



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 4 OF 2015**

**NYALUOYO AUCTIONEERS ...APPELLANT/APPLICANT**

**VERSUS**

**1. PATRICK AFYAI LUBEMBE T/A PAL MERCAHANTS**

**2. SHILOAH INVESTMENTS LTD .....RESPONDENTS**

**RULING**

**Introduction:**

1. Before Court is an application by way of a Notice of Motion dated and evenly filed on 19<sup>th</sup> January 2015 by **NYALUOYO AUCTIONEERS**, the Appellant herein.

2. The said application is seeking the following orders:-

a. ***THAT this Honourable Court may be pleased to certify this application as urgent and or be heard on a priority basis.***

***(b) THAT this Honourable Court be pleased to hear this application, exparte in the first instance.***

***(c) THAT this Honourable Court may be pleased to grant a temporary stay of the Court order dated 14/01/15, issued by Honourable J. Ong'ondo, Principal Magistrate, Kakamega, in Kakamega CMCC No. 499 of 2013, pending the inter partes hearing and or determination of this application.***

***(d) THAT this Honourable Court may be pleased to grant a stay of the Court Order dated 14/1/15 issued by Honourable J. Ong'ondo, Principal Magistrate, Kakamega, pending he hearing and determination of the appeal herein.***

***(f) THAT costs of this application be provided for.***

3. There are nine grounds in support of the said application appearing on the body thereof. The application is further supported by the Affidavits of **JAMES ONYANGO JOSIAH** sworn on 15/01/2015, the Supplementary Affidavit sworn on 04/03/2015 and a Further Supplementary Affidavit sworn on 02/04/2015.

4. **SHILOAH INVESTMENTS LTD**, the second Respondent herein, is in support of the said

application. To that end, it filed the Replying Affidavit of one **GEORGE MAGETO** sworn on 25/02/2015.

5. **PATRICK AFYAI LUREMBE** who trades as **PAL MERCAHANTS** is the first Respondent in the Appeal. He opposes the application and filed Grounds of Opposition on and evenly dated 21/01/2015, a Replying Affidavit sworn on 03/02/2015, a Supplementary Affidavit sworn on 21/03/2015 and a Notice of Preliminary Objection dated 21/03/2015. It is however worth-noting that the Preliminary Objection was later on expunged from the record by the consent of all parties.

**Background of the application:**

6. The application under consideration arises from an appeal filed against an interlocutory order in Kakamega Chief Magistrate's Civil Case No. 499 of 2014 (hereinafter referred to as "***the suit***").
7. I will briefly revisit the parties as they were in the suit. The Plaintiff was PATRICK AFYAI LUBEMBE trading as PAL MERCAHANTS. He was a tenant in premises known as Kakamega Town Block No. 119/97. The Landlord to the said premises was SHILOAH INVESTMENTS LTD. The Landlord was sued as the first Defendant. The second Defendant was NYALUOYO AUCTIONEERS.
8. The suit was instituted when Nyaluoyo Auctioneers levied distress for rent on PATRICK AFYAI LUBEMBE and as instructed by SHILOAH INVESTMENTS LTD, the Landlord.
9. The suit proceeded before the lower Court and several orders were issued time after time including the one dated 14/01/2015. As the order dated 14/01/2015 is what prompted this appeal, we will have a closer look at it.
10. The order made on 14/01/2015 was based on an application dated 09/12/2014. The application was filed by the Plaintiff in the suit who is now the first Respondent in the appeal. The said application sought the following orders:

*(a) Service of the application hereto be dispensed with in the first instance.*

*(b) That the application hereto be certified urgent and be heard on priority basis.*

*(c) That this Honourable court be pleased to order the property of the first defendant to be attached and sold and out of the proceeds thereof the plaintiff be compensated such an amount as this court may deem just.*

*(d) That this Honourable court be pleased to order the imprisonment of the directors of the first defendant company for a period not exceeding 6 months in imprisonment.*

*(e) That the costs of this application be provide for.*

11. On 14/01/2015, the lower Court upon hearing the parties to the said application dated 09/12/2014 issued the following order which I will reproduce in full.

**“ORDER**

**The application dated 9<sup>th</sup> December, 2014 coming up for hearing interpartes, on 12<sup>th</sup> January, 2015 in the presence of Mrs. Amasakha and Imbenzi respectively, for the Plaintiff and Mr. Munuon'g'a, holding brief for Mr. Gerbela for the 1st Defendant and Mr. Kirenga for the 2<sup>nd</sup> Defendant, IT IS HEREBY ORDERED:**

- (1) THAT the attachment of the plaintiff's goods be and hereby set aside and declared null and void.**

(2) THAT the 2<sup>nd</sup> Defendant to deliver the Plaintiff's goods he carted away to Court within 2 days from the date hereof that is to say by the 19/01/2015.

