



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 784 OF 2016**

**ROBA TSAGEYE.....APPELLANT/APPLICANT**

**- V E R S U S -**

**MICHELE KADOGO MWOLOLO.....1<sup>ST</sup> RESPONDENT**

**FESTUS WAMBUA MWOLOLO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. In the motion dated 13.1.17 the appellant sought for *interalia*, an order for stay of proceedings in Milimani C.M.C.C. no. 2170 of 2015 pending appeal. The motion is supported by the affidavit sworn by Maureen Andeje. When served with the application, the respondents filed the replying affidavit of Muendo Muasa Uvyu to oppose the application. Learned counsels appearing in this appeal recorded a consent order to have the motion disposed of by written submissions.

2. I have considered the grounds put forward on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival written submissions. The history behind this motion appears to be short and straightforward. Michele Kadogo Mwololo and Festus Wambua, the 1<sup>st</sup> and 2<sup>nd</sup> respondent's respectively, filed a compensatory action against Roba Tsagaye, the appellant herein before the Chief Magistrate's Court, Milimani Commercial Court.

3. The suit was fixed for hearing on 16.8.2015. Come that date, the appellant's counsel applied for an adjournment and sought for leave to file a supplementary list of documents and witnesses. The trial court declined to grant the order and instead allocated the parties the hearing at noon. It would appear the appellant's counsel proceeded to another court for the hearing of another matter. Come noon, the trial court proceeded for hearing *exparte* as scheduled.

4. The plaintiffs advocate had the case closed upon presenting the evidence of witnesses summoned to testify in support of the plaintiff's case. The trial magistrate proceeded to order closure of the defence case when she noted that the defendant and his advocate were not present in court. On 18.8.2016, the appellant filed an application for review and setting aside of the orders denying the defence an adjournment. The application was heard and eventually dismissed on 9<sup>th</sup> December 2016. Being dissatisfied with the decision, the appellant preferred this appeal. The appellant is now seeking for an order for stay of proceedings in the suit before the trial court pending appeal.

5. It is the submission of the appellant that he has a good and arguable defence which require to be ventilated for the effectual determination of the suit. It is further argued that if the order is not granted, the suit will proceed for submissions and judgement delivered thus rendering the appeal nugatory making the appellant suffer irreparable loss.

6. The respondents are of the view that the motion lacks merit. It is argued that the appellant never filed any witness statements for any witness as at the time of the trial and therefore it was futile to adjourn the case when there was no defence witness statement on the record of the trial court. The respondents also argued that the appeal has no chances of success since the applicant is seeking for *interalia* an order to be allowed to adduce evidence in support of the defence when there are no witness statements on record.

7. Having considered the material placed before this court and having taken into account the rival written

submissions, I think the main issue this court should grapple with is whether or not it should stay further proceedings in C.M.C.C.C no. 2170 of 2015. This appeal seeks to have the order issued by the trial court to deny the appellant an adjournment to be set aside. If the appeal succeeds the appellant will have a chance to present the defence case. If the order sought herein is denied, it will mean that the trial court will proceed to receive submissions and thereafter deliver a judgment meaning this appeal will be overtaken by events. In my view this will be a substantial loss visited on the appellant. The appellant has stated that he was not given an opportunity to cross-examine the plaintiffs' witnesses to determine the veracity of the defendant's (appellant's) evidence. I am convinced that there is need to preserve the *status quo* pending appeal. I appreciate that the respondents will suffer prejudice but I hasten to state that such prejudice can be compensated by an award of costs.

8. In the end, I allow the motion dated 13.1.2017 in terms of prayer 3 to last for 90 days. The appellant should ensure that his appeal is made ready for hearing within 90 days from the date hereof. In the circumstances of this matter I award the respondents costs of the motion assessed at ksh.10,000/=.

**Dated, Signed and Delivered in open court this 25<sup>th</sup> day of May, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent