



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 12 OF 2016

FRANKLIN MUSILA MAKOLA.....1ST APPELLANT/APPLICANT

SAMICO LIMITED.....2ND APPELLANT/APPLICANT

VERSUS

PAUL MUTHYA NTHUMO.....RESPONDENT

RULING OF THE COURT

The Application

1. The Notice of Motion before the court is dated **10th March, 2016**. It prays for the following orders;
 - a. That this matter be certified as urgent and be heard ex-parte in the first instance.
 - b. That this Court be pleased to order stay of the execution of the ruling dated **11th February, 2016** and all consequential decrees and/or orders thereof pending hearing and determination of this application.
 - c. That this Court be pleased to order stay of the execution of the ruling dated **11th February, 2016** and all consequential decrees and/or orders thereof pending hearing and determination of an appeal against the said ruling.
 - d. That the cost of this application be provided for.
2. The application is founded on the grounds that the applicant has filed an appeal in the High Court at Machakos against the ruling of the learned Principal Magistrate delivered on **11th February, 2016**, which appeal has high chance of success and if this application is not allowed the appeal will be rendered moot and/or nugatory, and that the applicant is entitled to fair hearing under **Article 50 of the Constitution** and it is in the interest of justice to grant the application.
3. The application is supported by the affidavit of the **Franklin Musila Makolo**, the 1st applicant on his own behalf and on the behalf of the second applicant. The application attaches Memorandum of Appeal also dated **10th March, 2016**.

The Response

4. The application is opposed by the replying affidavit sworn by the Respondent on **6th April, 2016**. The respondent's case is that the application is frivolous, vexatious, incompetent, fatally defective and a gross abuse of the court process and ought to be dismissed. That the Applicants had filed a similar application dated **12th November, 2015** seeking stay which was dismissed but this fact has not been disclosed to court. (*annexed and marked PMN 1 is a copy of the said application*). The respondent's case is that the Applicants have not in the least satisfied the grounds for granting of stay to warrant intervention of this Court. Further, the Applicants have not even given any security for the decretal sum and cannot come to court to seek blanket stay. The respondent states that he has already suffered enough in the hands of the applicants having given them Kshs. 930,000/= on **5th September, 2013** which the applicants have admitted in their supporting affidavit in their application dated **12th November, 2015** at paragraph 6. The respondent's case is that the applicants are enjoying his hard earned cash paid to them when they failed to fulfill their part of the contract and are merely frustrating him because they have nothing to lose. The application by the Applicants is therefore in bad faith, meant to frustrate the respondent and deny him the enjoyment of the fruits of the judgment.

Submissions

5. Parties filed submissions which I have considered. The brief background of the application is that the 2nd defendant entered into a sale agreement dated 5th September, 2013 with the respondent for the sale of land **plot no. 3547 and 3550 Matungulu/Sengani** at a consideration of Ksh 930,000/=. In the process of transferring the said plots to the respondent the 2nd applicant detected that fraudsters had transferred some of the company's plots to their names and were in the process of selling the same to unsuspecting buyers. The 2nd defendant immediately upon realization reported the matter to Tala Police Post and later to the District Criminal Investigation Officer at Kangundo District and a report was made to County Criminal Investigation Officers at Machakos. The aforesaid report formed part of the defendant's list of documents. In the midst of a search of an amicable solution to the situation the respondent sought legal services which culminated in the service of a demand letter dated 27th February, 2014 upon the applicants herein for the reimbursement of the purchase price. After this a suit was filed for the said Shs. 930,000. The said suit was not defended and therefore the 2nd defendant was served with a notice of entry of judgment and intention to execute dated 2nd November, 2015. As a result the applicants instructed another firm to appear defend and represent them in the matter by filing an application dated 12th November, 2015 to set aside interlocutory judgment which was dismissed in a ruling dated 11th February, 2016 and consequently prompting an application for stay of execution of the said ruling.

6. **Order 22 rule 22 of the Civil Procedure Rules, 2010** is to the effect that *“the Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such a decree for a reasonable time to enable the judgment-debtor to apply to the Court by which the decree was passed, or any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for an order relating to the decree or execution which might have been made by the court of first instance, or appellate court if the execution has been issued thereby, or if the application for execution has been made thereto.”*

7. The applicant has lodged an appeal by filing a Memorandum of Appeal annexed and marked FM1 in the applicant's supporting affidavit to the application herein. It was submitted that the appeal has high chances of success. Primarily the appeal is faulting the court of first instance for not taking into account the principles of setting aside an interlocutory judgment. The applicant cited the case of **Mohamed & Another v. Shoka** where **Justice Nyaragi, Justice Gicheru and Justice Kwach JJ.A** held that *“The test for the correct approach in the application to set aside a default judgment is firstly whether there was a defence on merit, secondly whether there would be any prejudice and thirdly what is the explanation of the delay”*.

8. **Order 1 rule 10(2)** of the **Civil Procedure Rules** states;

“The Court may at any stage of the proceedings either upon or without the application of either

party improperly joined whether as plaintiff or defendant be struck out and that the name of any party who ought to have been joined whether as plaintiff or defendant, or whose presence before the court effectively and completely to adjudicate upon and settle the questions involved in the suit added.”

Determination

9. Without getting to the merits of the intended appeal, it is to be noted that the lower court found out that the applicants took the respondents money. The principles for granting stay pending appeal are now settled under **Order 42 rule 6(2)**. The three principles emerging from that order are that the application for stay should be filed without delay, that the applicant should show the loss which it is likely to suffer if the stay is not allowed; and lastly consideration of security.

10. In this case the appellants have admitted receiving money from the respondent for a consideration which the appellants failed to deliver. It is not clear to me how, even if the appeal succeeds and the interlocutory judgment set aside, they will escape liability. However, that is not for this court to decide.

11. The appellants will not suffer and loss if they pay the decretal sum. But if they fear that if the money is paid and the appeal succeeds then the respondent may not be able to refund the same, then this court will rule that the entire decretal sum be deposited in a joint interest earning account in the name of the parties advocates within fourteen (14) days of this ruling.

12. In the upshot, the application is allowed with costs in the cause subject to the entire decretal sum being given as security as stated above.

Order accordingly.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF FEBRUARY, 2017

.....

DAVID KEMEI

JUDGE

In the presence of;

Mapesa – for Makundi for Applicant

Nthiwa - for Respondent