(3) THAT the 1<sup>st</sup> Defendant will pay the 2<sup>nd</sup> Defendant's delivery of the goods.

Given at Kakamega under my hand and the Seal of this Honourable Court this 14<sup>th</sup> day of January, 2015

Issued at Kakamega this 19<sup>th</sup> January, 2015

J. ONG'ONDO

**PRINCIPAL MAGISTRATE**

11. Being aggrieved by the said order, the Appellant herein preferred this appeal whereupon it filed the current application and this Court issued an order staying the order of the 14/01/2015 in the suit.
12. The application was eventually heard by way of oral submissions hence this ruling. This ruling is therefore on whether or not there ought to be a stay of the order dated 14/01/2015 pending the hearing and determination of the appeal.

**Analysis and Determination:**

13. The subject of stay of execution pending appeal is provided for in **Order 42 Rule 6 of the Civil Procedure Rules, 2010** (hereinafter referred to as "**the Rules**").
14. **Rule 6(2)** thereof sets out the conditions upon which the Court may exercise its discretion. The same is tailored as follows:

***“(2) No Order for stay of execution shall be made under sub rule (1) unless-***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.***

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

15. I will now have a look at the said legal requirements as follows.

**(a) Whether substantial loss may arise unless the order is granted.**

16. This matter in essence revolves around the issue of a Tenant failing to pay rentals and the efforts taken by the Landlord in recovering the arrears. This Court has carefully visited the rival positions in the matter as is on record albeit without the advantage of the full record in the suit as the lower Court file was yet to be forwarded to this Court when the application was heard. I have equally seen the various orders made by the trial Court on several occasions as well as the conditions attached thereto.
17. Among the key contestations in the suit is the allegation by the second Respondent (the Landlord) that the first Respondent (the Tenant) is in rental arrears to the tune of Kshs. 1,829,951/= whereas the first Respondent contends having made all the payments as directed by the trial Court. As that issue is pending determination before the appropriate forum, I will not tender my unsolicited comments on it, but suffice to say it remains the root of the entire litigation in this matter as a whole.

18. Be that as it may, a look at the order dated 14/01/2015 reveals that the Applicant herein (Nyaluoyo Auctioneers) was to deliver the goods it had taken possession of when it carried out an attachment upon the tenant. That delivery was to be made to the Court by 19/01/2015. However the Order did not stipulate the time of the said delivery. As a result thereof it can be safely assumed that the delivery of the attached goods to the Court was to be by the close of business on 19/01/2015 that is 0500 hours.

19. As above stated, on the very 19/01/2015, the Applicant lodged an appeal alongside the application under consideration and stay orders were issued. The hearing of the application was then fixed for 22/01/2015.

20. The record further indicates that the Order aforesaid was collected by Mr. P. Kirenga Advocate on 19/01/2015 at 04:20p.m. and was served upon the lower Court's Executive Officer, Mr. Alex Amasakha Advocate and Wasuna & Co Advocates on the said 19/01/2015.

21. The said Executive Officer on receiving the Order made the following remarks thereon:

***“Received a copy and placed in the respective file for the attention of the trial magistrate.”***

22. But there are proceedings which took place before the trial Magistrate on 19/01/2015. The said proceedings are contained in the Supplementary Affidavit of JAMES ONYANGO JOSIAH as annexure “JOJ-2”. On the said date, that is 19/01/2015, one Mr. Imbenzi Counsel for the First Respondent herein appeared before the trial Magistrate and on an oral application sought the arrest of the Directors of the Second Respondent herein (Shiloah Investment Ltd) on grounds of failure to comply with the orders of the Court made on 14/01/2015 which required the delivery of the attached goods by 19/01/2015.

23. Based on the said oral application, the trial Court then made the following Order:-

***“1. Warrants of Arrest do issue against the Directors of the Defendant, Shiloah Investment Limited (Names attached to order).***

***2. Warrant of Arrest do issue against James Onyango Josiah t/a Nyaluoyo Auctioneers for disobeying Court Orders issued on 19th January 2014.***

***3. Mention on 26th January 2014.***

***4. The OCS Kisumu Central Police Station to ensure compliance and execute Warrants of Arrest.***

***5. The OCS Kisumu Central Police Station to resort the aforesaid persons as soon as issued before Kakamega Law Courts.”***

24. Those proceedings did not end there. On 21/01/2015 the trial Court undertook further proceedings again on the instigation of the said Mr. Imbenzi Counsel. This was upon the arrest of one George Misati Mageto who was the Acting Assistant Accountant of Shiloah Investments Limited. The said Mr. George Mageto also informed the Magistrate of the High Court order which was in force and on the issue of the said order Mr. Imbenzi replied as follows:-

***“...The order given does not stay the orders if given they were given simultaneously. So it is not clear which order are first.”***

25. The Magistrate then did the unthinkable and unexpected of a judicial officer. He consciously disregarded the order of the High Court and proceeded to order the release of the said Mr. George Mageto only on the deposit of a cash bail of Kshs. 50,000/=. As that was not enough, the

Magistrate set the matter for further proceedings on 22/01/2015. This Court is not aware of what transpired on 22/01/2015.

