



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 211 OF 2014

PATRICK MASILA MALU.....1ST APPELLANT

THE REGISTERED TRUSTEES OF TALA CATHOLIC CHURCH....2ND APPELLANT

THE COUNTY GOVERNMENT OF MACHAKOS.....3RD APPELLANT

VERSUS

GIDEON MWAKA KIVEKE.....RESPONDENT

(Being an Appeal from the Ruling of Senior Principal Magistrate's Court

at Kangundo in Civil Case No. 53 of 2014 delivered on 1st October, 2014 by

Hon. L. N. Mugambi, Senior Principal Magistrate)

RULING

1. In the Notice of Motion dated 20th May, 2015, the Appellants have prayed for the following orders:

a. That this Honourable Court be pleased to grant an order for stay of the proceedings of the Senior Principal Magistrate's Court at Kangundo SPMCC No. 53 of 2014 pending the hearing and determination of this Appeal.

b. That the costs of this Application be in the cause.

2. The Application is premised on the grounds that the Appellants lodged an Appeal in this court against the Ruling of the Senior Principal Magistrate's Court in Kangundo SPMCC No. 53 of 2014; that the Appellants' Application for stay of proceedings was dismissed on 29th April, 2015 by the lower court and that if the order of stay of proceedings is not stayed, the Appellants stand to suffer irreparable loss and damage.

3. The Appellants further deponed that unless the proceedings in the lower court are stayed, the Appeal will be rendered nugatory and that the Respondent will not suffer any prejudice.

4. In his Replying Affidavit, the Respondent deponed that the Notice of Preliminary Objection was filed in the lower court by the Appellants on 14th August, 2014; that after the said Preliminary Objection was dismissed by the court, the Appellants filed the Memorandum of Appeal on 7th October, 2014 together with an Application in the lower court for stay of proceedings and that the lower court dismissed the said Application.

5. The Respondent deponed that the Appellants have not annexed to the Application the Ruling of the court dismissing their Preliminary Objection; that this court is not in a position to appreciate the issues that were raised in the lower court and that the Application should be dismissed *in limine*.

6. The Respondent deponed that for almost three (3) years, no action has been taken by the Appellants by either filing all the necessary papers or setting the Appeal down for hearing; that the Appellants will still have an opportunity to lodge an Appeal in this court for hearing and final determination and that the Appellants have not demonstrated what substantial loss they will suffer if this Honourable Court declines to order for stay of proceedings in the lower court.

7. The 1st and 2nd Appellants' advocate submitted that the issue of the lower court not having the requisite jurisdiction to hear and determine

the present suit is an important legal issue which must be addressed first in order for the court to be properly seized of the matter; that the Respondent did not specifically plead for fraud in his Plaintiff and that no amendments have been sought and made to the original Plaintiff.

8. Counsel submitted that Section 12 of the Limitation of Actions Act provides that the limitation period for filing a suit on account of a contract of sale of land is twelve (12) years and that the trial Magistrate failed to appreciate this fact.

9. The 1st and 2nd Appellants' advocate submitted that the Ruling the subject of this Application was delivered way back on 1st October, 2014; that the Appellants filed an Application dated 17th March, 2015 in the lower court to stay the proceedings and that the Appellants then filed the current Application. Counsel submitted that it will be prejudicial if the proceedings in the lower court are allowed to proceed. The 3rd Appellant's advocate's submissions are similar to the 1st and 2nd Appellants' advocate's submissions.

10. The Respondent's advocate submitted that the lower court proceeded to hear the suit with the Appellants participating in the proceedings; that the Appellants have been indolent and that it is against the ends of justice for the Appellants to file an Appeal and abandon it for five (5) years.

11. Counsel submitted that the matter in the lower court has been heard in its entirety and is pending Judgment and that the parties will still have the unfettered opportunity to Appeal against the decision of the lower court.

12. The records shows that on 7th October, 2014, the Appellants filed the Memorandum of Appeal challenging the decision of the learned Magistrate in Kangundo SPMCC No. 53 of 2014. The Appeal by the Appellants is seeking to overturn the Ruling of the lower court dated 1st October, 2014.

13. The current Application was filed by the Appellants seeking for a stay of proceedings pending the hearing of the Appeal. In the Application, it has been deponed that after the learned Magistrate dismissed the Appellants' Notice of Preliminary Objection on 26th November, 2014, he also dismissed the Application for a stay of proceedings on 29th April, 2015.

14. The two Rulings dismissing the Notice of Preliminary Objection and the Application for stay of proceedings have not been annexed on the Appellants' Affidavit. Indeed, the pleadings in the lower court were also not annexed on the Application seeking for a stay of proceedings.

15. Having not annexed the impugned Rulings of the lower court, this court is unable to appreciate the reasons that were given by learned Magistrate while dismissing the two Applications without appreciating the reasons for the dismissal of the two Applications, this court cannot make a determination on the current Application. On that ground alone, I find the Application dated 20th May, 2015 to be unmeritorious.

16. The Appellants having filed the Record of Appeal, the issues raised in the learned Magistrate's Ruling of 26th November, 2014 will be considered in that Appeal. In fact, no prejudice will be suffered by the Appellants even if the matter is heard and determined in the lower court considering that the Appeal is already before this court.

17. For the reasons I have given above, I find the Application dated 20th May, 2015 to be unmeritorious. The same is struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE