



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 14 OF 2018

PETER KYALO MUTUA

NZIOKI WILSON NDUTU

DANIEL MULANDI KIKUNZE

JULIUS KIOKO WAMBUA

ROSEMARY K. MUTUNGA (*Suing as trustees for themselves and*

***other beneficiaries of ATHI RIVER SLUM DWELLERS*).....APPELLANTS**

VERSUS

AKIBA MASHINANI TRUST.....RESPONDENT

RULING

1. In the Application dated 22nd June, 2018, the Appellants are seeking of the following orders:

a. That there be a stay of execution of the entire Judgment and Decree of Honourable A. Kibiru delivered on 17th April, 2018 assessment and approval of costs in Machakos CMCC No. 1151 of 2013 pending the hearing and determination of the Appeal filed herein.

b. That the costs of this Application be in the cause.

2. The Application is premised on the grounds that the Appellants filed Machakos CMCC No. 1151 of 2013 seeking for release of the Title Deed for parcel of land known as Mavoko Town Block 3/2347 from the Respondent; that the Appellants' suit was dismissed and that the Appellants have filed an Appeal against the said Judgment.

3. According to the Appellants, the Respondent has already forwarded a draft Decree claiming costs of Kshs. 649,700 and that the said Decree may be approved by the court and executed.

4. In response, the Respondent's Executive Director deponed that the Appellants have not given such security for the performance of the Decree; that the Applicants have not demonstrated that the Defendants is incapable of paying back the decretal sum in case the Appeal succeeds and that the assessed costs of Kshs. 622,883 should be deposited in court.

5. In their Memorandum of Appeal dated 15th May, 2018, the Appellants have challenged the decision of the learned Magistrate in Machakos CMCC No. 1151 of 2013. In the meantime, the Appellants are seeking for a stay of execution of the entire Judgment and Decree including the assessed costs, pending the hearing of the Appeal.

6. The claim by the Appellants against the Respondent in the lower court was for the release of the Title Deed for Mavoko Town Block 3/2347 having repaid the loan of Kshs. 3 million advanced to them by the Respondent. After hearing the suit, the learned Magistrate dismissed the suit with costs. Having dismissed the suit, there is no positive order to be stayed, save for costs.

7. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provide that for an order of stay of execution of a Decree or order to be given, a party must demonstrate that he will suffer substantial loss; the Application was made without unreasonable delay and the Applicant should give such security that is sufficient for the performance of such Decree.

8. As I have stated above, the Judgment of the court cannot occasion the Appellants any loss because the court simply dismissed the Appellants' case. Having lost the suit in the lower court, the Respondent is entitled to costs which have not been assessed by the court. Until the court assesses the costs, the Appellants cannot allege that it will suffer substantial loss.

9. To the extent that the court has not assessed the Respondent's costs, I find that the current Application was prematurely filed. In any event, the Appellants are required to give security for the due performance of the Decree of the court-in respect of the assessed costs, which they have not done. In the circumstances, I find no merit, in the Application dated 22nd June, 2018. The Application is struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE