



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 235 OF 2015

1. **JUKUMU ENTERPRISES LIMITED**
2. **GEOFFFREY NGUGI GITHUA.....APPLICANTS**

VERSUS

CHRISTOPHER MBINDYO MULWA

T/A CLENSOR SERVICES.....RESPONDENT

RULING

1. The Applicant has filed the motion dated 22nd May, 2015 seeking stay of execution of the decree and/or ruling delivered on 11th May, 2015 in Milimani Civil Case No. 613 of 2015 pending hearing and determination of this appeal.
2. The application is premised on the grounds set out on the face of the application and the supporting affidavit of the 2nd Applicant. He stated that following the Respondent's filing of an application for contempt against the Applicants, the Applicants were on 11th February, 2015 ordered to pay a fine of KShs. 100,000/= within seven days from the date of the ruling or serve three (3) months imprisonment. That when their advocate made an application for the ruling for purposes of filing a review, the trial magistrate said she would not issue the said and that the review would fail. He contended that their right to file a review and or appeal has been prejudiced. He further stated that their effort to trace the lower court file has been frantic as the file is said to be in the magistrate's chambers pending her interlocutory ruling. He stated that the business is still closed and they have suffered a great loss and that the amounts imposed are excessive and they have difficulty in raising the same. He further expressed that they are at a risk of being jailed in the orders sought herein are not granted.
3. The Respondent filed grounds of opposition to this application. It is contended that the orders of stay was sought without disclosure of material facts; that the ruling being appealed has not been attached to the application; that when the matter came up for ruling on 25th May, 2015, the Applicants' advocate requested that the file be forwarded to the registry to enable the Applicants pay the fine ordered.
4. The 2nd Applicant swore a further affidavit to the application. He contended that the failure to annex the ruling was occasioned by the inability to obtain the said from court; that the grounds of opposition does not specifically respond to the matters raised in the application; that the trial court exceeded her powers by citing the Applicants for contempt of court yet the same is expressly bestowed to the High Court and the Court of Appeal.
5. The Respondent filed an affidavit in response to the further affidavit. He contended that the only issue brought for appeal is that of contempt of court ruling and that the issues in the main suit which is still pending in the trial court and is therefore not subject of appeal. He contended that the trial court had the power to punish for breach of injunctive orders.

6. I have considered the depositions by parties herein and the submissions tendered thereto. For this application to succeed, the Applicants must therefore satisfy the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules, 2010 thus:-

- i. That the application has been brought timeously;
- ii. That if the stay orders are not granted she will suffer substantial loss; and
- iii. She must give security of costs.

7. This position was affirmed in the decision of **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** where it was held that:-

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

- 8. The ruling the Applicants seek to appeal against was delivered on 11th May, 2015 and this application was filed on 22nd May, 2015. Clearly, this application was filed timeously.
- 9. On the issue of loss, the Applicants stated that there is a real danger of them being jailed. Incarceration of a person trickles down to that person's right to freedom enshrined in the Bill of Rights. Considering that it is that aspect that the Applicant's intend to appeal against, they shall for sure suffer loss if stay orders are not granted and the appeal shall be rendered nugatory.
- 10. Although the Applicants have not offered security, this court has the mandate to impose such conditions if it deems fit.
- 11. In view of the foregoing, I am inclined to allow the application herein in the following terms:-

- a. I hereby grant orders staying execution of execution of decree and/or ruling delivered on 11th May, 2015 in Milimani Civil Case No. 613 of 2015 pending hearing and determination of this appeal.
- b. The Applicants are ordered to deposit the contempt fine in court within the next 15 days from this date failure to which execution to issue.
- c. Costs shall be in the cause.

Dated, Signed and Delivered in open court this 31st day of August, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicants.

.....for the Respondent.