



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 48 OF 2018

MOSES INGASIA.....1ST APPELLANT

ALEXIUS KHALUMBA.....2ND APPELLANT

THE ATTORNEY GENERAL.....3RD APPELLANT

-VERSUS-

HARRISON AMULI ABUKUTSE.....RESPONDENT

RULING

[1] The Notice of Motion dated **17 December 2018** was filed herein by the three Appellants on **18 December 2018** pursuant to the provisions of **Section 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; and **Order 42** of the **Civil Procedure Rules, 2010** for the following orders:

[a] Spent

[b] Spent

[c] That the Court be pleased to grant stay of execution pending the hearing and determination of the substantive appeal;

[d] That the costs of the application be provided for;

[e] That any other or further orders that the Court may deem fit and just to grant, be given.

[2] The Application is premised on the grounds that there is a Judgment/Decree delivered against the 2nd Defendant/Applicant in respect of which he has lodged an appeal; and that he stands to suffer irreparable loss if stay of execution is not granted, as the said appeal shall be rendered nugatory. The application was supported by the affidavit of the 2nd Applicant, **Moses Ingasia**, sworn on **17 December 2018** to which was annexed a copy of the Judgment of the lower court as well as a copy of the Memorandum of Appeal. The 2nd Applicant reiterated therein that the appeal is arguable and has very high chances of success; and that the Respondent is a man of straw and is therefore unlikely to refund the decretal sum in case the appeal succeeds.

[3] The Respondent is opposed to the application. He relied on his Replying Affidavit sworn on **14 February 2019**. In addition to specific rebuttal of the Applicant's allegations, such as that he is a man of straw, the Respondent averred that the application is defective, and therefore untenable in law. He annexed to his Replying Affidavit copies of documents filed in **High Court Civil Appeal No 44 of 2018: Alexius Khalumba & 2 Others vs. Harrison A. Abukutse**, to demonstrate that this appeal was filed in abuse of the process of the court; and further that the application is *sub judice*.

[4] Pursuant to the directions given herein on **14 February 2019**, the application was canvassed by way of written submissions. The Applicants written submissions were thereafter filed on **8 March 2019**, while the Respondent's written submissions were filed on **9 April 2019**. The Applicant's written submissions focused on the question whether the application meets the threshold for stay as set out in **Order 42 Rule 6** of the **Civil Procedure Rules**. Counsel relied on **Stanley Karanja Wainaina & Another vs. Ridon Anyangu [2016] eKLR** and **Kenya Orient Insurance Co. Ltd vs. Paul Mathenge Gichuki & Another [2014] eKLR** and urged the Court to find that the application was made without undue delay; that the Applicants stand to suffer substantial loss unless the stay order is granted; and that the Applicants are ready to furnish such security as the Court may order.

[5] Counsel for the Respondent, on the other hand, reiterated his stance that the application is *sub judice* and relied on **Section 6** of the **Civil Procedure Act** to support that posturing. He also argued, on the authority of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR; Sylverstein vs. Chesoni** and **Heritage Insurance Company Ltd vs. Patrick Kasina Kisilu [2015] eKLR** that the Applicants had failed to demonstrate that he stands to suffer substantial loss should his application be refused.

[6] Thus, before embarking on a consideration of the merits of the application, it is imperative to determine the preliminary issue as to whether or not the application is *sub judice*; for **Section 6** of the **Civil Procedure Act** is explicit that:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

[7] Annexed to the Respondent's Replying Affidavit is a copy of the Memorandum of Appeal filed in **Eldoret High Court Civil Appeal No. 44 of 2018**; and it confirms that the parties are the same and that the appeal is from the same Judgment of **Hon. N. Wairimu, PM**, delivered on **10 April 2018** in **Eldoret CMCC No. 428 of 2011** in which the Respondent had been awarded **Kshs. 600,000/=** in compensation for malicious prosecution. **Annexure "HA4"** is a copy of an Order issued in **HCCA No. 44 of 2018** by **Hon. Githinji, J.** and it confirms that the Applicants had filed a similar application in that appeal for stay of execution, dated **2 November 2018**. It is curious therefore that no mention was made of this prior application by the 2nd Applicant in his Supporting Affidavit, or by his Counsel in his written submissions. It is therefore manifest that the issues before the Court by way of the appeal and the application dated **17 December 2018** are the very matters in issue in **Eldoret HCCA No. 44 of 2018**.

[8] Regarding the *sub judice* principle, the Court of Appeal took the following view in **Kenya Airports Authority vs. Anthony Mutumbi Wachira [2015] eKLR**:

"We think, as a matter of policy of the law that finds expression in Section 6 of the Civil Procedure Act for instance that no court should proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties where such suit or proceeding is pending in the same or any other court having jurisdiction to grant the relief claimed. The sound object behind that policy is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits or proceedings in respect of the same subject matter in issue."

[9] In the premises, I would agree with the submission of the Respondent and accordingly find that the application dated **17 December 2018** is incompetent for being *sub judice*. The same is hereby struck out with costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST 2019

OLGA SEWE

JUDGE