



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
IN THE HIGH COURT AT NYERI
ENVIRONMENT AND LAND CASE NO. 224 OF 2013

ANDREW GITHINJI
MWHIHURI.....PLAINTIFF

VS

SILAS MUHUHE
MWANIKI.....DEFENDANT

JUDGMENT

The application dated 3/3/2014 seeks an order that this honourable court be pleased to issue an order of stay of execution in Nyeri Environment and Land Court Case No. 224 of 2013 of the ruling dated 21/2/2014 until the hearing and determination of the appeal. The application is based on grounds that the applicant filed the suit on 7th November, 2013 accompanied with an application to stop the defendants from disposing the 10th defendants assets which were to be sold from 10th November 2013. The defendants were served with all relevant court documents upon which the 2nd defendant William Gathecha filed memorandum of appearance and the resolution of the board of Directors of Muhotetu Farmers Company limited and preliminary objection and replying affidavit on 18th November, 2013. The applicant claims that the 2nd defendant had no written authority from the other 9 defendants to act, file or swear the replying affidavit on behalf of the other 9 defendants. He ignored, Order 1 Rule 13(1) (2) of the Civil Procedure Rules which is mandatory to file the written authority in the court file authorizing him to act on behalf of the other defendants.

The application is supported by the affidavit of Andrew Githinji Mwhihuri sworn on 3/3/2014 in which he states that the defendant's list of authorities dated 20/11/2013 in the application received in court on 21st November 2013 was not

served to the appellant but served to a stranger and addressed to Gakuhi Chege & Co Advocates KCB building P.O. Box 1907-20300 Nyahururu. The 2nd respondent/defendant's William Gathecha Nguyo had no authority to swear the replying affidavit on behalf of the other respondent/defendants for he lacked written authority from the other respondents/defendants to act on their behalf. He argues that Order 1 Rule 13 sub-rule (1) and (2) of the Civil Procedure Rules does not allow William Gathecha Nguyo to act on behalf of the other respondents/defendants. That the applicant had requested the court to summon the 2nd respondent/defendant William Gathecha Nguyo the deponent of the replying affidavit to be cross-examined by the applicant but was denied the right to cross-examine him by the Hon. Trial judge. That order 19 rule 2 sub-rule (1) of the civil procedure rules was rendered nugatory after the denial to invite 2nd Defendant for cross-examination to determine the truth and credibility of the said replying affidavit.

On the 17/3/2014, the 2nd Respondent filed a replying affidavit whose import is that the application is hopelessly incompetent and misleading. The defendants filed a Notice of Preliminary objection which I will deal with first.

The **gravamen** of the submissions by Mr. Nderitu on the Preliminary Objection is that the suit was dismissed with no orders as to costs and upon the ruling, the court became **functus officio**. Moreover that the decision was not positive but negative hence negative decisions cannot be stayed.

Mr. Githinji on his part argued that the objection is misconceived and that the same including the replying affidavit be struck out as the defendants did not obtain the authority to file the same.

In reply Mr. Nderitu correctly submitted that Mr. Githinji had missed the point.

I have considered the application and do find that the applicant seeks to reverse the order of this court made on 21/2/2014. Moreover that the order he seeks to stay did not give any positive direction but was a dismissal. The court technically can't stay a dismissal of a suit as this will amount to the reinstatement of the dismissed suit.

The decision of ***E.O. O'KUBASU, E.M. GITHINJI, J.A. ALUOCH JJA in Kileleswa service station Ltd vs Shell Ltd{2008} KLR 55*** is relevant where the court held that application for stay pertained to a negative order that was

capable of execution by enforcement. The same holding was made in Attorney General vs LSK & Another (2009) KLR 304

The upshot of the above is that the preliminary objection is upheld and the application dismissed with no order as to costs.

DATED AND SIGNED AT ELDORET THIS.....DAY OF.....2015

A.OMBWAYO

JUDGE

DELIVERED AND SIGNED IN NYERI THIS 27TH DAY OF JANUARY,2015

LUCY WAITHAKA

JUDGE