



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 547 OF 2004**

NJOROGE REGERU.....PLAINTIFF

*VERSUS*

WANDA BARID AS THE ADMINISTRATOR OF THE ESTATE  
OF THE LATE GEORGE NEIL BAIRD.....1<sup>ST</sup> DEFENDANT

WANDA BAIRD.....2<sup>ND</sup> DEFENDANT

AND

NJAMA WAMBUGU.....1<sup>ST</sup> INTERESTED PARTY

GULABCHAND SAMJI SHAH.....2<sup>ND</sup> INTERESTED PARTY

KANAIYALAL MOHANLAL PANDYA.....3<sup>RD</sup> INTERESTED PARTY

RASHIDA BANU YUSUF MITHOO.....4<sup>TH</sup> INTERESTED PARTY

**RULING**

1. It is said that Gulabchand Shah (The 2<sup>nd</sup> Interested Party) and Kanaiyalal Mohantal Pandya (the 3<sup>rd</sup> Interested Party) are aggrieved with the Ruling of Ogola J. delivered on 22<sup>nd</sup> July 2016. The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties filed a Notice of Appeal dated 4<sup>th</sup> August 2016 challenging some of the findings in that Ruling.

2. In the meantime the two Interested Parties have taken out a Notice of Motion dated 26<sup>th</sup> September 2016 under the Provisions of Order 42 Rule 6 and order 51 Rule 1 of The Civil Procedure Rules seeking an order of Partial Stay of Execution of the orders from the impugned Ruling pending the substantive hearing and determination of the Appeal therefrom.

3. A brief background to this matter suffices for now.

4. Pursuant to proceedings that culminated in the Ruling of this Court made on 17<sup>th</sup> November 2015, LR No.179/20 section IV mainland North Mtwapa was sold by Public Auction in satisfaction of a Decree herein and the claims of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties herein who had Registered Charges secured

against the said property. That sale happened on 26<sup>th</sup> January 2016 and a sum of Ksh.25,000,000/= was paid into Court pending the resolution on distribution of the net sale proceeds (after deduction of costs associated with the auction sale) as between the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties.

5. That Order of distribution was made in a Ruling by Ogola J. on 22<sup>nd</sup> July 2016. The Judge's ultimate order was as follows:-

- a. Shs. 4,841,393.70 shall be paid forthwith to the plaintiff from the proceeds of the sale herein.**
- b. The 2<sup>nd</sup> Interested Party shall be paid pursuant to paragraph 27 of this ruling, except that the principal amount to be considered is the actual amount lent of Shs.1,000,000=**
- c. The 3<sup>rd</sup> Interested Party shall be paid pursuant to paragraph 27 of this ruling. The amount advanced under the charge was Shs.250,000=**
- d. Shs.1,462,905= shall be given to the Defendant in refund of the rates pursuant to paragraph 30(i) of this ruling.**
- e. Shs.625,000= shall be paid to Jagani Auctioneers pursuant to paragraph 30(ii) of this ruling.**
- f. This court approves the costs incurred by the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, including their advocates costs subject to taxation should parties see the need for taxation, in which event a sum of Shs.1,000,000= shall remain in the court account to be disbursed after the said taxation.**
- g. The remaining balance shall be released to the Defendant.**
- h. Any other costs arising in relation to this matter shall be borne by parties themselves.**

6. It is that order that aggrieved the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties herein.

7. Following that order the firm of Amingo Opiyo Masese & Co. Advocates, acting for the Defendants, wrote a letter to Court dated 19<sup>th</sup> August 2016 seeking release of the sale proceeds as follows:-

- a. Njoroge Regeru & Co. Advocates .....Ksh. 4,841,393.10
- b. Daly & Inamdar Advocates (for 2<sup>nd</sup> Interested Party) ....Kshs.2,680,000/=
- c. Daly & Inamdar Advocates (for 3<sup>rd</sup> Interested party) ...Kshs. 550,000/=.
- d. Amingo Opiyo Masese & Co. Advocates (being refund of money paid for Land Rates & clearing certificate).....Ksh.1,462,905/=.
- e. Tagani Auctioneers.....Ksh. 625,000/-.
- f. To remain in Court to be disbursed after taxation for costs and expenses..... Ksh.1,000,000/=
- g. Balance to Amingo Opiyo Masese & Co. ....Kshs. 13,840,701.30

8. The Notice of Appeal dated 4<sup>th</sup> August 2016 and filed on 5<sup>th</sup> August 2016 reveals that the part of the Decision on 22<sup>nd</sup> July 2016 that is under challenge is that which decided as follows :-

1. The Principal amount lent to the Defendants by the 2<sup>nd</sup> Interested Party under the 2<sup>nd</sup> Interested Party's charge dated 31<sup>st</sup> August 1995 was Kshs.1,000,000/=.

