



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
CIVIL APPEAL NO. 26 OF 2011

PAUL MUTISO NZAU

BONIFACE KITWA NZAU

THOMAS KYALO NZAU.....APPELLANTS

VERSUS

SIMON MUEMA NZAU.....RESPONDENT

RULING

The appellants sued the respondent at the Resident Magistrate’s Court at Machakos on 27th November 2002 in Machakos SPMCC NO. 967 of 2002, Paul Mutiso Nzau and 2 Others –vs- Simon M. Nzau (“the lower court case”) seeking; a permanent injunction to restrain the respondent from selling, alienating, disposing or otherwise interfering with all that parcel of land known as Muputi/Kaani/1548 (hereinafter referred to as “the suit property”) and in the alternative, an order that the appellants be allowed to satisfy the monies owed to the respondent on account of the said parcel of land. The respondent filed a statement of defence denying the appellants’ claim and urged the court to dismiss the same with costs.

Together with the plaint, the appellants filled a Chamber Summons application dated 25th November 2002 seeking a temporary injunction to restrain the respondent from selling, alienating, disposing or otherwise interfering with the suit property pending and hearing and determination of the application and further determination of the suit. The appellants also sought a further order that they be allowed to liquidate the sum of kshs. 48,000/= that was owed to the respondent by paying a deposit of kshs. 10,000/= and thereafter kshs. 4,000/= per month until payment in full.

The appellants’ application was heard by S.M. Kibunja SPM (as he then was) who in a ruling delivered on 17th March 2003 dismissed the application with costs to the respondent. After the dismissal of the appellants’ application as aforesaid, the respondent purported to move the court to have his costs for the application assessed and the executive officer purported to assess the said costs at kshs. 18,560/=. It is not clear to me on what basis these costs were assessed. While dismissing the appellant’s application for injunction, the court did not make an order that the costs be paid forthwith. This means that the recovery of the costs that were awarded to the respondent had to wait for the hearing and disposal of the main suit. The purported assessment of costs was therefore irregular.

The appellants moved the court through an application dated on 2nd March 2004 to have the said costs reviewed. Although the court (D.W. Nyambu SRM) found the purported assessment of costs as irregular and premature, she declined to set the same aside on the ground that the said assessment was not an order capable of being reviewed. Although I am not sitting on appeal against the decision of D.W. Nyambu SRM, I cannot shy away from stating that her final decision was wrong. The Executive Officer while exercising any ministerial act or thing that may be done by the court under the Civil Procedure Rules is deemed as a civil court and any decision made by him is deemed as having been made by the court and may be reviewed or set aside as any court order. In this regard, see the provisions of order 49 Rule 6 of the Civil Procedure Rules 2010.

On 23rd March 2009, the respondent purported to apply for execution of “Decree” dated 17th March 2003 for the recovery of the sum of kshs. 18,560/= that was purportedly awarded to the respondent as costs. This application was made notwithstanding the fact that the court had declared the purported costs as have been irregularly and prematurely assessed. This move in my view was an abuse of the process of the court by the respondent. In his application for execution, the respondent sought the arrest and committal of the appellants to civil jail in default of payment of the said sum of kshs. 18,560/= which had by then increased to kshs. 34,835/= by application of interest and other charges. Faced with this application, the appellants moved the court through an application dated 28th April 2009 seeking a stay of execution of the purported decree pending the hearing and determination of the lower court case. The respondent conceded to the appellant’s application save for costs. In his decision on this issue of costs, J.M. Munguti SRM in his ruling of 5th November 2009 found that the respondent had attempted to execute a non-existent decree and awarded the appellants the costs of the application for stay dated 28th April 2009. The appellants suit was subsequently struck out with costs on a technicality by B.T. Jaden CM (as she was then) on 16th February 2011.

The appellants were dissatisfied with the decision of B.T. Jaden CM and preferred an appeal against the same to this court on 16th March 2011. In their Memorandum of Appeal, the appellants have challenged the said decision by B.T. Jaden CM on several grounds. While the appeal herein is pending, the respondent applied for execution of the lower court decree for the recovery of his costs in the sum of kshs. 29,555/=. The application was made on 20th April 2015. On 20th May 2015, the appellants filed an application in the lower court for stay of execution pending the hearing and determination of the appeal before this court. The appellant’s application was heard by L. Simiyu SRM who allowed the same conditionally on 14th August 2015.

The appellants were granted an order of stay of execution on condition that they deposit within 30 days from the date of that order the decretal amount in a joint interest earning account in the joint names of the appellants’ and the respondent’s advocates. The appellants found the condition that had been imposed by the lower court onerous and moved to this court on 10th September 2015 through Notice of Motion dated 10th September 2015 seeking a stay of the said condition pending the hearing and determination of their appeal herein. This is the application before this court. The application was brought on the grounds that the condition that was imposed by the lower court while granting a stay order was harsh and curtailed the appellants’ right to prosecute the appeal herein. In their affidavit in support of the application that was sworn by the 1st appellant, the appellants contended that they are unable to raise the decretal amount that they had been ordered to deposit in court.

The application was opposed by the respondent through a replying Affidavit sworn on 22nd September 2015. The respondent contended that the appellants’ application has no merit since the furnishing of security is a condition precedent to granting an order of stay. The respondent contended further that the appellants’ application is only intended to deny him the enjoyment of the fruits of the judgment that was made in his favour by the lower court in that the appellant has not taken any step to file a record of appeal since he filed the appeal herein in the year 2011.

The application was heard before me on 12th October 2015 when the parties made oral submissions. I have considered the appellants’ application and the replying Affidavit filed in opposition thereto by the

respondent. The appellants' application is essentially seeking and setting aside of the condition that was imposed by the lower court while granting them an order for stay of execution. Order 42 Rule 6 of the Civil Procedure Rules provides that any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

The appellant's are not seeking the setting aside of the stay that was granted to them by the lower court but only the condition that was imposed for the stay that they have claimed is erroneous. I am in agreement with the submission by the respondent's advocate that a party seeking stay of execution of a decree must furnish security for the performance of that decree in the event that he loses the appeal. The lower court did not therefore fall into any error in ordering that appellants to furnish security as a condition for the stay. I am also not persuaded that the security that was imposed by the lower court was onerous or harsh. After their suit in the lower court was struck out with costs, the lower court assessed the respondent's costs at kshs. 19,410/=. This is the amount that the lower court ordered the appellants to deposit as a security. It is the same amount that the appellants would be required to pay if they lose this appeal. Requiring them to deposit the amount in an interest earning account pending the hearing of the appeal as a security is not harsh at all. The fact that the appellants are unable to raise the amount is not a good reason to excuse them from this requirement of the law.

That being my view of this matter, I find the appellant's application dated 10th September 2015 without merit. The application is dismissed accordingly with costs to the respondent. In the interest of justice, I hereby extend the time within which the appellants were to comply with the condition that was imposed by L. Simiyu SRM on 14th August 2015 up to 29th February 2016. In the event that the appellants fail to comply by that date, the respondent shall be at liberty to proceed with the execution of the decree of the lower court.

Delivered, Dated and Signed at Nairobi this 29th Day of January 2016.

S. OKONG'O

JUDGE

In presence of

N/A for the Appellants

N/A for the Respondent