



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 64 OF 2014

ELIJAH KINYUA NG'ANG'A aka GENERAL BAHATI

MWAI WA MUTHIGI

WAWERU MUGO

MUIRURI NJUGUNA aka

GENERAL MUIRURI NJUGUNA.....PLAINTIFFS/APPLICANTS

-VERSUS-

GITU KAHENGERI

JACOB NYAGA

MAU MAU WAR VETERANS ASSOCIATION

THE REGISTRAR OF SOCIETIES.....DEFENDANTS/RESPONDENTS

RULING

1. This ruling relates to the *ex parte* Notice of Motion dated 23rd May, 2019 brought by the Plaintiffs/Applicants. The said Motion is sustained by the grounds on its face and the affidavit of *Elijah Kinyua Nyaga aka General Bahati*, being one of the applicants herein.
2. The applicants are seeking an order for a stay of execution of the decree issued on 13th December, 2017 and all consequential orders pending the hearing and determination of Civil Appeal No. 436 of 2018 pending before the Court of Appeal at Nairobi, plus costs thereon.
3. The deponent asserted that the applicants had earlier on filed a suit seeking injunctive orders against the respondents as well as a mandatory injunction compelling the 4th respondent to register the applicants as the office bearers of the 3rd respondent.
4. It is the deponent's further assertion that the applicants' suit was subsequently dismissed on 17th October, 2017 adding that their attempts to have the suit reinstated by way of an application were unsuccessful as the court equally dismissed their said application vide its order issued on 7th December, 2017. The applicants are indicated as having filed an appeal against the aforesaid order of 7th December, 2017 in the Court of Appeal vide Civil Appeal No. 436 of 2018.
5. Elijah Kinyua Nyaga has gone ahead to aver that the respondents soon thereafter filed a Bill of Costs which was taxed on 10th May, 2019 and hence, their apprehension that they stand to suffer substantial loss in the event of execution, given their old age. The deponent further clarified that the 1st and 2nd respondents are equally advanced in age, which is to say that there is no guarantee they will be able to refund the costs awarded on taxation should the appeal succeed, whereas the 3rd respondent has no physical office. Moreover, the applicants expressed their willingness to provide security for costs.
6. Going by the record, the Motion was not opposed by the respondents despite there being evidence of its service upon them.
7. The application was argued orally before me, with *Mr. Musili* learned counsel for the applicants reiterating his clients' prayer to stay

execution pursuant to the taxation ruling of 10th May, 2019 directing the applicants to pay to the 1st, 2nd and 3rd respondents a total sum of KShs.235,442/=. Counsel further pointed out that the appeal is ongoing.

8. I have considered the grounds laid out on the face of the Motion alongside the facts deponed to in the affidavit in support. As required, I have similarly taken into consideration counsel's reinforcing arguments. Nonetheless, before I proceed to address the merits of the aforementioned Motion, I find it necessary to first determine whether there is an appeal in place given that the concerned appeal lies with the Court of Appeal and not this court.

9. The applicants have annexed to the supporting affidavit of *Elijah Kinyua Ng'ang'a* a copy of the notice of appeal dated 11th December, 2017 marked "EK1". Equally annexed to the said affidavit is an application marked "EK2" which it appears was filed at the Court of Appeal seeking leave of the court to file a memorandum and record of appeal out of time respectively.

10. The deponent indicated in his affidavit that the Court of Appeal allowed the relevant application on 23rd November, 2018 prompting the filing of the record of appeal on 4th December, 2017.

11. I have carefully perused the record and noted that while the applicants have annexed the application for leave to appeal out of time and have claimed that such leave was granted by the Court of Appeal, the applicants have not availed a copy of the relevant order for this court's reference, thus making it difficult if not impossible for me to ascertain whether the Court of Appeal truly considered the aforesaid application and/or granted the applicants leave to appeal out of time. Either way, a stay of execution cannot exist in a vacuum and in the absence of clear evidence that the appeal was filed pursuant to leave being granted by the Court of Appeal.

12. In the circumstances, there is no reason for me to address the merits of the Motion and I am only left with the option of striking out the same with costs. Consequently, the application is struck out.

Dated, signed and delivered at NAIROBI this 4th day of July, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiffs/Applicants

..... for the 1st, 2nd and 3rd Defendants/Respondents

.....for the 4th Defendant/Respondent