



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CIVIL APPEAL CASE NO. 14 OF 2017

MOHAMED SUDI BINDO

MTANA SUDI BINDO.....APPELLANTS/APPLICANTS

-VERSUS-

HAMISI MWINYI NGWISA.....RESPONDENT

RULING

1. The appellant/applicant has moved the Court under the provisions of Order 42 rule 6 and Order 51 seeking for orders that:

1) Spent

2) Spent

3) Spent

4) That this Honourable Court be pleased to make an order that pending hearing and determination of this appeal there be a stay of execution of the entire Judgment and Decree of Hon. E. Mutunga, Senior Resident Magistrate delivered on 19th May 2017 in Mombasa SRMCC No 2142 of 2013.

5) That costs be provided for.

2. The application is grounded on the averments inter alia; that the applicant has arguable appeal and unless stay of execution is granted the appeal shall be rendered nugatory. The appellant pleads further that if the orders are not granted, they will suffer irreparable loss. The application is also supported by the facts contained in the supporting affidavit of Mohamed Sudi Bindo.

3. The application is opposed by the Respondent vide his replying affidavit sworn on 18th August 2017. He deposes that the applicants have not met the criteria set out under Order 42 rule 6 for granting stay of execution. He also deposed that he has been waiting since 17th January 2013 for the appellants to pay him his money. The applicants filed a supplementary affidavit dated 1.12.2017 but filed in Court on 29.11.17 which the Respondent argues was filed out of time without leave and urged the Court to expunge the same from record. The applicants have not explained the inconsistency in the date of filing and date of swearing this supplementary affidavit.

4. In the contested affidavit the applicants deposed that they were sued as directors of Al Munawar

Intergrated Muslims & Orphanage School which is registered as a self – help group which fact the Respondent has vehemently opposed. I have perused the plaint and the defence which constitutes the pleadings before the lower Court, there is no mention that the applicants were sued as directors of the self – help group. The nature of the business carried out in the suit premises during the lifetime of the tenancy is also not described. I will therefore not delve into the issues that regard the operations of Al Munawar Intergrated School as they constitute new issues which cannot be introduced at this stage in appeal without leave of the Court.

5. There is a plethora of case law that discusses grounds to be considered for allowing an application for stay of execution. The case laws provided by the Respondent herein are anchored on the provisions of Order 42 rule 6 (2) that provides as stated hereunder:

“(2) No order for stay of execution shall be made under rule (1) unless:

(a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that 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 his has been given by the application.”

6. I have noted that cases referred to by the Applicants emanated from decisions of the Court of Appeal that applies principles that are different from those provided under Order 42 rule 6 expect the decision in the case of Oraro & Rachier advocates that is relevant to the present case since this is also a monetary decree. The simple question for this Court to resolve is whether the application meets the criteria set out above. The judgement and decree being appealed was delivered on 19th May 2017. This application was filed on 10.7.2017. It was thus filed without unreasonable delay. In the case of **Oraro & Rachier Advocates vs Co-operative Bank of Kenya Ltd (2000) eKLR** the Court of appeal noted that both sides’ interests must be weighed and not just whether the Respondent would be able to refund the monies paid as the only consideration.

7. What is sought to be stayed is a monetary decree which can easily be refunded if the appeal succeeds. However the applicants state that if the Court orders for the money to be deposited, it may result into closure of the school. As I pointed in paragraph 4 of this ruling, the school is not a party to these proceedings so I find this explanation out of place. The applicants have not offered any form of security in their application. In this instance, weighing the interest of both parties I deem it necessary that there ought to be some form of security to be offered so that even if the stay is granted, the Respondent’s interest is also taken into consideration. To do this; I shall make the following orders to determine the application:

(i) I do grant stay of execution of the judgement and decree in MSA SRMCC 2142 of 2013 pending hearing and determination of the appeal on condition of compliance with item (ii) i.e.

(ii) The applicants to pay the Respondent Kshs 100,000= which as part of the decretal sum within 30 days of this date as security.

(iii) In default of (ii) above, the Respondent is at liberty to execute for the said sum of Kshs 100,000=

(iv) Costs of the application abide the outcome of the appeal.

Dated, signed & delivered at Mombasa this 30th January 2018.

A. OMOLLO

JUDGE