



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC APPEAL CASE NO.193 OF 2014

1. ALFRED NZIOKA KATHONDE

2. VERONICA WANJIKU NZIOKA APPELLANT/APPLICANTS

VERSUS

1. WILSON NJOROGE KAMAU

2. HENRY KIMARU KAMAU

3. SOLOMON NJOROGE KAMAUPLAINTIFFS/RESPONDENTS

RULING

- 1.** The matter before court is a Notice of Motion dated 11.9.2014 seeking 8 prayers to wit:
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. Stay of execution of Magistrate's ruling in civil case No.324/012 (Mks) delivered on 7.8.2014.
 6. Setting aside judgment delivered on 12.6.2014.
 7. Leave be granted to adduce evidence and cross-examine witnesses in case the appeal is successful.
 8. Costs.

The application is based on 8 grounds a-f on the face of the motion. The application is supported by the affidavit of ALFRED NZIOKA KATHONDE sworn on 11.9.2014. The application is anchored on the provisions of order 41 Rule 4(1) (2). Rule 24, Rule 63, order 1 Civil Procedure Act Section 3A, Civil Procedure Act inter alia. In opposition to the application the Respondents have grounds of opposition dated 23.9.2014.

2. The applicants' case is based on very scant material in the supporting affidavit to the effect that the lower court suit in which they were the defendants proceeded in absence of themselves and their advocate and a judgment made in favour of the Respondents who were the Plaintiffs. Subsequently, they filed to set aside the aforesaid judgment delivered on 12.6.2014 via application filed on 19.6.2014.
3. The Applicants procured exparte orders for stay but come 3.7.2014 when matters was for inter parte hearing, the Applicants and their advocates were once again absent and the matter was dismissed. This prompted the filing of the instant appeal and the motion being canvassed instantly.
4. The Respondent's rejoinder is that the application is an abuse of the process of the court since the application is time barred. Further both the judgment and the impunged ruling/order were made due to the absenteeism of the applicant advocate. The Respondent further state that the judgment effect is the order of refund of purchase price of KShs.198,000 as the agreement failed due to want of Land Board Consent and breach of contract. Further the Respondents state that the appeal is time barred as it was filed outside the statutory period of 30 days prescribed by the law.
5. The provisions of Order 42 Rule (1) and (2) Civil Procedure Rules prescribes the conditions to be demonstrated before stay of execution if granted. Among them is that the applicant has to demonstrate the likely substantial loss to be suffered if execution is levied. The Applicant has also to demonstrate that the application was filed without unreasonable delay. The provisions also prescribe the provision of the security.
6. The Applicants fear is that the Respondents will execute to recover titles and the amount of KShs.198,000/-be paid to them as contract had failed and the Land Board consent had not procured as prescribed by the law to give blessings to the sale agreement in terms of the provisions of Section 6 of Cap 302. What is the substantial loss to be suffered? The Applicants do not come out clearly though it is submitted that KShs.198,000/= is to be refunded together with interest from date of filing suit as defendants have been in occupation and farming the suit land.
7. At this stage the court has only dealt with prayers No.5 of the Notice of Motion as the setting aside of the judgment sought in prayer No.6 is not one of the reliefs sought in the memorandum of appeal dated 4.9.2014 and filed on 5.9.2014. In any event, same relief would be time barred as the judgment was made on 12.6.2014 and the appeal was lodged on 5.9.2015.
8. Further, prayer No.7 which is seeking rehearing of the suit can only be canvassed at the time of the hearing of the appeal. The ruling impunged was delivered on 5.9.2014 vide memo in court and receipt dated 5.9.2014. The appeal was thus filed within 30 days (27.8.2014 to 5.9.2014) prescribed by the law. The application for stay was filed on 15.9.2014 and thus cannot be deemed to have been filed with unreasonable delay.
9. The applicant has not offered any security as prescribed by the provisions of order 42(b) Civil Procedure Rules. However, the court can always impose the same as condition for stay. The court has noted the issues emerging in the parties contestation which will be canvassed during the hearing of the appeal. The Respondent submits that they are ready to comply with the order issued in the judgment by refunding KShs.198,000/- plus interest from the date of the judgment. This would entail the applicants to return to them the original title. But what about the issue of occupation of suit land by the applicants?
10. The court is of the view that to secure the interest of all the parties, the stay will be granted conditionally to await appeal to be heard on priority basis. The court therefore makes the following orders:

 1. The parties shall deposit both the original title in court (that is the applicants') and the KShs.198,000/- (by the Respondents) within 30 days pending hearing and determination of the appeal and in default on part of the Applicant, the application stand dismissed.
 2. The costs to abide by result of the appeal.

3. The appeal records be prepared by the applicant within 30 days and be lodged and served.
4. The appeal thereafter be heard on priority basis.

Signed and delivered at Machakos this 6th day of February, 2015.

CHARLES KARIUKI

JUDGE