REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 138 OF 2014

MARY MUTIE……...…..……1ST APPELLANT/APPLICANT

DANIEL K. MUTIE……..…...2ND APPELLANT/APPLICANT

GIDEON MUTIE KIMATHI…….....3RD APPELLANT/APPLICANT

VERSUS

AYUB MWANIKI MWALILI……..RESPONDENT

R U L I N G

1. By a Notice of Motion dated **12th November, 2014** the Applicants seek orders that there be a stay of a decree issued on the **25th June, 2014** at **Makindu Law Courts** pending hearing and determination of the appeal.
2. The application is premised on the grounds that an order was made against the Appellants on **25th June, 2014**; the order was against a single mother and her two (2) sons and satisfying the decree before the appeal is heard will be prejudicial if afterwards the appeal succeeds.
3. The application is supported by an affidavit deponed by the 1st Applicant having been authorized by the 2nd and 3rd Applicants who deposes that: the Notice to Show Cause was served upon them; they have preferred appeal against the decision of the Lower Court; it will be prejudicial if the decree is satisfied before the appeal is heard because they have an arguable appeal; the decree is against the same family; the only property they have is a piece of land they are residing on; and they will be financially incapacitated to prosecute the appeal.
4. In response thereto the Respondent through his advocate filed a replying affidavit stating that: The application and the main appeal are incompetent as they have been filed by an advocate not on record; the Applicants have concealed material facts by failing to file the application in the court that passed the decree and which court has the full history of the case; reasons advanced by the Applicants are clear that the Appellants do not wish to settle the decretal amount for their own convenience and comfort which are not considerations for granting the order sought; the decree is a money decree that cannot be defeated as the Respondent can always pay back the money in event the appeal succeeds; the Applicants have not offered any security as a show of good faith.
5. Principles upon which the application sought should be granted are stipulated in **Order 42 Rule 6 (2)** of the **Civil Procedure Rules, 2010** which provides:

"(2) No order for stay of execution shall be made under subrule (1) unless –

a. ***the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

b. ***such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."***

6. It is averred by the Applicants that they will suffer prejudice if the appeal succeeds. The Respondent herein sought monetary relief. Consequently, the decree herein is monetary in nature. In the case of **Josephine Seraphine Wadegu V. Kenya Power and Lighting Company LTD (2013) eKLR** the court stated thus:

> ***"Where a decree for payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of the appeal had to be considered within the circumstances of each particular case."***

7. The circumstances prevailing in the case are that a sum of Kshs. 128,600/= was awarded as compensation for damage caused to the Respondent's crops and fence. If the appeal succeeds money can be refunded. As such no substantial loss will be suffered.
8. The competence of the advocate representing the Applicant has been questioned. It has been demonstrated that in the Lower Court the Applicants were represented by the firm of **P. M. Mutuku and Company Advocates** who filed submissions on their behalf. The appeal and the application have been filed by **Muema and Associates Advocates.** Circumstances under which the latter firm of advocates came on record have not been explained. According to **Order 9 Rule 9** of the **Civil Procedure Rules, 2010** the current advocate ought to have come on record following a court order since judgment had been passed and a decree issued. The law having not been complied with, the advocate purporting to represent the Applicant is improperly on record. **(Also see John Langat vs. Kipkemoi Terer & 20 Others (2013) eKLR; Florence Hare Mkaha vs. Pwani Tawakal Mini Coach & Another (2014) eKLR)**

This renders the application incompetent. Consequently it is struck out with costs to the Respondent.

9. It is so ordered.

Dated at **Kitui** this **21st** day of **October,** 20**15.**

L. N. MUTENDE

JUDGE

Dated, Signed and **Delivered** at **Machakos** this **9th** day of **November,** 20**15.**

P. NYAMWEYA

JUDGE