



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 161 OF 2016**

**PHILIP KAMUYU NJENGA..... 1<sup>ST</sup> APPELLANT/APPLICANT**

**JOSEPHINE WAMBUI .....2<sup>ND</sup> APPELLANT/APPLICANT**

**V E R S U S –**

**JOSEPH NGANGA KIMANI.....RESPONDENT**

**RULING**

1) The Applicants **Philip Kamuyu Njenga** and **Josephine Wambui** filed a notice of motion dated 6<sup>th</sup> April 2016 where they sought for orders:

***1. THAT this application be certified as urgent and service of the same be dispensed with at the first instance.***

***2. THAT this Honourable court be pleased to issue orders of stay of execution of the ex parte judgment issued on 2<sup>nd</sup> October 2013 vide civil suit No. 2412 of 2007 and any other consequential orders thereto pending the hearing and determination of this application and the appeal herein.***

***3. THAT the costs of this application be provided for.***

2) The motion is supported by the affidavit of Philip Kamuyu Njenga. When served, Joseph Ng'ang'a Kimani, filed a replying affidavit and a notice of preliminary objection to oppose the application.

3) When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the matter disposed of by way of written submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the application and the preliminary objection raised by the respondent.

4) The Applicants asserts that the Respondent brought a suit against them before the trial court vide Milimani CMCC no. 2412 of 2007 in which an ex parte judgement for kshs,512,610/= was entered. They contend that they had not been served with the summons to enter appearance and that they only discovered the existence of the suit through auctioneers when they sought to execute the judgement. The Applicants thereafter sought to set aside the aforesaid judgment but **Hon. D. W. Mburu learned Principal Magistrate**, dismissed the application necessitating the filing of this appeal. The Applicants further argue that they have an arguable appeal with high probability of success. The applicants have argued that they attached their draft defence to the affidavit filed in support of the application to set aside before the trial court but the learned Principal Magistrate did not consider it before dismissing the

application. They argued that the judgement was irregular for want of service of summons to enter appearance. The Applicants further addressed the preliminary objection, raised by the respondent.

5) The Respondents in response filed a preliminary objection on the grounds that the current application was filed by a firm of advocates which is not properly on record and in breach of the provisions of Order 9 Rules 5 and 9 of the Civil Procedure Rules, 2010. He referred the court to the supporting affidavit of the Applicant which is deemed to be filed by **M. M. Uvyu & Co. Advocates**. He argued that an advocate of the parties before the trial court is deemed as their advocate on appeal unless a notice of change of advocate is filed. He further argued that the Applicants application was self defeating since no judgment was given on 2<sup>nd</sup> October 2013 but instead the same was delivered on 13<sup>th</sup> July 2010 by **Hon. Ragot** and not **Hon. D. Mburu**. He added that the ruling was given on 21<sup>st</sup> March 2016 and not on 23<sup>rd</sup> March 2016. He also contended that the Applicants have not pegged their prayers for stay on Order 42 of the Civil Procedure Rules but instead they have asked for a stay of execution and pegged their prayers on the fact that there is an appeal. He added that the Applicants have not shown the substantial loss they would suffer if the order for stay is denied nor have they alleged that the Respondent is not a person of means. He asked the court to dismiss the application. The Respondent also beseeched this court that should it grant the relief, the Applicant should be ordered to deposit the decretal sum and to settle the auctioneers charges plus the storage charges.

6) Before I delve deeper into the merits of the motion, let me first determine the preliminary objection raised by the Respondent. It is argued that the Applicants changed their advocates from **M. M. Uvyu & Co. Advocates** who had entered appearance in the trial court to **Mutuma Gichuru & Co. Advocates**. The later firm of advocates, currently representing the Applicants without filing a notice of change of advocates. The Respondent argued that this is contrary to Order 9 Rules 5 and 9 of the Civil Procedure Rules, 2010. In response, the Applicants contend that Order 9 rule 9 of the Civil Procedure Rules only comes into play after judgement has been delivered. A closer look at the court record before this court, it is evident that the trial court presided over a matter between the parties in CMCC 2412 of 2007. Judgement was delivered on the matter in the sum of Kshs .913,939/=. The Applicants moved the trial court by filing an application drawn and filed by **M. M. Uvyu & co. Advocates** dated 8<sup>th</sup> December 2015 where they prayed for orders of stay of execution of the decree pending the hearing and determination of the application as well as setting aside of the exparte judgement and the consequential decree and further that they be granted unconditional leave to defend the suit. The court upon hearing the Applicants exparte issued an order dated 18<sup>th</sup> December 2015 where it certified the application urgent, issued an order of temporary stay of execution of the decree and directed the Respondent to be served for interpartes hearing on 15<sup>th</sup> January 2016. The Applicants through their advocate **M. M. Uvyu & Co. Advocates**, in response to the replying affidavit sworn by the Respondent's advocate, the firm of advocates filed a supplementary affidavit in the trial court countering the averments by the Applicants that they never served the summons.

7) From the foregoing, it emerges that indeed as averred by the Respondents, the firm of **M.M. Uvyu & Co. Advocates** was on record for the Applicants to the extent that they sought orders for stay of the execution in the lower court, which order were temporarily issued pending the interpartes hearing on 18<sup>th</sup> January 2016. Moreover, the memorandum of appeal filed herein is pegged on failure of the Honourable Magistrate to set aside the judgement and the order for stay of execution amongst others after considering the parties' arguments

Though the ruling and judgement delivered on 22<sup>nd</sup> March 2016 were not annexed to this application it is clear that the lower court presided over this matter and considered the application for stay and despite it all, it dismissed the application for stay of execution and declined the prayers to set aside the exparte judgment prompting the Applicants to file an appeal in this court together with the current application.

8) It is also evident that the firm of **M. M. Uvyu & CO. Advocates** is on record for the Applicants in the lower court and the firm of **Mutuma Gichuru & Associates Advocates** was instructed to file an appeal against the decision of the learned Principal Magistrate to dismiss the application seeking to set aside the exparte judgement. It is clear in my mind that the firm of M. M. Uvyu & Co. Advocates is not on record

as appearing in this file neither has the firm of Mutuma Gichuru & Associates Advocates appeared on record in place of M. M. Uvyu & Co. Advocates to represent the defendants (Appellants) before the trial court in Milimani C.M.C.C 2412 of 2007. Had the firm of Mutuma Gichuru & Co. Advocates attempted to come on record in the trial court's file, it would have been required to comply with the provisions of Order 9 Rule 5 of the Civil Procedure Rules. However the aforesaid firm is not required to do so in this file because the firm is not on record. I find the preliminary objection to be without merit.

9) Having disposed of the preliminary objection, let me now consider the motion dated 6<sup>th</sup> April 2016 on merits. The appellants are before this court seeking for an order for stay of execution pending appeal. The principles to be considered while determining such applications are well settle.

First, an applicant must show the substantial loss it would suffer if the order is denied.

10) In this appeal the appellants are saying that they will be able to show on appeal that they were not served with the pleadings and summons thus they lost a chance to defend the suit before the trial court. It is argued that unless the order for stay is granted, they will be forced to settle the decree without being first heard. In my view, the fact that an applicant is likely to settle a contest decree and without first being heard, is a substantial loss by itself.

11) The second principle to be considered is the provision of security for the due performance of the decree. The applicants have stated on oath that they are ready and willing to provide security. The respondent has beseeched this court if its inclined to grant the order for stay to order the respondents to deposit the decretal sum, plus the auctioneers and storage charges.

12) In the end I am satisfied that the appellants have convinced me that they merit to be given the order for stay of execution pending appeal which I hereby grant on condition that they deposit the decretal sum of ksh.913,938/= in an interest earning account in the joint names of advocates and or firms of advocates within 30 days from the date hereof. In default the motion shall be deemed to have been dismissed. Costs of the motion to await the outcome of this appeal.

Dated, Signed and Delivered in open court this 19<sup>th</sup> day of August, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellants

..... for the Respondent