



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 22 OF 2014

WAMAE NJEGA.....1ST APPELLANT/APPLICANT

SIMON NJOGU MUNGURI.....2ND APPELLANT/APPLICANT

V E R S U S

EMBU GATURI HOUSING CO-OPERATIVE SOCIETY LTD.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

R U L I N G

1. This is an application dated 13/03/2017 seeking for review and setting aside of interim orders for stay pending appeal issued on 9/03/2017
2. The grounds in support of the application are contained on the face of it and in the affidavit of Wamae Njega. It is deposed that the respondent on 9/03/2017 obtained an ex parte order for stay pending hearing inter parties of his application dated 8/03/2017 and all consequential orders.
3. The applicant has not set down the notice of motion for hearing and has enjoyed the ex parte orders to the disadvantage of the applicant. The notice of motion was premised on the fact that the 1st respondent had filed a notice of appeal.
4. The notice expired within 60 days from the date it was filed and at the moment there is no existing appeal in the Court of Appeal. The respondent made no effort to obtain proceedings after interim orders were issued. The applicant states that he was never served with any request for proceedings as it is the practice. The proceedings were collected four (4) months after they were ready for collection. He prays that the said orders be set aside to facilitate him to enjoy the fruits of his judgment.
5. The respondent opposed the application on grounds that the proceedings took long to be supplied and that it was not easy to fix the application for hearing. This caused the delay in filing the appeal and in fixing the notice of motion for hearing. After the proceedings were prepared and ready for collection, the registry failed to notify the respondent.
6. The respondent stated that an appeal No. 71 of 2018 has now been filed in the Court of Appeal. It was argued that if the interim orders are set aside, the appeal will be rendered nugatory. The respondent therefore urges the court to preserve the appeal by dismissing this application.
7. I have perused the record of this appeal and noted that the respondent was given the interim orders for stay on 9/03/2017. The application was fixed for inter parties hearing on 2/05/2017. It appears that the application did not go before the Judge on the material day. If the Judge was away which is the most probable thing, the respondent's counsel would have gone before the Deputy Registrar the same day and fixed another date for inter parties hearing.
8. In the absence of the Judge, the practice is that matters cause listed for that day are mentioned before the Deputy Registrar. This did not happen in this case. Chances are that the respondent's counsel was absent.
9. The next item in the file is this application dated 13/03/2018 filed by Magee and Magee advocates seeking to set aside the interim orders. The applicants states that it was difficult to fix their application for inter parties hearing because the "matter" (meaning the court file) was missing. There was no correspondence to the Deputy Registrar the subject of missing file.
10. It is surprising that the applicant was able to trace the file a year later when this application was filed. This state of affairs confirms that the court file did not go missing. Had it gone missing, a litigant in need of services of the court in such crucial application would have turned tables in court by calling upon the Deputy Registrar to procure the court file or have a skeleton file opened.

11. It is my considered view that the conduct of the respondent is one of an indolent litigant or one who has lost interest in filing or pursuing his appeal after getting orders for stay.

12. It is said that an appeal (No. 71 of 2018) has been lodged in the Court of Appeal. No document was tendered to support this claim. The notice of appeal filed by the respondent in this court is not valid for the reasons that it has expired. It was filed in the High Court and not in the court. The time to lodge the appeal was 30 days from the date of judgment. This period expired more than one year ago. There is no evidence that an application for extension of time was ever filed in the Court of Appeal.

13. The respondent blames the Deputy Registrar and the registry for not notifying him that proceedings were ready which led him to collect the proceedings four (4) months after they were prepared. The applicant states that no request of proceedings was copied to them as required. The court file has only a single letter by the respondent's counsel dated 9/03/2017 requesting for proceedings. The respondent did not say that he wrote a reminder to the Deputy Registrar.

14. I reach a conclusion that no satisfactory reason has been shown as to the delay of over one (1) year to fix the application dated 8/03/2017 for inter parties hearing.

15. It is inexcusable for a party to obtain interim orders and enjoy the benefits for such a long period without taking the necessary steps to have the application heard inter parties and to pursue the filing of the appeal. The respondent's conduct is incomprehensible and an abuse of the due process of the court and must not be condoned.

16. I find the application merited and allow it as prayed.

17. The interim orders issued on 9/03/2017 are hereby vacated. In the same breath, I hereby order the application of the respondent dated 8/03/2017 dismissed for want of prosecution.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Kimotho for appellants

Ms. Muriithi for Kanyara for respondent