2. The rate of interest payable to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties under their charges both respectively dated 31<sup>st</sup> August 1995 is 24% per annum until the date fixed for payment under the said charges and thereafter at court rates for a maximum period of ten years.

9. In supporting the application for stay, Advocate Samir Inamdar depones as follows:-

11. THAT so far as the amounts to be paid out to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties and the Defendant are concerned, these will have to wait submissions by the relevant parties at the inter partes hearing of this application as to what can be either agreed or determined as being undisputable – given the absence of a redemption date being provided for in either of the two Charges to enable a calculation on interest to be made. This will enable the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties and the Defendant to receive part payment of the amount paid into Court leaving behind a balance reflecting the disputed amounts to abide the outcome of the appeal filed herein.

10. The thrust of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties concern is that if payment is made to the various parties without providing for the retention of the disputed amounts then the subject matter of their Appeal will have been distributed and they would be prejudiced.

11. The Defendants opposed the Application on five Grounds which can be reproduced without inconvenience:-

1. The Application is misconceived vexatious bad in law and an abuse of the due process of law.
2. There is inordinate delay in bringing up the application to the prejudice of the defendant.
3. The application is premature as the undisputed amounts have not been released to the parties thus delaying the parties from enjoying the fruits of their undisputed parts of the judgment.
4. The applicant has failed to tabulate the amounts that is not disputed and which should be released to the respective parties after taking into account the amounts they feel is due to them to the prejudice of the defendant/respondent.
5. No appeal has been filed so far in this matter and the reasons given in the application herein are not sufficient to warrant the issuance of the orders sought.

12. At the hearing of the Application, Mr. Inamadar for the Applicants argued that this was not a classic application for stay of execution pending Appeal and that the Court should not lay much emphasis on the principle of substantial loss. It was contended that there was already money retained in Court and that the Defendant did not stand to suffer prejudice at all. And, at any rate, the Defendants had already received substantial payment out of the money. So as to avoid any loss, Counsel suggested that the money to be retained be moved into an interest earning account to be held by the Advocates of the rival parties.

13. Although this Court was asked to find that this was not a classic case of an Application for Stay pending Appeal, the Court notes that the Application was brought under the auspices of the provisions of order 42 Rule 6. Subrule 2 of Rule 6 sets out the conditions to be met before such stay is granted and as will become apparent shortly, those conditions cannot be entirely discounted even in the matter before Court.

14. Order 42 Rule 6(2) provides:-

(2) No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

15. The Ruling which is sought to be stayed was delivered on 22<sup>nd</sup> July 2016. Thirteen days later, or thereabouts, on 5<sup>th</sup> August, 2016, the Applicants filed a Notice of Appeal. The Application before Court was then filed on 27<sup>th</sup> September 2016 and as correctly pointed out by the Respondents that would be about 60 days after the Ruling was delivered. While the Applicants could have acted with greater agility and speed, I do not find the delay of 60 days to be so unreasonable as to be a sole ground to disentitle the Applicants of the request they make.

16. An issue was also raised as to whether an Appeal had been filed. No doubt an application under Order 42 Rule 6 can only be made after an Appeal has been filed. But Order 42 Rule 6(4) is instructive as to when an appeal to the Court of Appeal is deemed to have been filed and it reads:-

“(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given”.

