



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 4 OF 2015

DAVID NGANGA.....1ST APPELLANT/APPLICANT

REV. BERNARD WAMBUA.....2ND APPELLANT/APPLICANT

SHADRACK SILA.....3RD APPELLANT/APPLICANT

ARON MUTUNDU.....4TH APPELLANT/APPLICANT

PETER SILA.....5TH APPELLANT/APPLICANT

HARRISON MULL.....6TH APPELLANT/APPLICANT

PAUL MUNYAO7TH APPELLANT/APPLICANT

(All suing on behalf of members of African Inland Church Mathunthini)

VERSUS

PHILES SYOMBUA MULWA & 21 OTHERS.....RESPONDENTS

RULING

1. The Application dated 8th April, 2015 and filed by the Applicants is seeking for the following orders:

a. That this Honourable Court be pleased to order stay of execution of the order issued by Honourable J.N. Nyagah C.M and consequential proceedings pending hearing and determination of the Appeal against the order.

b. Costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 1st Appellant who has deponed that the Plaintiffs instituted the suit in the lower court in their capacity as L.C.C officials of A.I.C Mathunthini; that the matter proceeded for hearing ex-parte and a Decree was issued on 8th December, 2014 and that when the Respondents were evicted, they filed an Application dated 18th December, 2014.

3. The Applicants have deponed that in its Ruling, the court proceeded to set aside the ex-parte Judgment contrary to what the Applicants were seeking in their Application and that their Appeal has high chances of success.

4. In response, Rev. Joshua Kiiti deponed that he is the Chairman of the A.I.C Makutano, Mathunthini District Church Council; that the deponent to the Affidavit in support of the Application lacks *locus standi* to swear the Affidavit because he is not an official of A.I.C; that the Appellants in filing the suit in the lower court were aware of other existing suits and that the lower court set aside the ex-parte Judgment for having misled the court and that the Appeal has very limited chances of success.

5. The Applicants' advocate submitted that a party in a suit is always bound by his pleadings; that from the proceedings, the Respondents abandoned prayers Nos. 1, 3, 4, 5, 6 and 7 of the Application and that the Magistrate should have confined himself to the prayers sought in the Application. Counsel submitted that if stay of execution is not granted, there is a real risk of the Respondents re-entering the suit premises thus affecting their constitutional right of worship.

6. In his submissions, the Respondents' advocate submitted that the trial court upheld the Respondents' Preliminary Objection by having the

Appellants' suit struck out and that there is nothing to show that the Appeal will be rendered nugatory if a stay is not granted.

7. The Application before me is for a stay of execution of the order of the lower court pending hearing and determination of the Appeal. The law governing stay of execution of an order or Decree pending Appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules.

8. For the current Application to be allowed, the Applicants have to show that: substantial loss may result to them unless the order is made: the Application has been made without unreasonable delay; and such security on the court orders for the due performance of the Decree has been given by the Applicants.

9. Although the Applicants have gone into great length explaining why they believe the learned Magistrate erred in setting aside the ex-parte Judgment, they did not inform this court the substantial loss that they will suffer unless the order of the Magistrate is stayed. Indeed, the order of the Magistrate, according to the Applicants, simply set aside the ex-parte orders that he had granted to the Appellants. Consequently, the said order did not direct the taking of any action as against the Applicants that can occasion substantial loss.

10. In any event, the Applicants did not even annex the order or the typed Ruling of the court that they intend to have stayed by this court. Instead, they photocopied a handwritten Ruling of the learned Magistrate and annexed it on the current Application. That is not a practice that this court will encourage considering that this is a court of record. The Applicants should have sought for a typed Ruling.

11. In the circumstances, and for the reasons I have given above, I dismiss the Application dated 13th April, 2015 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE