



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 22 OF 2018**

**FEDELE GRASSI.....1<sup>ST</sup> APPELLANT/APPLICANT**

**JUDITH BIGISA OENGA.....2<sup>ND</sup> APPELLANT/APPLICANT**

**EASTFORD MANAGEMENT LIMITED.....3<sup>RD</sup> APPELLANT/APPLICANT**

**VERSUS**

**EMILY MUKONYO MUSAU.....1<sup>ST</sup> RESPONDENT/RESPONDENT**

**WINNIE KAMENE PETER.....2<sup>ND</sup> RESPONDENT/RESPONDENT**

**(An Appeal from the Ruling of the Chief Magistrate's Court at Malindi Hon. Dr. Julie Oseko made on 11<sup>th</sup> April, 2018 in CMCC No. 115 of 2017)**

**RULING**

1. Fedele Grassi, Judith Bigisa Oenga and Eastford Management have brought the application dated 13<sup>th</sup> April, 2018 by way of notice of motion. The outstanding prayers in that application seek stay of execution of a ruling delivered on 11<sup>th</sup> April, 2018 in Malindi CM Civil Case No. 115 of 2017 and an order setting aside the judgement entered in favour of Emily Mukonyo Musau and Winnie Kamene Peter, the respondents herein. The applicants also pray for costs of the application.
2. In brief, the applicants aver that the respondents filed a suit against them via a plaint dated 9<sup>th</sup> June, 2017 seeking an order to rescind an agreement entered between them and the respondents on 23<sup>rd</sup> December, 2016, a refund of Kshs.7,100,000 being monies paid to the applicants by the respondents, interest on the decretal amount at 14% per annum till payment in full and costs of the suit.
3. The applicants' case is that the summons and the plaint were not personally served on them as they were out of the country. The documents were instead served on their advocates who did not have instructions from them.
4. There being no notice of appearance and defence on record, the respondents subsequently filed an application dated 18<sup>th</sup> December, 2017 for summary judgement. The applicants responded to the application through a replying affidavit dated 22<sup>nd</sup> January, 2018 and at the same time filed an application seeking unconditional leave to file their defence.
5. The applicants' and the respondents' applications were heard together and in a ruling delivered on 11<sup>th</sup> April, 2018 the applicants' application was dismissed and summary judgement entered in favour of the respondents in the sum of Kshs.4,100,000. The applicants are wary that the respondents will execute the judgement rendering their appeal nugatory.
6. The application is opposed through a replying affidavit sworn by the 2<sup>nd</sup> Respondent on 20<sup>th</sup> April, 2018. The respondents opposed the application on the grounds that the application is incompetent and an abuse of the court process. Also, that it fails the threshold for grant of stay of execution in that the appellants have not offered to provide security for costs.
7. According to the respondents, the applicants' averment that they were out of the country and they could not file a defence has no basis as they managed to file a replying affidavit sworn on 22<sup>nd</sup> January, 2018. Further, that the applicants' advocates had organised for their documents to be notarized and the applicants have been in constant communication with their advocates.
8. The respondents also aver that a defence does not require the signature of the defendants and the applicants' advocate could have filed a

defence on their behalf. It is the respondents' case that the defence sought to be filed does not raise triable issues. Finally the respondents aver that the application is brought in bad faith and ought to be struck out with costs.

9. The application was disposed of by way of written submissions. The applicants' submission is that the application meets the threshold for the grant of stay of execution pending appeal as provided by Order 42 Rule 6 of the Civil Procedure Rules, 2010. According to the applicants, the application was brought without undue delay and if the same is not allowed they will suffer irreparable loss. Also, that their defence raises triable issues.

10. The respondents' position is that the grant of an order of stay of execution is not automatic. The respondents also hold the view that the intended appeal does not raise any triable issues and the application is loaded with malice only meant to delay the execution of the decree. The respondents contend that they are entitled to enjoy the fruits of their judgement. They urge this court to uphold the overriding objective that requires courts to do justice in accordance with the law and prevent abuse of the court process.

11. The respondents opine that where an applicant claim likelihood of substantial loss, it is upon such an applicant to demonstrate the said loss in the event that the execution is not stayed. Further, that the applicants have failed to express their willingness to furnish security for costs.

12. The respondents urges the dismissal of the application but state that were the application to be allowed, the applicants should be compelled to furnish security for due performance of the decree by depositing the decretal amount in a joint interest earning account of the advocates for the parties.

13. Have the applicants met the conditions for the grant of an order of stay of execution? The grant of stay of execution pending appeal is not automatic. Where the court decides to exercise its discretion in favour of an applicant, it should ensure that the appeal has been brought without unreasonable delay, the applicant has satisfied the court that he will suffer substantial loss unless an order is made, and security for due performance of the decree has been made as directed by the court.

14. The instant application was made without undue delay hence the applicants have jumped the first hurdle. They filed their application a day after the ruling was delivered.

15. The applicants have indicated that they will suffer substantial loss should the order not be made. They also claim that their appeal may be rendered nugatory if execution is carried out. This being a monetary decree, one cannot automatically say that the applicants' appeal will be rendered nugatory. The respondents can always refund the decretal amount were the appeal to succeed.

16. However, there is the question as to whether the applicants' defence raises triable issues. In the impugned ruling, the trial magistrate held that there was no dispute that the respondents had paid the applicants Kshs. 4,100,000. She then proceeded to enter summary judgement and referred the claim for the disputed sum of Kshs. 3 million to arbitration.

17. I will not comment on the arbitration clause in the agreement as the parties have not raised the issue before me. I, however, find that the defence raised a triable issue. The question whether the contract ought to have been rescinded was a triable issue which had been raised by the applicants in their proposed defence. The applicants have thus demonstrated that they will suffer substantial loss if an order of stay is not granted.

18. In essence, I find that the applicants have met the conditions for grant of an order of stay of execution. Execution shall be stayed on condition that the applicants deposit the sum of Kshs. 2 million in court within 45 days from the date of this ruling.

19. As for the applicants' prayer that they be granted leave to defend the suit, I find that the same is the subject of their appeal. The prayer cannot therefore be addressed at this stage.

20. Costs will abide the outcome of the appeal.

**Dated, signed and delivered at Malindi this 18<sup>th</sup> day of October, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**