



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 108 OF 2012**

**CHEMELIL SUGAR COMPANY LIMITED.....1ST APPELLANT**

**SILAS OMONDI.....2ND APPELLANT**

**VERSUS**

**SILVANUS OLALE.....RESPONDENT/APPLICANT**

**RULING**

The Notice of Motion dated 29th March 2017 seeks to stay judgment in High Court Civil Appeal No. 108 of 2012 on the ground that the same was to be heard together with High Court Civil Appeal No. 107 of 2012. The application is supported by the affidavit of Kiberenge N. Foustine sworn on 29th March 2017 in which he deposes inter alia that the appeal arises from the judgment of Nyando Court in PMCC No. 246 of 2000 which comprised of the other matters and where the defence judgment was adopted in the other; That, thereafter the appellants filed two appeals for consistency. Further that the Advocates for the parties held a conversation that the two appeals be heard together and that it was impossible for him to attend Court on the day the appeal was scheduled to be heard. She deposes that the two appeals ought to be consolidated and heard together and that this application ought to be allowed for that reason.

In the replying affidavit Counsel for the Respondent/Appellants disputes that there was an agreement to take out the appeal from the cause list for purposes of consolidating the same. She also deposes that the issue of consolidation was never brought up even when directions were taken.

I have considered the application carefully and it is my finding that the same has no merit. Firstly, the application is defective, for being brought under rules some of which are non existent and others not relevant at all. Order 51 of the Civil Procedure Rules has no rules 22 and 52 whereas Order 10 rule 11 provides for setting aside judgment but not arrest of judgment and Order 40 rules 1, 2, 3 (3) of the Rules provides for injunctions for injunctions which is not what the application here seeks.

On the merits, no order or even application for consolidation was made despite several appearances by the Advocates. It is my finding that the real reason for this application, which is not even provided for in the Civil Procedure Act and rules but which I believe the Court would have discretion to grant under its inherent power under Section 3 and 3A of the Civil Procedure Act, is that the appeal proceeded in the absence of Counsel for the Respondent/Applicant. This Court cannot however exercise its discretion in favour of an Advocate who decides to be less than candid. She has not told this Court why she did not attend the hearing though duly served. She has not come to Court with clean hands and accordingly this application is dismissed with costs to the Appellants/Respondent. It is so ordered.

**E. N. MAINA**

**JUDGE**

**25/5/2017**

Ruling delivered in open Court in the presence of Mr. M. M. Omondi for the Applicant

