



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 29 OF 2006

MARK WEFWAFWA.....PLAINTIFF/RESPONDENT

VERSUS

DISMAS NYONGESA WEFWAFWA

CHARLES WEKESA WANJALA

SIMON WANJALA WEFWAFWA.....DEFENDANT/APPLICANTS

RULING

1. By an application dated 13th November 2013 the Defendants/applicants moved this court under section 1A, 3, 3A and 63 (e) of the Civil Procedure Act and order 22 rule 22 of the Civil Procedure rules seeking the following orders;

- i. Service of this application be dispensed with in the first instance.
- ii. Pending the hearing and determination of this application there be a temporary stay of execution of the decree herein.
- iii. That pending the hearing and determination of Eldoret court of appeal civil application no. 10 of 2013 there be a stay of execution of the decree herein.
- iv. Costs of this application be provided for.

The application is supported by seven (7) grounds listed on the face of it, supporting and further affidavits sworn by Dismas Nyongesa Wefwafwa the 1st defendant/applicant. He deposed that unless these orders are granted, they stand to suffer irreparable loss if the respondent proceeds with execution.

2. The application is opposed by the respondent. In his replying affidavit he deposes that stay can only be granted in very clear circumstances not as this. He also deposed that the memorandum of appeal has been read to him by his counsel on record and he is advised that the same raises no triable issues. He also filed a further affidavit in which he deposes the applicants were granted leave to file appeal out of time but which order the applicants have failed to comply with. He asked the court to dismiss the application.

3. A reading of the prayers contained in this motion reveals the stay is sought pending determination of Eldoret Court of Appeal civil application no.126 of 2013. That application was determined by a consent entered into and signed by advocates of parties on record dated 24th February 2014 filed on the same date in that application. The consent stated thus;

“By consent of both parties

(a). The applicant's application dated 12th February 2013 be and is hereby allowed.

b). That consequently the applicant is hereby granted leave to lodge his appeal out of time which appeal must be lodged within 30 days from the date hereon.”

This consent letter was annexed by the applicant in their further affidavit filed in court on 8th June 2014 as annexure “DNW1”

4. The effect of the terms of that consent makes this court's work easier as it has sealed the fate of the present application as spent. The Court of Appeal civil application no.126 of 2013 is no longer pending. There is no other prayer seeking stay of execution pending determination of the appeal lodged as per paragraph 4 of the applicant's further affidavit where he deposes that they already lodged an appeal awaiting an allocation of a number. In my thinking, the applicants ought to have filed another application immediately on the consent being recorded to seek stay pending appeal.

5. Consequently I find the notice of motion dated 13th November 2013 as overtaken by events and do dismiss it. Each party will bear their costs of the application.

DATED and DELIVERED this 15th day of October 2014

A. OMOLLO

JUDGE.