



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 18 OF 2016

SWALEH MBARAK APPLICANT

Versus

MUTUA KINYAO legal representative of the estate of

KELVIN MUTUKU MUTUA – deceased 1ST RESPONDENT

**SALIM S.O. ATHEF 2ND
RESPONDENT**

RULING

The notice of motion dated 22nd March, 2016 seeks two main prayers namely: -

1. **Leave to appeal out of time.**
2. **Stay of execution of orders issued on 17th March, 2016 in Malindi CMCC No. 328 of 2012 and 329 of 2012 pending the hearing and determination of the intended appeal.**

The application is supported by the applicant's affidavit sworn on the same date. The 1st respondent filed a replying affidavit sworn on 6th April, 2016 by Geoffrey Kilonzo.

Counsel for both parties agreed to determine the application by way of written submissions. Counsel for the applicant submits that the applicant was condemned unheard. He has an arguable appeal. He will suffer substantial loss if the orders are not granted as the amount being claimed is colossal. Counsel for the 1st respondent maintain that the application herein seeks orders which affect two separate files. The suits were not consolidated. This practice denies the court of income. Further, the application is an afterthought as it has been filed after a period of one year. This is inordinate delay. No appeal has been filed. The applicant has not offered any security which is a condition precedent in an application for stay of execution.

The main issue being raised by the applicant is that he was sued in both suits together with the 2nd respondent. He instructed an advocate to act for him. The name of the advocate has not been revealed. It is further averred that he did not receive any communication about the case until 16th March, 2016 when he was arrested pursuant to a decree issued by the court and was committed to civil jail. He quickly instructed an advocate to act for him so that he could salvage the situation. He has requested for certified copies of proceeding in both files.

The pleadings herein show that there were two suits filed before the Malindi Chief Magistrate's Court. Malindi CMCC No. 328 of 2012, the plaintiff was awarded Kshs.1,683,611/= while in CMCC No. 329 of 2012 the plaintiff was awarded Kshs.1,713,917. The record also shows that the applicant was committed to civil jail. On 17th March, 2016, counsels for the 1st respondent and the applicant recorded a consent before Honourable Yusuf Shikanda. At that time the applicant was in custody. The effect of the consent was that the applicant was to pay Kshs.50,000/= as of that date and a further sum of Kshs.150,000/ on or before 23rd March, 2016.

The applicant would like to have that consent set aside. There is no contention that the advocate who recorded the consent had no instructions to do so from the applicant. Indeed it is the same advocate who is appearing for the applicant in this matter. Since the parties voluntarily recorded the consent, I do order that the applicant should comply with it and pay the total sum of Kshs.200,000/= as indicated in the consent within 30 days hereof.

Regarding the issue of leave to appeal out of time, none of the parties have bothered to indicate to the court the nature of the claim before the trial court. The decree that was being executed has not been exhibited. The pleadings in both suits have not been annexed. Parties casually dealt with this matter. The applicant ought to have explained why he is not satisfied with the judgement of the trial court, what is his relationship with the 2nd respondent and what is the nature of the dispute. All this could have informed this court as to what transpired before the trial court.

The applicant has a right to pursue an appeal. I do not wish to curtail that right. Since parties recorded a consent before a magistrate which in effect stayed execution, I do find that it is prudent to allow the applicant pursue his appeal but comply with the terms of the consent. The applicant has prayed that the orders in this file do apply to file number 329 of 2012. I find that to be in order as it appears the two cases involve the same parties and the same cause of action.

The upshot is that the applicant is granted leave to file his appeal out of time in terms of prayer 5 of the application dated 22nd March, 2016. The applicant to file his separate memorandum of appeal for both suits within fourteen (14) days hereof. The applicant to pay Kshs.200,000/= as per the consent recorded on 17th March, 2016 within thirty (30) days hereof. The amount to be paid to the counsel for the 1st respondent. The application dated 22nd March, 2016 is hereby granted on the above terms. In view of the delay to file the application, the applicant is condemned to pay costs of the application to the 1st respondent.

Dated and delivered in Malindi this 14th day of June, 2016.

S.J. CHITEMBWE

JUDGE