



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 16/2013

(Formerly KSM HCC No. 43 of 2003)

(Before Hon. Lady Justice Hellen Wasilwa on 4.4.2014)

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|---------|--------------------|
| OGOLA | 1. JOHN OSEWE |
| MUTATI | 2. DAVID |
| ONYANGO | 3. DAVID |
| OMONDI | 4. NOBERT |
| AKAI | 5. CHARLES |
| WERE | 6. SAMSON |
| ONGARO | 7. CHARLES |
| OWUODHA | 8. GEORGE ODUOR |
| OMOLLO | 9. MAURICE ADEK |
| NABULE | 10. DANIEL NYAOKE |
| OLENYO | 11. JAPHETH NJOMO |
| OMULO | 12. CHARLES OBONYO |
| | 13. JAIRUS OTIENDE |

ANDERE

14. PETER MAKUNA

OBWELA

15. WILLIAM MATORO

ODONGO

16. EMMANUEL K. OTIENO SIRMA

MAINGA

17. MATHEW ASANGAI

OMUSE

18. WILFRED

RADUL

19. SAMWEL ONYANGO

OKORE

20. CHARLES BOLVINCE

OPONDO

21. PATRICK ONYANGO

AYUGI

22. CHARLES ODHIAMBO

APINA

23. ELIAKIM MBOYA NAPALI

24. JOSECK OMUNYIN

OCHUDI

25. EDWARD

ODERO

26. SAMSON

OUCHE

27. LUKA LEPELL

28. LOCHUKA

LODIR

29. GEORGE

APINA

30. JOSEPH OMEDO

31. JOHN OGONDO

32. JOHN

OKITWI

33. SAMWEL

OUKO

34. MARY ASSUMPTA

AYITSI

35. LINET

OCHIENG

36. JAMES OTINDO

37. BILLY

OWUOR

38. ULIUS

OUMA

39. JAMES

OGONY

40. STEVE

WARINDA

41. DENNIS

ENONDA

42. JULIA

AGENGO

43. SALOME NYAMWATHI

MWANGI

44. MILKA ATIENO

JUMA

45. BONFACE SHIVOGA

MAKENZI

46. ELIZABETH ANYANGO

ODHIAMBO

47. LUCY AKOTH

SAO.....APPLICANTS

VERSUS

RAGHBIR SINGH SADHU T/A HOTEL
ROYALE.....RESPONDENTS

RULING

The application before court is the one dated 14.2.2014. The application is brought through a Notice of Motion dated 14.2.2014 and brought under Order 42 rule 6 of the Civil Procedure Rules, Section 3A of Civil Procedure Act and all other enabling provisions of law. The application was filed by the respondents applicant herein who seek orders:-

- 1. That the application be certified as urgent.**

2. **That this Honourable court be pleased to stay execution of the decree herein and any other order that may be issued pursuant thereto pending the hearing and determination of this application *inter parties*.**
3. **That this Honourable be pleased to stay the decree herein and any other order that may be issued pursuant thereto, pending the hearing and determination of Civil Appeal No. 7 of 2014.**
4. **That the costs of the application be provided for.**

The application is based on the grounds that:-

- (a) **The applicant has filed a robust appeal with a high probability of success.**
- (b) **If stay of execution is not granted the applicant's appeal will be rendered nugatory and the applicant will suffer irreparable damage.**
- (c) **Unless the application is granted, execution will be levied against the applicant.**
- (d) **The applicant is ready and willing to deposit to court title documents to Kisumu/Kogony/914 as security, or such other reasonable security as may be ordered by this honourable court.**
- (e) **Substantial loss will result tot he applicant unless the orders sought are granted.**
- (f) **This application has been made without unreasonable delay.**
- (g) **The application ought to be granted in the interests of equity and justice.**

The application is also supported by the annexed affidavit of Raghbir Singh Sandhu and further on such other arguments and grounds as adduced at the hearing of this application.

The applicants contend that they have satisfied conditions for the grant of orders sought. The 1st condition they state having satisfied is a demonstration that they will suffer irreparable loss if orders sought are not granted. They submitted that claimants are men of straw and it will be impossible for them to refund any moneys if the appeal succeeds.

Secondly, they submitted that the application has been brought without unreasonable delay, the application having been filed in February 2014 after judgment was delivered in January 2014.

3rd they submit that they are ready to deposit security in court, the security being a title deed of a parcel of land valued at 7.5 M as per the valuation report annexed to the application as annexure RSS1. They also argue that their appeal has high chances of success.

The claimant respondents, opposed this application. They sought to rely on a replying affidavit sworn by one William Odongo sworn on 3.3.2014. It is the respondents case that the applicants have not demonstrated that they have an arguable appeal. Secondly, it is respondents contention that the security the applicants want to deposit in court is not good security given the duplicity of titles in Kisumu and fraud involving land transactions. It is their prayer that the applicant should instead have offered to bring cash of which half should be paid out to respondents and other half on a joint interest earning account so that the claimant respondents are not denied fruits of their judgment after waiting for over 10 years.

They further submitted that the claim of respondents is for payment of salaries worked for and the claim that they are men of straw cannot arise because even the poor should not be denied what they have worked for.

The following then are issues for determination:-

1. **Whether the applicants have established sufficient case to warrant the orders sought being granted.**
2. **Whether the applicants can be granted the orders sought.**

On the 1st issue, Order 42 Rule 6 of the Civil Procedure Rules in the applicable law for grant of orders sought.

Order 42 rule 6, states that:-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from ----"

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; and

(b) such security as the court orders or order as may ultimately be binding on him has been given by the applicant."

The question then is whether substantial loss can result to the applicant if the prayers sought are not granted. The applicant submitted that they stand to loss substantially unless a stay is granted as the respondents are men of straw and cannot have means to refund in the event the appeal succeeds. The substantial loss the applicants contend they stand to suffer in however nor elaborated.

The Court of Appeal had to discuss the question of substantial loss in the case of **Mukuma VS Abuoga** where the court observed that substantial loss is the cornerstone of the discretion of the court as this must be prevented by preserving the *status quo* if the loss would render the appeal nugatory.

The applicants herein have not explained to this court what substantial loss they would suffer other than stating that the respondents are men of straw. The question then is whether by being men of straw, then the respondents should not realize fruits of a judgment they have got.

It had been submitted that by preventing the respondents from realizing the fruits of their judgment because they are poor, this would be treating them in a discriminatory manner. I do agree with this contention as Article 27(1) of the Constitution state that:-

"every person is equal before the law and has the right to equal protection and equal benefit of the law."

The applicants have submitted before court that they are willing to deposit a title of some land in Kisumu in Court. Whereas the title could be proper security, I take judicial notice of uncertainty of many title deeds in Kisumu. The authenticity of the title has not been established given that there was no official search certificate nor any letter/document from the Land Registrar attesting to it's authenticity. I will therefore not allow the said title as security.

However, given that the applicants have filed their appeal, it would be unfair to ignore that fact. Their appeal may raise triable issues. In order that the appeal is not rendered nugatory, I will allow this application and grant a stay pending appeal on the reasonable grounds that:-

1. **The applicants do pay the respondents half (½) of their entitlements as per the judgment within 60 days.**
2. **The balance of the decretal sum be deposited in a joint interest earning account held in the joint names of the counsel for the applicants and respondents within 60 days.**

No order as to costs.

HELLEN S. WASILWA

JUDGE

4.4.2014

Appearances:

Mwamu Advocate for claimants present

Menezes Advocates for respondents

CC. Wamache Sammy