



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPL. NO. 1 OF 2016**

**JAMES KIMANI ETTO.....1<sup>ST</sup> APPLICANT**

**PIERLITE EAST AFRICA LIMITED.....2<sup>ND</sup> APPLICANT**

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

**DAVID KIMANI NGARUIYA.....RESPONDENT**

**RULING**

1. The subject matter of this ruling is the notice of motion dated 6.1.2016 in which the applicants herein namely: James Kimani and Pierlite East Africa Ltd are seeking for the following orders *inter alia*:

***1. THAT this application be certified as urgent and the same be heard ex-parte in the first instance.***

***2. THAT this court be pleased to grant leave to the applicants to file an intended appeal out of time from the judgment and decree delivered in Milimani commercial Courts CMCC 1317 of 2014 David Gitau Ngaruiya vs James Maina Etto and Pierlite East Africa Limited on the 19<sup>th</sup> October 2015.***

***3. THAT pending the hearing and determination of this application or until such time as this court may order there be a stay of execution of the judgment and decree issued in Milimani Commercial Courts CMCC 1317 of 2014 Davit Gitau Ngaruiya vs James Maina Etto and Pierlite East Africa limited.***

***4. THAT pending the hearing and determination of the intended appeal there be a stay of execution of the judgment and decree issued in Milimani Commercial Courts CMCC 1317 of 2014 Davit Gitau Ngaruiya vs James Maina Etto and Pierlite East Africa limited.***

***5. THAT the costs of this application do abide by the outcome of the intended appeal.***

2. The motion is supported by the affidavit of Newton M. Mwangi.

The motion was served upon the firm of Nelson Kaburu Advocates for David Kimani Ngaruiya, the respondent herein. The respondent did not deem it fit to file a response.

3. When the motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order in which the applicants were given 14 days to file an appeal out of time as sought in prayer 2 of the aforesaid motion. Learned counsels were unable to agree on the prayer for stay of execution

pending appeal. They instead invited this court to make a finding on that prayer. Therefore this ruling seeks to determine the question as to whether or not an order for stay of execution pending appeal should be given. I have already stated that the respondent did not deem it fit to file a response to the motion hence this court will basically make its decision on the basis of the arguments from one side. It is the argument of the applicant that the respondent is likely to commence the execution of the decree and it is therefore necessary to grant an order for stay of execution. The applicant promised to abide by any conditions imposed as security for the due performance of the decree. It was argued that the appeal raises serious arguable grounds which will be rendered useless unless the order is granted. The principles to be considered are well settled. Those principles include *inter alia*, first, that an applicant must show the substantial loss he would suffer if the order for stay is refused. Secondly, that the application for stay must be timeously filed and thirdly that the court must take into account the provision for security for the due performance of the decree. On the first principle, the applicants are required by law to show the substantial loss they would suffer if the order is denied. The applicants are supposed to discharge this burden so that they can enjoy the order. In the affidavit filed in support of the motion, the applicants have simply stated that they would suffer irreparable and substantial loss. They did not specify what sort of loss to enable this court determine whether or not the loss is substantial. The applicants' learned counsel did not also help matters in that he did not also explain in his oral submissions the kind of substantial loss the applicants would suffer if the order for stay is not granted. It is not enough to just state that the appeal will be rendered useless. The applicants have failed to discharge the burden of proving substantial loss. This is the main consideration this court is mandated to take into account when determining whether or not to grant the order for stay of execution. There is no doubt that the motion was timeously filed. The third principle is dependent on whether or not the applicants have shown the substantial loss they would suffer if the order for stay is denied. I have already stated that the applicants have failed to discharge that burden therefore this court has no option but to dismiss the prayer for stay since it is not justified.

4. In the end, I decline to grant the prayer for stay of execution pending appeal. Costs of the motion dated 6.1.2016 shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 28<sup>th</sup> day of October 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent