



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 700 OF 2013**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION**

**OF ACTIONS ACT CAP 22 LAWS OF KENYA**

1. MARTHA WAKUTHII MUTUA
2. GRACE WAKARIMA MUTUA
3. JOYCE WANGU MUTUA.....PLAINTIFFS
4. PETER MAINA MUTUA.....APPLICANTS
5. DANIEL GACHOKI
6. WANJOHI KAMAU
7. NJOGU KAMAU NGURE

**VERSUS**

1. PAUL KANGANGI MUNENE
2. JOSEPH MUGARA KANGANGI.....DEFENDANTS
3. BETHA CATHERINE W. KANGANGI.....RESPONDENTS

**RULING**

[1]. The applicant filed this application under **Order 42 Rules 6 of the Civil Procedure Act 2010** and prays for a stay of execution of the judgment/decreed/pending the determination of an intended appeal. The application was supported by an affidavit of MARTHA WAKUTHII MUTUA. In her affidavit, she states that the judgment herein was delivered on 5<sup>th</sup> May 2017. She states that being dissatisfied, she decided to appeal against the said decision and that if stay is not granted, the plaintiffs stands the risk of being evicted from their homes and being condemned to costs since the defendant has fixed his bill of costs for taxation on 18<sup>th</sup> July 2018 and further that the intended appeal will be rendered nugatory.

[2]. The respondent opposed this application. He filed grounds of opposition and argued that the application is frivolous, vexatious and an abuse of the Court process. That the same lacks merit and does not lie. That no appeal exists under the law. That no appeal has been preferred in the statutory period and that the order made on 5<sup>th</sup> May 2017 is a negative order that declared the entire suit as res-judicata and that it is therefore not capable of execution. It is also argued by the respondent that the application is made by a stranger IKAHU NGANGA & CO. ADVOCATES who came into the suit after judgment was delivered on 5<sup>th</sup> May 2017. It is argued that the said advocates have not complied with **Order 9 Rule 9 of the Civil Procedure Rules 2010**. The lawyers on record when judgment was delivered were MORRIS NJAGI WHO & CO. ADVOCATES. That the counsel have come on record without leave of the Court and or consent with the previous lawyers as required by the said rule.

[3]. There is no appeal filed in this case at all. What is filed is a ground of appeal. Under **Order 42 Rule 6**, no appeal or 2<sup>nd</sup> appeal shall operate as a stay of execution unless the Court appealed from so orders or when sufficient cause is shown the Court appealed to so orders.

The orders that are supposed to be appealed against are negative orders. The Court in its judgment of 5<sup>th</sup> May 2017 stated that the suit is res-judicata. This is not an order capable of being executed. This is a negative order.

[4]. The advocate on record for the applicant came on record after judgment when a previous advocate MORRIS NJAGI had been acting. He was not given leave by the Court. There is no consent between himself and the outgoing advocate allowing him to come on record. He filed an application without leave.

This offends **Order 9 Rule 9 of the Civil Procedure Rules**. The application before the Court is incompetent having been filed without leave and offending the said **Order 9 Rule 9**.

[5]. For the above reasons, stay cannot be granted. The application is dismissed with costs.

It is so ordered.

**Dated and delivered in open Court at Kerugoya this 18<sup>th</sup> day of May 2018.**

**S. MUKUNYA**

**JUDGE**

**18/5/2018**

**In the presence of:**

Gichia - Court Assistant

Mr. Mwiti for Mr. Nganga for the Plaintiffs

Miss Waweru for the Respondents

Both parties.