



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, SICHALE & J. MOHAMMED, J.J.A)

KISUMU CIVIL APPLICATION NO. 151 OF 2019

BETWEEN

CALEB OUMA..... 1ST APPLICANT

JOHN MUGA..... 2ND APPLICANT

SAM OTIENO3RD APPLICANT

RICHARD OLUOCH..... 4TH APPLICANT

BARACK WERE..... 5TH APPLICANT

ABAS WAHEB..... 6TH APPLICANT

AND

SEVENTH DAY ADVENTIST CHURCH

(EAST AFRICA LTD).....RESPONDENT

(Being an application for stay of execution pending the lodging, hearing and determination of the appeal from the Judgment of the Environment and Land Court of Kenya at Kisumu (Ombwayo, J.) dated 22nd November 2019

in

ELC No. 806 of 2015)

RULING OF THE COURT

The motion dated 28th November 2019 filed by the applicants seeks an order that is curiously, if cleverly, crafted;

“That pending lodging, hearing and determination of the appeal in the Court of Appeal an order do issue staying the execution of the consequential decree dated 18/09/2019 arising out of the ruling delivered on the 22/11/2019 by justice Ombwayo in Kisumu

ELC No. 806/2015.” (Our emphasis)

We say it is all curious and clever because the prayer is for the stay of “a consequential decree” which is expressed as having arisen out of a ruling delivered on a date *later* than the decree in question. As will be shown later in this ruling, the exact terminology employed is calculated to side-step some fatal errors and omissions on the applicants’ part.

As the application before us seeks this Court’s discretionary intervention under **Rule 5(2)(b)** by way of stay of execution pending appeal, the central document whence flows our jurisdiction is a notice of appeal. Such notice must perforce relate to the order or decree that is impugned

on appeal or intended appeal, and the execution whereof is sought in the interim. In the instant case, as is plain from the manner in which the motion is entitled or described, and the notice of appeal dated 22nd November 2019, what is sought to be challenged on appeal is “*the decision and Ruling of (sic) the application dated 7th October 2019 ... delivered on 22/11/2019*” by Ombwayo, J. There is no notice of appeal filed against the “*consequential decree,*” as the applicants chose to describe, being the ruling and order delivered earlier on 18th September 2019.

That earlier order was the subject of the application before Ombwayo, J. praying that the court “*recall, review and set aside its orders issued on 18th September 2019 pending the hearing and determination of the main suit ELC No. 25 of 2018...*” The order sought to be reviewed was an eviction order issued on that date to give effect to a judgment of that court entered on 16th May 2018, granting orders of mandatory injunction against the applicants herein directing that they vacate Land Parcel No. **Kisumu/Municipality/Block 5/40** within 90 days failing which an eviction order was to issue as did, in fact, issue.

From the record, there is no indication that the applicants preferred any appeal against the judgment itself. As we have already observed they did not appeal against the order of eviction either.

The decision of Ombwayo, J. on the application to set aside and review was to dismiss it as he found that no new or important matter had been disclosed to warrant review. Now, the application for review having been so dismissed, or, put another way, the dismissal of the application having been a negative order, is it capable of being executed as is so as to invite this Court’s intervention pending appeal therefrom? With great respect, we do not think so. There is nothing that the respondents can execute in the order dated 18th September 2019 and so there really is nothing to stay. This Court has expressed itself that it cannot stay a negative order and will also not issue an order of stay when there is nothing to stay. Indeed, the Court has stated that it would have no jurisdiction to issue an injunction or stay when the court appealed from has not issued an executable order. See **REPUBLIC vs. KENYA WILDLIFE SERVICE & 2 OTHERS[2007] eKLR** and **GEORGE OLE SANGUI & 12 OTHERS vs. KEDONG RANCH LTD [2015] eKLR**, both of which cite and follow the earlier decision of **WESTERN COLLEGE OF ARTS & APPLIED SCIENCES vs. ORANGA & OTHERS [1976] KLR 63**

We think that the applicants attempted by this motion to obtain a stay of the eviction order made previously on 18th September 2019 but, such a move would not avail them much in so far as they never filed a notice of appeal against the said order, effectively depriving us of jurisdiction to entertain an application to stay execution of the same.

The upshot is that the motion before us is lacking in merit and inevitably fails. It is accordingly dismissed, with costs to the respondent.

Dated and delivered at Nairobi this 20th day of November, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR