



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 70 OF 2017

MUMO MAII

ZIPPORAH NDUNGE MUMO (*Being the Personal Representative of the Estate of*

**JOHN MUTHAMA MUMO.
PLAINTIFF/RESPONDENT**

VERSUS

**RACHAEL NJOKI WAINAINA.
.....DEFENDANT/APPLICANT**

R U L I N G

This is an application by the Defendant/Applicant Rachael Njoki Wainaina dated 20th March, 2017, brought under Section 1A, 1B, 3A Civil Procedure Act Order 42 Rule 6, Order 45 Rule 1 and Order 51 Rule 1, 2, 3 Civil Procedure Rules 2010 seeking orders that: -

- 1. This matter be certified urgent and the same be heard ex-parte in the first instance.***
- 2. That this Honourable court be pleased to order a stay of further proceedings in CMCC No. 412 of 2011 Mumo Maii & Zipporah Ndunge Mumo Vs Rachael Njoki Wainaina ending hearing and determination of the appeal herein from a ruling delivered by Honourable Magistrate on 14th February, 2017.***
- 3. That the costs of this application be provided for.***

This application is premised on the grounds that: -

- a) The Defendant/applicant was served with a hearing notice for 14th February, 2017 on 23rd January, 2017.***
- b) The Defendant/applicant was ready to attend the hearing of this particular date only to fall ill a fact that the court was informed on the day of the hearing way before the matter could be heard.***
- c) The Defendant/applicant also undertook to inform the Plaintiff/Respondent's counsel on record through a phone call on the evening of 13th February, 2017 of his client's illness and the fact that he could not be able to proceed with the Defendant's case on this date but will be proceeding with the Plaintiff's case.***

d) The Plaintiff/Respondent's hearing proceeded only for the magistrate to rule that parties file their submissions and went ahead to issue a mention date for compliance.

e) The net effect of the said ruling allows the matter to proceed for ruling without affording the Defendant/applicant a hearing which may lead to the Defendant/Applicant suffering substantial and irreparable loss.

f) The Defendant/Applicant has been denied the opportunity to defend the suit, violating her constitutional right to be hearing in the suit even after the Defendant justified its pleas in its application.

g) The Defendant/Applicant has a good arguable appeal with very high chances of success.

h) The Defendant/Applicant appeal shall be rendered nugatory if the matter is allowed to proceed for judgment.

The application is supported by the affidavit of Cynthia Kemunto Advocate sworn on 29th March, 2017 who reiterates the goods of the application. The Respondent opposed the application by filing grounds of opposition dated 10th April, 2017. His grounds of opposition is that: -

1. That the application is frivolous and an abuse of the court process.

2. That the application does not merit the condition for grant of stay of further proceedings in CMCC No. 412 of 2011.

3. That the application herein has no merit. It ought to be dismissed with costs.

4. That the Appellant participated in the hearing and they managed to file their submissions. The Appellant has deliberately chosen to delay the finalization of the matter at the subordinate court. Justice delayed is justice denied.

By consent this application was to be disposed off by way of oral submissions and each party addressed the court.

M/s Nyabuto for the Applicant submitted that the Applicant was a Defendant in a Chief Magistrate suit in Milimani Commercial Court Case No. 412 of 2011. The matter was set for hearing on 13th February, 2017 but the Defendant was unwell. After the closing of the Plaintiff's case the magistrate was informed of the inability of the Applicant to proceed but nevertheless made a ruling that the parties file written submissions and that the matter be mentioned on 7th March, 2017 to confirm compliance. The Applicant was aggrieved by this ruling and intends to appeal against the same. She has filed a memorandum of appeal and now seeks an order of stay of the proceedings pending the hearing of the appeal. Counsel submitted that unless the Application is not allowed the Applicant will suffer irreparable loss by hearing a judgment against her and yet she was not heard.

Mr. Mbuvi learned counsel for the Respondent submitted that no order appealed from or being challenged has been annexed to this application, that the application for adjournment was heard and applicant has filed submissions as ordered; that no judgment has been delivered which is capable of being stayed.

This application is premised on the provisions of Order 42 Rule 6 Civil Procedure Rules that Rules that: -

"O.42 Rule 6 (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeals preferred shall be at liberty, on application being

made, to consider such application and to make such order thereon as may to it seem just, and any persona aggrieved by an order for stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

The main issue raised by the Applicant is that after the closure of the Plaintiff case, they were ordered to offer defence but were unable to do so as the defendant was unwell. The court thus proceeded to direct submissions pending judgment. The Defendant/Applicant have duly filed the Defendants written submission and that the matter was therefore, pending for delivery of judgment. The first issue is whether this court can evaluate the reasoning of the trial magistrate in making the ruling where no such ruling or order has been annexed to this application. This court will find it difficult to ascertain whether such application was unfairly refused if no proceedings or such impugned ruling is presented before this court.

The second issue worth mentioning in this ruling is what is the Applicant asking this court to stay? Having filed written submissions and the Plaintiff having also complied that the only proceeding remaining is the delivery of judgment by the trial magistrate. This court cannot on the material placed before it stay the writing or delivery of the judgment by the trial magistrate. If he will be aggrieved by the judgment or decree delivered, she has the right to exercise her rights of appeal which are provided for. For these reasons, I am satisfied that this application is without merit and same is dismissed with costs.

Dated, signed and delivered at Nairobi this 18th day of September, 2017.

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S N RIECHI

JUDGE