



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC NUMBER 16 OF 2017**

**ETHICS & ANTI-CORRUPTION COMMION.....PLAINTIFF**

**V E R S U S**

**KANYI JOSEPH KARANJA, CECILIA FAITH MANGO AND**

**MICHAEL KIOKO MAUNDU T/A KANYI J. & COMPANY, ADVOCATES....1<sup>ST</sup> DEFENDANT**

**KIKAMBALA DEVELOPMENT COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**EPHRAIM MAINA RWINGO.....3<sup>RD</sup> DEFENDANT**

**JANE NJERI KARANJA.....4<sup>TH</sup> DEFENDANT**

**SELINE CONSULTANTS LIMITED.....5<sup>TH</sup> DEFENDANT**

**FREDICK OTIENO ASIEMA.....6<sup>TH</sup> DEFENDANT**

**JOY KAVUTSI ASIMA.....7<sup>TH</sup> DEFENDANT**

**JOAN ZAWADI KAREMA.....8<sup>TH</sup> DEFENDANT**

**JUMA RENSON THOYA.....9<sup>TH</sup> DEFENDANT**

**HARRY JOHN PAUL ARIGI.....10<sup>TH</sup> DEFENDANT**

**RULING**

1. Through a Notice of Motion dated 28<sup>th</sup> July, 2020, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants moved this court under Order 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act seeking orders that this Honourable court does stay execution of its Orders of 8<sup>th</sup> July, 2020, pending the hearing and determination of the Appeal arising therefrom.

2. The application is supported by an affidavit sworn on 28<sup>th</sup> July, 2020 by one Joseph Karanja the 1<sup>st</sup> Defendant herein. The Application herein is a culmination of this court's ruling and Orders made on 8<sup>th</sup> July, 2020 in which the court dismissed the Defendant's application dated 22<sup>nd</sup> January, 2020 seeking transfer of this file from Nairobi to Mombasa. Aggrieved by the said dismissal order, the Defendants/Applicants now claiming to have appealed against the dismissal order wants this court to issue stay of execution orders.

3. According to Mr. Kanyi's averment, the appeal stands high chances of success and that the Respondent will not suffer any prejudice if the stay order is granted. He annexed a copy of Notice of Appeal dated 17<sup>th</sup> July, 2020 and filed the same day.

4. In response, the Respondent filed a replying affidavit opposing the application. According to the respondents, the court did not make any orders to be stayed. That orders dismissing an application seeking transfer of a file cannot attract the orders sought. That there is no proof of or likelihood that the applicants will suffer substantial loss should the orders not be granted.

5. During the hearing, Mr Achoka for the Applicants merely adopted the averments contained in the Affidavit in Support of the Application. Counsel argued that the applicants have already filed appeal No. 82/2020 before the Court of Appeal and that they have received notification to file their submissions. Learned counsel opined that the Applicants will suffer substantial loss should the hearing of the suit continue before the Appeal is heard and determined. Counsel went further to state that the applicants were basically seeking stay of proceedings.

6. Mr. Achoka invited the court to consider a list of authorities filed in support of the application for stay. On their part, Mrs. Okwara appearing for the Respondents relied on the averments contained in the affidavit in reply to the application. She contended that the applicants had not met the threshold for grant of stay of execution orders as provided for under Order 42 Rule 6 of the Civil Procedure Rules.

7. In her view, the Applicants will not suffer any substantial loss by the matter proceeding in Nairobi as it has been since 2017. Regarding the order orally prayed for seeking to stay proceedings, Mrs Okwara asserted that proceedings should be stayed only under exceptional circumstances. To support this position counsel referred the court to various authorities filed in court.

8. I have considered the application herein, response thereto and oral submissions by both counsel. The only issue for determination is whether the applicants herein have met the threshold for stay of execution pending hearing and determination of the appeal.

9. The Application herein has basically been filed under Order 42 Rule 6 of the Civil Procedure Rules. For an order of stay of execution to issue, the Applicant must prove that:

**1) Unless the stay of execution order is made, he is likely to suffer substantial loss.**

**2) That the Application is filed within reasonable time.**

**3) That security as the court may determine has been offered or given.**

**4) Existence of any other sufficient cause**

10. The above principles were clearly set out in the case of **Kenya Shell Limited vs Kabiru (1986) KLR 410** wherein the court held that:

**“It is usually a good Rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case unless an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”**

11. It is trite law that to grant or not to grant stay Orders is a matter of discretion exercisable by the court seized of the matter. See **Butt vs Rent Restriction Tribunal (1982) KLR 417** where the court held that the prayer to grant stay of execution is discretionary and should be exercised in such away as not to prevent an appeal.

12. The orders being challenged herein are dismissal orders dismissing an application for transfer of a suit from Nairobi High court to Mombasa High Court. In my view, there is no positive order made capable of being stayed. See **Executive Estates Limited vs Kenya Posts and another (2005) 1E.A 53** where it was stated that:

**“... the order which dismissed the suit was a negative order which is not capable of execution”.**

13. Similar position was also held in **Umoja Service Station Ltd and 5 others vs Hezy John Ltd civil Application No. Nai 39/2006** where the court stated that a prayer seeking for stay of an order dismissing an injunction application is futile. See also **Republic v Retirement Appeals Tribunal Exparte Heritage A.I.I Insurance Company Limited Retirements benefits scheme (2017) eKLR.**

14. Having held that a dismissal order is a negative order which is not capable of execution, the applicant has not reasonably established any substantial loss likely to be suffered by having the suit heard in Nairobi High court which court has unlimited jurisdiction all over the country to hear both civil and criminal cases. The applicant is not likely to suffer any substantial loss if the matter proceeded in Nairobi as it has been since inception around the year 2017.

15. Regarding the oral application that the application is intended to stay Proceedings, this is not part of the prayers. Parties are bound by their pleadings. To stay or not stay proceedings is matter of discretion by the trial court taking into account that;

**1. The application for stay of proceedings has been made without much delay.**

**2. That the transfer of the suit is intended to save on precious judicial time.**

**3. That the stay of proceedings is in the public interest.**

16. In the case of Global Tours and Travel Ltd High Court cause No. 43 of 2000 the court stated that;

**“---whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order...And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in a sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.**

17. In the circumstances of this case, the suit has been pending in Nairobi High Court since 2017 four years down the line. No attempt was ever made in applying for transfer of the suit to Mombasa. Part of the claim has been settled. It is not in the interest of justice to stay proceedings considering that corruption matters should be disposed of expeditiously. For those reasons that ground is not available.

18. Regarding the question whether the appeal is arguable and is likely to be rendered nugatory if stay is not granted, I have already held that a negative order cannot be stayed. With that finding the appeal is not arguable hence incapable of being rendered nugatory.

19. As to whether the appeal was filed within reasonable time, the position is in the affirmative as the same was filed in less than 30 days. Concerning furnishing security, the same is not relevant in this case. In a nutshell it is my holding that the application is not merited and therefore dismissed. Costs shall be in the cause.

**DATED, SIGNED, DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF OCTOBER 2020**

**J.N. ONYIEGO**

**JUDGE**