



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CIVIL APPLICATION NO. 87 OF 2017

SAMUEL WERU GATHITU & 17 OTHERS.....APPLICANTS

VERSUS

AGUTHI FARMERS CO-OP SOCIETY LTD.....RESPONDENT

RULING

The application before me is the notice of motion dated 26th February 2019 and filed on 27th February 2019. It is brought under certificate of urgency of John Githinji Wang'ondou described as the "Recognized Agent" for the applicant.

He seeks one substantive order:-

- a. Extension of time to file an appeal against this court's ruling of 25th May 2018.
- b. Stay of execution of orders given on 6th November 2018 be extended.

The application is supported by the affidavit of the 1st applicant sworn on 26th February 2019. He depones that their counsel on record never availed to them the court orders of 27th November 2017. That the mistakes of their lawyer should not be visited on them.

In response counsel for the respondent swore an affidavit on 12th March 2019 to the effect that the application dated 26th February 2019 was an abuse of the process of court and had been brought 20 months after the judgment of the tribunal. That the application was drawn by a stranger while there was an advocate on record hence it was incompetent, bad in law and misconceived. That without the advocate's supporting affidavit there was nothing to support the applicant's allegation.

That the applicants had not placed any material before the court to show they had an arguable appeal and that the matter was *res judicata* because they were granted conditional stay of execution on 27th November 2017.

In a response to the Replying Affidavit, the 19th Applicant Peter Muturi Kamwaro swore an affidavit on 20th March 2019 to the effect that their advocates on record had returned their file to them on 9th February 2019, that in that file there was nothing about stay/extension of time but the orders were in the court file, that the issue of stay/extension of time was not *res judicata*, that it was never too late to access justice on the delay was caused by their lawyer but now their recognized agent was in control of the matter. That the respondents had embarked on execution despite the fact that no decree had been drawn.

Counsel for respondent raised the issue of the "recognized agent" and I directed that the same be addressed in the submissions.

In their submissions filed on 20th March 2019 the applicants submitted that they had an arguable appeal and proceeded to set out some of the grounds – that though they were granted Right of Appeal on 16th January 2018 their advocate never took action, and never confirmed them of the same. They did not address the issue of the recognized agent who in fact filed the submissions.

The respondent submitted in response and demonstrated that the applicants had so far filed 5 applications including the current one.

The 1st application dated 29th August 2017 was allowed granting them extension of time to file an appeal, and stay of extension.

That the current application amounted to an appeal. That the Ruling of 25th May 2018 had sufficient information on the background of the

case hence they could not express ignorance of the ruling in the application of 16th January 2018.

Counsel did not also address the issue of the recognized agent.

The issue for determination is whether the application before me is merited.

However, I must address the issue of the recognized agent.

On the issue of “recognized agent” **Order 2 rule 16 states:** -

“Every pleading shall be signed by an advocate, or a recognized agent (as defined by Order 9 rule 2) or by the party if he sues or defends in person”

Order 9 rule 2 states:-

Recognized agents: -

The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

I have carefully considered the three scenarios set out by the law. It appears to me that the applicants and their recognized agents are trying to apply sub rule (b)

The so called recognized agent does not hold any powers of attorney authorizing him to act as he has done, and in any event, he needed to seek the court’s approval to do to act on behalf of the applicants. He has not done so. He has not demonstrated that he is carrying on business/trade for and in the names of any of the parties herein- to enable him act on their behalf.

Clearly therefore the so called recognized agent remains a stranger to this suit and is not competent to bring the application on behalf of the applicants.

In the ruling dated 27th November 2017, this court granted orders for extension of time to lodge their appeal within 30 days- the applicants never acted on those orders.

The applicants filed application for review of the orders issued and by ruling dated 25th May 2018, this court dismissed that application. The applicants have never complied with orders they sought in 2017- two years down the line, they are accusing their lawyers of not informing them of what was happening?

This case belongs to the applicants. They instructed their lawyer to file the application in 2017 after the judgment of the tribunal- how is it that they can come almost 2 years down the line to say that all this time they knew not what was happening?

The only conclusion the court can draw is that they had no interest in the matter and no amount of extra time can change their mode of operation. The explanation given for the delay is not tenable. The applicants in their submissions attack the orders that this court issued on 27th November 2017. Clearly on that basis alone- the only avenue available to them is an appeal against that ruling and not another application seeking similar orders.

My view is that the applicants ignored sound legal advice and sought the services of a “recognized agent” who has not even complied with the law.

Their application is not only incompetent; it is also an abuse of the due process of the law. It is struck out with costs to the respondent.

Dated, delivered and signed in open court at Nyeri this 7th June 2019.

Mumbua T. Matheka

Judge

In the presence of: -

Court Assistant: Nancy

1st Applicant

Waweru Macharia for the Respondent

Judge