



**REPUBLIC OF KENYA**

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

**COMMERCIAL SUIT NO.75 OF 2018 (FORMERLY ELC 155 OF 2012)**

**DORCUS ODHIAMBO MBUDI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**THE ARCHDIOCESE OF KISUMU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**ERASTUS KHANDIRA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. By a notice of motion dated 18.6.18 brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act; Order 9 Rule 9 and 10; Order 22 Rule 22, Order 50 Rule 1 and all enabling provisions of the law, the defendants/applicants pray for orders that

a. ....Spent

b. ....Spent

c. **The firm of Ken Omollo & Co. Advocates be granted leave to come on record for the defendants/applicants in place of Wasuna & Co. Advocates**

d. **This Honourable Court be pleased to stay the execution of the Judgment dated 14th February, 2018 pending the final outcome/result of the Appeal**

e. **Costs of this application be in the cause**

2. The application is based on the grounds among others that the respondent has commenced execution proceedings of the judgment dated 14<sup>th</sup> February, 2018 and has proclaimed the defendants'/applicants' goods and they stand to suffer tremendous irreparable loss if the execution process is allowed to continue.

3. The application is supported by an affidavit sworn on 18<sup>th</sup> June, 2018 by Rev, Fr, Moses Nicholas Omollo, who reiterates the grounds on the face of the application. Attached to the affidavit is a copy of judgment dated 14<sup>th</sup> February, 2018, copy of Proclamation and Copy of Notice of Appeal filed by respondent marked **MNO 1, 2** and **3** respectively.

4. The application is opposed on the grounds set out in a replying affidavit sworn on 20<sup>th</sup> June, 2018 by Jude Ragot, advocate for the respondent who gives a brief of the case till judgment. He avers that the respondent being dissatisfied with the judgment dated 14<sup>th</sup> February, 2018 instructed him to appeal and he filed a notice of appeal marked **MNO 3** on 19.2.18. In his supplementary affidavit sworn on 16th July, 2018, Jude Ragot, advocate for the respondent additionally avers that applicant owes the respondent 12,097,813/- which include the principal sum plus interest awarded in the judgment dated 14<sup>th</sup> February, 2018. He urged the court to find that applicants have not appealed and are therefore not entitled to the orders sought.

5. I have considered the application in the light of the affidavits on record and annexures thereto. I have also considered respondent's written submissions filed on 30<sup>th</sup> July, 2018. Defendants/applicants did not file their written submissions.

The issues for determination are as follows:

**i. Leave to come on record**

6. The firm of **Wasuna & Co. Advocates** has not opposed the application by the firm of **Ken Omollo & Co. Advocates** to come on record.

The firm of **Ken Omollo & Co. Advocates** is granted leave to come on record for the defendants/applicants and the Notice of Change of Advocates filed on 21.6.18 is deemed as properly filed.

**ii. Stay of Execution**

7. Order 22 provides as follows:

*(1) The court to which a decree has been sent for execution (emphasis mine) shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.*

8. The decree that the defendants/applicants seek to stay emanates from this court. It has not been sent from another court and the provisions of Order 22 Rule 22 are therefore not applicable to this application.

9. The defendants/applicants seek an order for stay of execution of the Judgment dated 14th February, 2018 pending the final outcome/result of the Appeal. It is close to m6 months since the Judgment dated 14th February, 2018 was delivered. Of interest to note is that the defendants/applicants do not appear to have been aggrieved by the said judgment for the reason that while the respondent filed a notice of appeal on 19.2.18, the applicants have to date not taken any steps to demonstrate their keenness to appeal.

10. The above scenario in my considered view explains the reason why the defendants/applicants could not move the court under the provisions of Order 42 (6) of the Civil Procedure Rules.

**Decision**

11. The totality of the foregoing is that no sufficient cause has been shown for stay the execution of a decree for which the defendants/applicants have not appealed against.

15. The upshot is that the notice of motion dated 18.6.18 is devoid of merit and it is dismissed with costs to the plaintiff/ respondent.

**DATED AND DELIVERED IN KISUMU THIS 2nd DAY OF August 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Felix**

**Plaintiff/ Respondent - Mr. Abida**

**Defendants/Applicants - N/A**