17. From the Court file, the Applicants lodged a Notice of Appeal dated 1<sup>st</sup> August 2016 with the High Court but withdrew it by a Notice of Withdraw of Notice of Appeal of 4<sup>th</sup> August 2016. Subsequently the Applicants prepared another Notice of Appeal of even date (ie. 4<sup>th</sup> August 2016) and the Court record shows it was paid for and filed at the Registry of the High Court on 5<sup>th</sup> August 2016. I must therefore find that for purposes of an Application of Order 42 Rule 6, there is an Appeal against the Ruling of 22<sup>nd</sup> July 2016 to the Court of Appeal.

18. Whether or not the Defendant is a foreign National is an issue that this Court will ignore in determining this matter. That the Defendant is a foreign National and not resident in the Country was raised by Mr. Inamadar as he argued the application. As correctly countered by Mr. Opiyo such a statement from the Bar is not evidence. At any rate the issue was brought up so late in the day that the Respondent would not have had a fair opportunity of reacting to it.

19. As I turn to substance of the Application, I must observe that when considering an Application for Stay from the Decision of the High Court to the Court of Appeal, the High Court will test the Application within the parameters of the provisions of Order 42 Rule 6(2). Unlike the Court of Appeal (when considering on Rule 5(2)(b) matter), the High Court will not concern itself with whether the intended Appeal is arguable. The rationale being that to engage the High Court in that exercise would be to invite it to re-evaluate its own decision (however superficially), often an embarrassing prospect.

20. This Court has understood the gist of the Applicant's request stay to be in paragraph 11 of the Affidavit of Samir Inamadar of 26<sup>th</sup> September 2016 which therefore bears repeating:-

11. THAT so far as the amounts to be paid out to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties and the Defendant are concerned, these will have to wait submissions by the relevant parties at the inter partes hearing of this application as to what can be either agreed or determined as being undisputable – given the absence of a redemption date being provided for in either of the two Charges to enable a calculation on interest to be made. This will enable the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties and the Defendant to receive part payment of the amount paid into Court leaving behind a balance reflecting the disputed amounts to abide the outcome of the appeal filed herein.

21. I hear the Applicants to be saying that even on the basis of the Court's Ruling there may be no agreement on what is due to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties because the charge documents did not provide for a Redemption Date which would enable a calculation on interest to be made. For that reason it would either have to be agreed or determined as disputed. That once this is done, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties and the Defendant would receive part payment and the balance (reflecting the disputed amounts) would abide the outcome of the Appeal.

22. This issue, raised by the Applicants, would stem from the finding in paragraph 27 of the impugned Ruling;-

27. In this regard this court will allow the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties' claims with interest at 24% per annum until the date fixed for payment under the charges, and then thereafter at court rates for a maximum period of ten(10) years.

23. But the Defendants' Counsel pointed out that the Plaintiff's Counsel was not of much assistance to the Court as Counsel did not suggest how much was not in contention. To this, Counsel retorted that the issue of calculation is an issue in the Appeal. And to be fair to the Applicants, they had in the Affidavit in support of the Application made specific reference to that issue. Mr. Inamdar had deponed,

“The learned Judge,,,,also failed to appreciate that neither of the two charges provided for a redemption date,,,,making it impossible for any meaningful calculation of determining what was claimable under that head”.

24. The Defendant on the other hand did not directly address what must be a vexing issue; upto when is the rate of 20% to be applied?

25. My appreciation of what is a live issue, and I hope I am right, is that even if both sides accepted the Decision of the Court, there may be no consensus on the amount due to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties as the date 'fixed for payment' of the monies under the charge is unclear. It is from this perspective that it may be desirable that the parties agree on undisputed position or the Court makes some determination and the rest is left for the Court of Appeal to determine.

26. In the end, I reach the decision that if this was a typical application for Stay pending Appeal then it would have failed as it has not been demonstrated by the Applicant that they stand to suffer substantial loss if the Stay sought is not granted. But so as to avert an untidy situation where the parties are asking the Court to release monies to them on the basis of different workings, this Court will stay the release of the balance of the monies to the firm of Aming Opiyo Masese Co. pending an agreement by the parties or further orders of the Court.

27. The Application of 26<sup>th</sup> September 2016 succeeds in that very limited sense and each party will therefore bear their own costs.

**Dated, Signed and Delivered in Court at Nairobi this 20<sup>th</sup> day of April, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Muhidi h/b for Ogado for Applicants

N/A for Defendant

Alex - Court Clerk