

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 61 OF 2014

ELISTONE MBELA & 20 OTHERS APPELLANTS

V E R S U S

NATIONAL HOUSING CORPORATION RESPONDENT

(Being an appeal from Judgment delivered by Hon. R. M. Kitagwa, RM dated 27th March 2014 delivered on 10th April 2014 in RMCC No. 2665 of 2008)

RULING

1. Appellants filed a suit in the lower Court being **Mombasa RMCC No. 2665 of 2008**. The prayer sought in that action was for an injunction to issue to restrain Respondents from increasing rent or altering the terms of the existing tenancy terms of Appellant. By judgment delivered in that case on 27th March 2014 the suit was dismissed. Appellants being dissatisfied with that judgment filed the present appeal.
2. Appellants filed a Notice of Motion dated 7th May 2014. They seek a stay of execution of the decree in **RMCCC No. 2665 of 2008** pending appeal which I believe in error they state was delivered on 10th April, 2014 and not 27th March, 2014
3. As stated before the judgment of the lower Court dismissed Appellant's suit was delivered on 27th March 2014. The end result of that dismissal was that no positive order was made capable of being stayed as sought. Indeed the end result of that judgment was a negative order. A negative order is incapable of being stayed. It is so stated by the Court of Appeal in the case **KANWAL SARJIT SINGH DHIMAN –Vs- KESHAVJI JIVRAJ SHAH (2008)eKLR** as follows-

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976]KLR 63 at page 66 paragraph C).

4. It follows that the prayer for stay of execution fails because the order issued by the lower Court judgment was negative and incapable of being executed.
5. But perhaps of more importance is that the Notice of Motion will fail because the appeal before Court is incompetent, for having been filed out of the 30 days period provided in Section 79G of the Civil Procedure Act. There is no prayer to admit the appeal out of time. Section 79G provides-

“Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite

for the preparation and delivery to the appellant a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

6. Appellants appeal was filed on 7th May 2014 and the lower Court judgment was delivered on 27th March 2014. The 30 days within which the appeal should have been filed fell on 27th April 2014.
7. There being no competent appeal upon which orders of stay can be granted the Notice of Motion dated 7th May 2014 is dismissed with costs to the Respondent.

DATED and DELIVERED at MOMBASA this 17TH day of JULY, 2014.

MARY KASANGO

JUDGE