



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISCELLANEOUS CIVIL APPLICATION NO. 42 OF 2017**

**YUSUF M. HAMZA.....1<sup>ST</sup> APPLICANT**

**HANAFI ABDI SHUGHULI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**FRIDA PENDO KAPUMU.....RESPONDENT**

**RULING**

**[APPLICANTS' NOTICE OF MOTION APPLICATION DATED 16<sup>TH</sup> OCTOBER, 2017]**

1. The instant application is brought under Order 51 Rule 1 of the Civil Procedure Rules, 2010 and sections 98, 79G, 1, 1A, 1B and 3A of the Civil Procedure Act. Through the application, Yusuf M. Hamza (the 1<sup>st</sup> Applicant) and Hanafi Abdi Shughuli (the 2<sup>nd</sup> Applicant) seek orders against Frida Pendo Kapumu a.k.a. Pendo George as follows:

**“1. Spent.**

**2. THAT this Honourable Court be pleased to Direct the Executive Officer of Malindi Law Courts to immediately comply with the Order of this Honourable Court dated 15<sup>th</sup> December 2016 for release of Kshs. 300,000.00 to the Respondent herein.**

**3. THAT this Honourable Court be pleased to order stay of execution by the Respondent against the Applicants pending the release of Kshs. 300,000.00 deposited in court to the Respondent.**

**4. THAT this Honourable Court be pleased to make any such further Order(s) and issue any other relief it may deem just to grant in the interest of justice;**

**5. THAT the costs of this Application be in the cause.”**

2. The application is supported by the grounds on its face and an affidavit sworn by the applicants' advocate, Allan Odongo.

3. The application is opposed through a replying affidavit sworn on 11<sup>th</sup> November, 2017 by the Respondent's advocate, Mccmillan Jengo.

4. The advocates for the parties agreed to dispose of this matter by way of written submissions.

5. The undisputed facts that emerge from this application show that the Respondent herein successfully sued the applicants in Kilifi SPM's Court for damages as a result of injuries sustained in a road traffic accident. The applicants being aggrieved by the decision of the trial court appealed to this court through Malindi H.C. Civil Appeal No. 31 of 2015. The appeal was dismissed by this court (Chitembwe, J) in a judgment delivered on 30<sup>th</sup> November, 2015.

6. Prior to the hearing and determination of the appeal, the applicants sought stay of execution of the trial court's judgement. A stay was granted on condition that the applicants deposited the sum of Kshs. 300,000 in court. The applicants claim that they complied with the conditions of the stay order.

7. After the appeal was dismissed, the Respondent obtained a decree for Kshs. 628,898. The Respondent also applied to this court for the release of the Kshs. 300,000 deposited by the applicants and an order was issued accordingly. The applicants paid Kshs.328,898 directly to the Respondent's counsel. That should have settled the matter between the parties.

8. However, the Kshs. 300,000 deposited in court could not be released to the Respondent as the applicants had allegedly deposited the money in the revenue account instead of the deposit account. Letters dated 26<sup>th</sup> January, 2017 and 24<sup>th</sup> February, 2017 addressed to the Deputy Registrar and the accountant respectively were allegedly not responded to. The two letters have stamps showing that they were actually received by this court.

9. The order directing the accountant to release Kshs. 300,000 to the Respondent not having been actualized, the Respondent filed a declaratory suit against the applicants' insurer vide Kilifi SPMCC No. 99 of 2017. This is what has made the applicants move this court through the instant application.

10. In my view, the question is not whether the application should be allowed. The question should be the kind of orders to be issued in order to do justice to the parties. Although the parties appear to be litigating against each other, the actual culprit which is the Judiciary is not a party to these proceedings.

11. The Respondent submitted that this application is *res judicata* as the issue was concluded in Malindi High Court Civil Appeal No. 31 of 2015. The argument is without merit. The issue is not about the dismissal of the applicants' appeal. They have accepted that outcome. The issue is about the Kshs. 300,000 which ought to have been released to the Respondent long ago.

12. In my view, the parties took the wrong course of action. It was not necessary for the Respondent to file the declaratory suit at Kilifi SPM's Court. It was also not necessary for the applicants to file the instant application. In any case the applicants ought to have brought the application in Malindi H.C. Civil Appeal No. 31 of 2015 instead of instituting a miscellaneous application. However, the most important point to note is that this is an administrative matter that ought to have been resolved by addressing the court administration.

13. Whatever the case, the buck stops with me. This court has exhibited unwarranted inaction in so far as this matter is concerned. For that I tender unreserved apologies to the advocates on record and their clients.

14. In the end, the application is allowed in the following terms:

- a) The Executive Officer, Malindi Chief Magistrate's Court is directed, upon production of the necessary evidence by the applicants, to forthwith pursue the release to the Respondent the sum of Kshs. 300,000 deposited in court by the applicants' insurer.
- b) This order to be served upon the Deputy Registrar of this Court; the Chief Magistrate, Malindi; the Senior Principal Magistrate, Kilifi Law Courts; the Executive Officer, Malindi Chief Magistrate's Court; and the Accountant, Malindi Law Courts for coordination and action within the next 15 days;
- c) There shall be stay of any further action by any of the parties pending the resolution of this matter by the court administration.
- d) There will be no order as to costs; and
- e) This matter to be mentioned on 16<sup>th</sup> September, 2018 to confirm compliance and for closure of the file.

**Dated, signed and delivered at Malindi this 26<sup>th</sup> day of July, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**