



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HIGH COURT CIVIL. APPEAL NO. 80 OF 2014

CLARIS AUMA OKUMU 1ST APPELLANT

TONY OCHIENG OKUMU 2ND APPELLANT

VERSUS

JACOB BLASIO OKUMU 1ST RESPONDENT

ROSELYNE ABUYA OKUMU 2ND RESPONDENT

MANASES OBONYO ADONGO 3RD RESPONDENT

DAVID ABILO 4TH RESPONDENT

JANE AKELLO NYAMUNGA 5TH RESPONDENT

RULING

By the Notice of Motion dated 15th September, 2014, the Plaintiff/Applicant seeks orders as follows:

1. (Spent)
2. **That this honourable court be pleased to stay all proceedings and execution in Winam Civil Suit NO. 109 of 2013 pending the hearing of the applicant`s application.**
3. **That this honourable court be pleased to stay all proceedings and execution in Winam Civil Suit No. 109 of 2013 pending the hearing and determination of the applicants/appellant appeal NO. 80 of 2014.**
4. **That pending the hearing and the determination of the applicants application the court be pleased to stay attachment and sale of the applicant`s property.**
5. **That pending the hearing and determination of the applicant`s appeal No. 80 of 2014 the court be pleased to stay attachment and sale of the applicant`s property.**

The application which is supported by the affidavit of James Aggrey Mwamu sworn on 15th September, 2014 is premised on the following grounds:

- a) **That the applicant being dissatisfied with the ruling and the decision of the Honorable Magistrate at Winam has filed an appeal challenging the failure to set aside the ex-parte assessment**

proceedings in the lower court.

b) That the applicant`s appeal is going to be rendered nugatory if the respondent is allowed to execute for costs which are fairly astronomical.

c) That it is the constitutional right of every litigant in the Republic of Kenya to access the court for justice especially when the costs are on the higher side.

d) That anybody perpetrating an idea of refusing a litigant to hire an advocate of his Or her choice is not only breaching the rules of professional ethics but is also abusing the constitutional rights of

the citizen of the republic of Kenya.

e) That the rights of litigant to defend a suit at every stage is a sacrosanct right that has to be respected and honoured by every person.

f) That unless the stay is granted the applicant`s case and appeal are going to be totally prejudiced in the circumstances.

The application is vehemently opposed vide a replying affidavit sworn by **Jacob Blasto Okumu**, the 1st respondent on 26th September, 2014.

On 19th September, 2014 this court granted an interim stay of execution pending hearing interpartes in which has been extended on subsequent attendances.

The application was canvassed by way of written submission as ordered by my brother **Chemitei-J** on 2nd October, 2014 as can be seen from the grounds of the application, the gist of it is that the application is aggrieved by the decision of the magistrate at Winam on the assessment of costs involving the parties in this matter. It is contended that the said magistrate has refused to set aside the exparte assessment hence this appeal. It is also contended that the costs are fairly astronomical and the appeal will be rendered nugatory if execution is allowed to proceed and that it is the constitutional right of every litigant in the Republic of Kenya to access the court for justice especially when the costs are on the higher side.

I agree with the assertion that access to Justice is an inalienable right to all citizens of Kenya. However, we are not here concerned with the merits of the appeal but first whether or not substantial loss is likely to occur should this application be refused and the appeal succeed; whether the application has been brought without undue delay and lastly whether the applicant is willing to deposit security for costs. Having considered all the materials placed before me I am not persuaded that the applicant is likely to suffer substantial loss should this application be refused and the appeal succeeds. It has not been demonstrated that the Respondents are men of straw incapable of refunding the money in the event that the appeal is successful. The application is dismissed with costs to the Respondents.

E.N. MAINA

JUDGE

Signed, dated and delivered this 19th day of March, 2015

In the presence of:

No appearance for the Applicant

Miss Wafula for the Respondent

Moses Okumu- Court clerk