26. I have carefully perused the order made by this Court on 19/01/2015 as well as the comments by the Executive Officer upon service and the proceedings by the Magistrate both on 19/01/2015 and 21/01/2015. I am satisfied that the said order issued on 19/01/2015 was duly served accordingly on the same day and that the same was placed in the Court file.

27. From the foregoing, the only explanation for the proceedings before the Magistrate on 19/01/2015 could be either an outright disregard of the order of the High Court or that the Magistrate dealt with the matter before the close of the Court hours on 19/01/2015. Either way, the trial Court cannot claim innocence on its dealing as it ought to have been more careful moreso when dealing with the liberty of persons.

28. I will at this point in time restrain myself from making further comments on this issue as that may definitely have a bearing on the matters pending before the appeal or the suit, but suffice to say that any proceedings which were undertaken by the trial Court after the issuance and service of the stay orders by this Court were without any legal basis.

29. Among the orders the lower Court made on 19/01/2015 was for the arrest of James Onyango Josiah t/a Nyaluoyo Auctioneers for disobeying a court order. That is the Appellant/Applicant herein and going by the tenor and vigour of the proceedings before the said trial Court even after the service of the order of this Court, the arrest of the Applicant is a glaring reality. If then that is allowed to happen, the incarceration would be irreversible even in the event the main appeal succeeds. That will definitely translate to substantial loss of one's liberty and the Applicant will be forced to release the attached goods, the substratum of the appeal and the suit at large. The rest of the matter would then become more or less academic. It is therefore imperative not to allow such a scenario to flourish before the order dated 14/01/2015 is fully interrogated during the hearing of the appeal.

30. I therefore choose to be guided by the consideration of the Court of Appeal in the case of **Jakson Kipkemboi Koskey & 7 Others vs. Samuel Murithi Njogu & 4 others (2007) eKLR** in dealing with a matter where the liberty of the Applicants was at stake due to an eminent arrest on allegation of disobedience of court orders. The Court had the following to say:

***“... We are of the view that this is a proper case in which we should exercise our discretion in favour of the Applicant. It cannot be denied that to refuse the application would render this intended appeal nugatory since the applicant is likely to have served the six months jail sentence by the time his appeal comes up for hearing.”***

31. Whereas this Court remains aware that the principles for consideration in stay of execution applications in the Court of Appeal differ from those in the High Court, the effect of not allowing the application when an Applicant is faced with an eminent arrest and incarceration on allegations of disobedience of court orders remain similar. To that end the above cited authority by the Court of Appeal remain relevant in this matter.

32. From the foregone analysis, this Court is hence satisfied that the Applicant has demonstrated that he stands to suffer substantial loss in the event the prayers sought are not granted.

**b. Delay in filing the application:**

33. The record is clear that the order appealed against was made on 14/01/2015. The appeal as well the application was filed on 19/01/2015 which is around 4 days thereafter. This Court finds that the application was made without any delay; it was timeously made.

**c. On security:**

34.The Applicant has deponed of his readiness to offer any security once called upon by the Court to do so. It is equally on record that the Applicant alleges that he has never disposed of any of the items he removed from the first Respondent's premises and has expressed his utmost willingness to comply with any Court order on the issue. In view of the history of this matter and with a view of not complicating the matter further, this Court would consider the Applicant's undertaking as sufficient security. I so hold.

**Disposition:**

35.As I come to the end of this ruling, I note that the first Respondent raised several other issues including the competency of the appeal and the legality of the attachment of the goods, among others. I however choose not to venture into the arena of dealing with those issues as indeed that will form a substantial part of the appeal or the suit.

36.Being guided by **Order 42 Rule 6** of the Rules and the law in general and by taking the unique circumstances of this matter into account, this Court finds that the Applicant in deserving of the prayers sought and hereby makes the following Orders:-

*(a) Prayer 4 of the Notice Motion dated 19/01/15 is hereby granted.*

*(b) The Applicant to file and serve the Record of Appeal within 60 days of this ruling.*

*(c) The Appeal shall be fixed for directions within 45 days of filing of the Record of Appeal as in (b) above.*

*(d) Costs of the application be in the appeal.*

Orders accordingly.

**Dated and SIGNED at MIGORI this 13<sup>th</sup> day of October, 2015**

**A .C. MRIMA**

**JUDGE**

**DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 12<sup>th</sup> day of November, 2015.**

.....

**JUDGE**