



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. 205 OF 2015**

**MAUNDU MUIA NDUA.....1<sup>ST</sup> APPELLANT**

**ANCENT MAILU MUIA .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSEPHAT KAVATI MUIA .....1<sup>ST</sup> RESPONDENT**

**ALLOYS MUTISYA MUIA .....2<sup>ND</sup> RESPONDENT**

***(Being an Appeal from the Ruling of the Chief Magistrate's Court at Machakos in Civil Case No. 415 of 2014 delivered on 9<sup>th</sup> December, 2015 by Hon. L. Mbugua -CM)***

**RULING**

1. In the Application dated 18<sup>th</sup> June, 2018, the Appellants are seeking for the following orders:

***a. That there be a stay of any further proceedings in Machakos CMCC No. 415 of 2014 pending the hearing and determination of Machakos HCCA. No. 205 of 2015.***

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

2. The Application is premised on the grounds that on 6<sup>th</sup> July, 2015, the Appellants raised a Preliminary Objection on the jurisdiction of the Subordinate Court to hear the Application dated 29<sup>th</sup> June, 2015 for leave to Appeal out of time; that the Preliminary Objection was dismissed on 9<sup>th</sup> December, 2015; that the Appellants' Application for stay of proceedings was dismissed by the lower court and that the Appellants' Appeal has high chances of success.

3. The 1<sup>st</sup> Appellant has deponed that the Appeal raises substantial issues of law as to whether a Subordinate Court can hear and grant leave to Appeal out of time pursuant to Section 79(g) of the Civil Procedure Act and that the proceedings in the lower court should be stayed.

4. In response, the 1<sup>st</sup> Respondent deponed that the Appellants filed an Application similar to the present one in Machakos CMCC No. 415 of 2014 which was dismissed; that the Appellants filed a Memorandum of Appeal after being dissatisfied with the Ruling dismissing their Preliminary Objection and that the Appellants have not demonstrated the substantial loss they will suffer in the event the orders are not granted.

5. The 1<sup>st</sup> Respondent deponed that although the Memorandum of Appeal was filed on 17<sup>th</sup> December, 2015, the Application was filed on 25<sup>th</sup> June, 2018; that the delay of four (4) years in filing the Application has not been explained and that the Application should be dismissed.

6. The Appellants' advocate submitted that the main issue for determination in this Appeal is whether the Subordinate Court can hear and determine an Application for leave to Appeal out of time; that the Appellants shall demonstrate that an Application to Appeal out of time cannot be made to the same court which gave the Ruling sought to be appealed from and that the current Application is merited.

7. The Appellants filed the Memorandum of Appeal dated 17<sup>th</sup> December, 2015 and filed on the same day challenging the Ruling that was made in the lower court on 19<sup>th</sup> December, 2015. In the said Memorandum of Appeal, the Appellant averred that the Magistrate erred when she held that the Subordinate Court can hear and determine an Application seeking for leave to Appeal out of time for orders issued under Order 40 of the Civil Procedure Rules.

8. The Appellants averred in the Memorandum of Appeal that the learned Magistrate erred by conferring upon herself jurisdiction to hear the

Application dated 29<sup>th</sup> June, 2015 for leave to Appeal out of time and that the Preliminary Objection dated 6<sup>th</sup> July, 2015 should be allowed. In the meantime, the Appellant is seeking for a stay of the proceedings in the lower court.

9. Although the Appellants have annexed on their Application the copy of the Notice of Preliminary Objection that was filed in the lower court, they have not exhibited the Ruling that was made by that court. Indeed, the Appellants have also not annexed a copy of the second Ruling that was made by the trial Magistrate in which he refused to stay the proceedings.

10. The failure by the Appellants to annex the above stated Rulings of the lower court is fatal to the current Application. I say so because this court can only order for a stay of proceedings in the lower court pending the hearing of the Appeal if it is satisfied that the Rulings being appealed against are likely to cause substantial loss to the Appellants (*See Order 42 Rule 6(2) of the Civil Procedure Rules*). The court cannot make such a finding without the benefit of the Rulings appealed against.

11. In any event, the Appellants have not demonstrated the substantial loss that they shall suffer unless the proceedings of the lower court are stayed, or the prejudice that they are likely to suffer. If, after trial, the Appellants lose, they can still ventilate the issues they raised in the lower court, including the Preliminary Objection, during the hearing of the Appeal.

12. The current Application was filed four (4) years after the filing of the Memorandum of Appeal. Indeed, there is no explanation as to why the Appellants have never filed a Record of Appeal to date. The period the Appellants have taken to file the current Application, and the Application in the lower court for stay of execution, is unreasonable.

13. In the circumstances, I find that the Appellants have not satisfied the requirements for the grant of stay of proceedings as stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules. Consequently, I dismiss with costs the Application dated 18<sup>th</sup> June, 2018.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8<sup>TH</sup> DAY OF MARCH, 2019.**

**O.A. ANGOTE**

**JUDGE**