.

3. The Application is supported by an affidavit deponed by the 1st Applicant who avers *inter alia* that the Application sought to have the Notice to Show Cause struck out and the matter be placed before another Magistrate, as the trial Court heard and determined the matter that was on Appeal and they were also challenging the costs that were unilaterally assessed without reference to the Applicants.

4. That the Respondent is desirous of executing the orders of arrest against them which will result into being arrested and committed to civil jail thereby frustrating the Appeal.

5. **Joseph Musyoka Nzavu,** the Respondent, filed grounds of opposition to the Application where he stated that it is bad in law and indeed *res judicata,* lacks merit, an abuse of the Court process, it cannot stand in view of the orders sought and the multiplicity of Applications filed by the Appellants depict an outright contempt with which the Applicants are treating the Courts.

6. It was urged by **Ms. Muatha,** learned Counsel for the Applicants that after the Respondent filed a reply to the Application they were granted time to file a Supplementary Affidavit and when the matter came up the Application was not considered and the warrants were issued summarily which meant that the Court did not exercise independence of mind before choosing how to proceed and the Applicants who were absent were condemned unheard.

7. **Mr. Mwalimu,** learned Counsel for the Respondents argued that there is already an **Appeal No. 83 of 2018** touching on the same subject matter where the Applicants applied for stay of execution, an Application that has already been dealt with which makes the instant Application *res judicata.* And, when the Lower Court listed the matter for Notice to Show Cause, no cause was shown by either the Applicants or their Counsel having not attended Court.

8. That the Application dated **26th March, 2019** was passed to the Court while in session without being certified by any Magistrate and has neither been given a date or listed for hearing therefore the trial Court was being blamed for no apparent reason.

9. That an Appeal from an order for execution ought to have been filed with leave of Court which was not the case.

10. In reply Counsel **Muatha** argued that the Application before Court was not *res judicata* as it was independent, raising independent issues from **Appeal No. 83 of 2018.**

11. The Application has been brought pursuant to **Order 42 Rule 6** of the **Civil Procedure Rules (Rules). Order 42 Rule 6(1)** and **(2)** provides thus:

> ***"6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***
>
> ***(2) No order for stay of execution shall be made under subrule (1) unless—***
>
> > ***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
> >
> > ***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."***

12. To benefit from the order sought the Applicants are duty bound to demonstrate that unless the order sought is granted they will suffer substantial loss; that the Application has been made without delay and they are willing to give security as to costs that may be ordered by the Court.

13. The main argument advanced by the Applicants is that if orders sought are not granted they will be arrested which will result into frustration of their Appeal. In the case of **M/s Portreits Maternity vs. James Karanja Kabia, Civil Appeal No. 63 of 1997** it was stated that:

> ***"That right of appeal must be balanced against an equally weighty right that the plaintiff has to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff the right."***

14. The contention of the Applicants is that orders appealed were issued summarily without being given a hearing. The record however shows that upon being served with the Notice to Show Cause, the Applicants filed an Application dated the **26th** day of **March, 2019.** Their prayer was to have the Notice to Show Cause struck out and to have the matter placed before another Magistrate for determination. When the matter came up for hearing of the Notice to Show Cause the Applicants did not turn up. Their Advocate **Ms. Muatha** addressed the Court thus:

> ***"We have an application dated 26/3/2019 and another dated 7/2/19. The orders issued by the High Court are therefore not final. Application dated 7/2/19 has a hearing on 24/4/19."***

15. Since there was no stay orders the trial Magistrate could not be faulted for proceeding with the matter.

16. In the case of **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCC No. 363 of 2009,** it was stated that:

> ***"The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."***

17. The peculiar circumstances in this matter are that the Applicants herein being aggrieved by the decision of the Lower Court appealed and sought stay of execution in **HC Civil Appeal No. 83 of 2018.** A conditional stay of execution was granted. They failed to comply with the order within the stipulated time of 30 days. After the time set lapsed they filed the Application dated **7th February, 2019** seeking to be given 12 months to deposit the security ordered and a further order of stay of execution. This particular Application is yet to be heard.

18. It is apparent that two (2) appeals have been filed in the same matter.

19. It is urged that the Applicants will be prejudiced but there is no suggestion of some security being given for due performance of the Decree that has been passed against the Applicants.

20. This is an Application that must be viewed as intended to gain an advantage by frustrating due performance of the decree. The only way the abuse of the Court's due process can be brought to an end is by the Application not being allowed.

21. In the premises, I find the Application lacking merit which I dismiss with costs to the Respondent.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 14th day of May, 2019.

L. N. MUTENDE

JUDGE