



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 42 OF 1997(OS)**

**PAUL N. NDUNGU**

**ELIUD N. NJOROGE**

**RAPHAEL K. NG'ETHE**

**P. KIHARA KARIUKI All practising as**

**NDUNGU NJOROGE & KWACH ADVOCATES.....APPLICANTS**

**V E R S U S –**

**KIRAITU MURUNGI**

**GIBSON KAMAU KURIA**

**KATHURIM M'INOTI All practising as**

**KAMAU KURIA & KIRAITU ADVOCATES.....RESPONDENTS**

**MUGWE INVESTMENTS LTD.....INTERESTED PARTY**

**RULING**

- 1) Kamau Kuria & Kiraitu Advocates, the respondents/applicants herein, have taken out the motion dated 01.11.2016, the subject matter of this ruling, in which it sought for *inter alia* an order for stay of further proceedings in this matter pending the lodging, hearing and determination of their intended appeal against the ruling delivered on 9<sup>th</sup> August, 2016. The motion is supported by the affidavit of Gibson Kamau Kuria. When the motion came up for inter partes hearing, learned counsels made oral highlights.
- 2) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support of the application. I have also considered the oral highlights made by both counsels.
- 3) The applicants aver that there is need to maintain the *status quo* by granting an order for stay. It is also argued that unless the order is granted the appeal will be rendered nugatory since the applicants will be forced to pay the purported undertaking the respondents are trying to enforce. The respondents opposed the motion arguing that no prejudice will be visited upon the applicants if the order for stay is denied.
- 4) The principles to be considered in determining an application for stay are well stated under Order 42

of the Civil Procedure Rules. First, an applicant must show the substantial loss it would suffer if the order for stay is denied. Secondly, the application for stay should be filed without unreasonable delay. Thirdly that the court should consider the provision of security for the due performance of the decree.

5) On the first principle, the applicants are of the view that they would suffer substantial loss if the order for stay is denied because the objective of the stay is to maintain the status quo pending the hearing and determination of the appeal. It is said if the order for stay is not given the appeal will be rendered nugatory in that the appellants will be forced to honour the undertaking to their utter detriment. The respondents have argued that the applicants will not suffer any substantial loss if the order for stay is denied. With respect, I am convinced that the applicants have shown that they would suffer substantial loss if the order for stay is denied.

6) The second principle is that the application should be filed without unreasonable delay. It is apparent that this appeal was filed on 18.08.2016 while the motion was filed on 01.11.2016. I am satisfied that the motion was timeously filed.

7) The third principle is the provision for security for the due performance of the decree. The applicants avers that, they are willing to furnish security. The respondents on the other hand did not submit on to this principle in their oral highlights. On my part I think the issue touching on the provision of security for the due performance of the decree is tricky. Looking at the orders sought vide the chamber summons dated 2<sup>nd</sup> April 2014, will reveal that the Respondents/applicants were seeking for declaratory orders and with this in mind, then, a condition will not be imposed on the requirement to furnish security for the due performance of the decree.

8) In the end, the order for stay of proceedings is granted pending appeal to last for 90 days. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 9<sup>th</sup> day of March, 2018.

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Applicants

.....for the Respondents