

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC CIVIL APPLICATION 140 OF 2015

ALICE WANJIKU NJAGI.....PLAINTIFFS/RESPONDENT

VERSUS

GILBERT MURIUKI MUNYUGI

BENSON MURIITHIDEFENDANTS/APPLICANTS

RULING

1. The defendants have through their notice of motion applied for stay of execution of the magisterial *ex-parte* judgement that was delivered on 6th November 2014 pending the hearing and determination of their intended appeal. They have also sought leave to appeal out of time against the ruling of the magisterial court delivered on 28th May 2015, which refused to set aside the *ex parte* judgement. Their application is supported by the supporting affidavit of Sandra Nyakweba. According to her, the proceedings that gave rise to the judgement and ruling complained of were conducted in their counsel's absence. It is also her affidavit evidence that they are able to furnish reasonable security. She also states in that affidavit that the intended appeal raises weighty issues of law (paragraph 9 of the affidavit).
2. The application is opposed by the plaintiff. According to the plaintiff, the application is bad in law and is an abuse of the court process. She further states that there was and there is inordinate delay in prosecuting the applications, which in aggregate amounts to over one year (Para 3 (e) of the affidavit). It is also her evidence that the defendants have been filing several applications in order to deny her from enjoying the fruits of the judgement that was entered in her favour.
3. I have perused the affidavit evidence and the annexes of both parties and the rival submissions of their counsel. I find that the main judgement was obtained in the absence of the defendants. They only came to learn of it during the execution proceedings. I accept their explanation of the delay that led them not to challenge the judgement timeously.
4. I also find that there are weighty issues of law in the intended appeal. In the circumstances, the defendants should be given an opportunity to have their day in court. However, as a condition of being granted leave to appeal and the stay of execution the defendants should deposit the whole decretal amount in the sum of Kshs. 2,081,626/- in court pending the hearing of their applications. In this regard they are required to deposit the amount of money within three months from today failing which the orders granting leave and stay will automatically lapse.
5. Costs of this application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **13th** day of **APRIL 2016**

In the presence of Mr Kisinga for the defendants and in the absence of the plaintiff

Court clerk Njue

J.M. BWONWONGA

JUDGE

13.04.16