



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 34 OF 2016

JEFF BONDIST LUSIKI PLAINTIFF

VERSUS

MORRIS SHAURI KAZUNGU DEFENDANT

RULING

The application dated 20th June, 2016 seeks an order of stay of execution of the judgement entered on 16th October, 2015 in Malindi CMCC No. 38 of 2011, Morris Shauri Kazungu v Jeff Bondist Lusiki. It is supported by the applicant's affidavit sworn on the same date. The respondent filed grounds of opposition to the application.

M/s Khaminwa & Khaminwa Advocates, counsel for the applicant submit that the applicant intends to appeal against the judgement. The court should consider the overriding objective principle in determining the application. The appeal may be rendered nugatory if the orders being sought are not granted.

Mr. Ole Kina, counsel for the respondent contends that the application is frivolous, vexatious and a total abuse of the court process. It is brought under Order 22 instead of Order 42. The submissions by counsel for the applicant relate to an application for injunction as opposed to one of stay of execution. It is an omnibus application which should be struck out. Counsel further submit that no application for stay of execution was made before the trial court, no substantial loss has been established and no security has been given for the performance of the decree. Further, the applicant is guilty of unreasonable delay in making the application. Judgement was entered on 18th October, 2015 while the application was filed in June 2016.

The main issue for determination is whether the decree of the trial court should be stayed pending the applicant's intended appeal. It is clear from the application that no appeal has been filed. The annexures to the application indicate that the applicant applied for certified proceedings on 30th October, 2015 and paid a deposit of Kshs.800/= on 9th November, 2015. It appears that after requesting for the proceedings, the applicant went silent until 26th May, 2016 when a notice to show cause was served upon him.

The application is brought under Order 22 Rule 22 (5), 62 and 63 € of the Civil Procedures Rules. It is obviously clear that some of the rules cited have nothing to do with stay of execution. Order 22 rule 5, deals with objection to attachment. Rule 62 of Order 22 deals with restriction to bidding. There is no rule 63 (e) under Order 22. The applicant could not have intended to be relying on Order 63 as there is no Order 63 in the Civil Procedure Rules. Order 22 rule 22 does not deal with applications for stay of execution pending appeal.

Apart from the above observations, the applicant does not explain why the application has been brought late. Even if the proceedings have not been typed, that cannot be a reason for not filing an application for stay of execution within reasonable time. The applicant could have used photocopies of the judgement or proceedings to file the application. The judgement was delivered on 16th October, 2015 while the application was filed on 20th June, 2016. No explanation has been given for this unreasonable delay.

The sub missions by counsel for the applicant mainly dwell on issues relating to applications for injunctions. This shows lack of seriousness on the part of counsel. Counsel has cited the case of **SULEIMAN V AMBOSEL, RESORT LIMITED [2004] 2 KLR 589** where Justice Ojwang (as he then was) stated that the law governing the grant of injunctive relief is not cast on stones and that the law has kept on growing. Similarly, the case of **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & OTHERS [2003] KLR, 125** has also been cited. Counsel has cited the above case in support of the argument that the applicant has established a prima facie case and that in an interlocutory application, the court is not being asked to make any conclusive or definitive findings.

It is quite unfortunate that the application has not been brought with the seriousness it deserves. I will not revisit all the above anomalies entirely on the applicant himself. Most of the issues can be attributed to the applicant's counsel. This court takes cognizance of the applicant's fundamental right to appeal against the judgement of the trial court. That right has to be balanced against the respondent's right to enjoy the fruits of his judgement. The respondent should not be kept waiting by an indolent litigant. The applicant was awakened from his slumber by the notice to show cause.

The applicant has not made any commitment to furnish security. There is no submissions relating to the conditions necessary for the granting of an application for stay of execution.

Having noted that the applicant has a fundamental right to pursue an appeal against the judgement of the trial court and having noted the weakness exhibited by the application, I will exercise my discretion and allow the application on the following conditions: -

- i. The applicant to deposit the entire sum of Kshs.655,441/= in court within forty five (45) days hereof.
- ii. The applicant to ensure that his appeal is properly filed and served within ninety (90) days hereof.
- iii. The applicant is condemned to pay costs of this application in view of his indolence.

Dated and delivered in Malindi this 30th day of November, 2016.

S.J. CHITEMBWE

JUDGE