



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 150 OF 2013

JOSHUA NJAU GITAU Alias GITAU JOSHUA APPELLANT

V E R S U S

**MADZUNGA OMARI MWAMASHANGO Alias MADZUNGA OMARI 1ST
RESPONDENT**

ALI HAMISI MWAKUKOSA 2ND RESPONDENT

RULING

1. The Appellant has filed an appeal against the Ruling of **KWALE RMCC No. 297 of 2010** by which Ruling the learned Magistrate denied the Appellant his application to re-open the case and adduce extra evidence. Pending the hearing and determination of that appeal the Appellant filed a Notice of Motion dated 6th December 2013 which is being considered in this Ruling. That Notice of Motion was amended orally before Court by consent on 6th March 2014 and although the Appellant was ordered to file an amended Notice of Motion in the terms of the consent within seven (7) days, I have not seen such an amended motion. Because the amendment was by consent I shall proceed to consider the application as amended.
2. The prayer in that motion under consideration is the one that seeks stay of any further proceedings in **Kwale RMCC No. 297 of 2010** pending the hearing and the determination of this appeal.
3. The deponent of the affidavit in support of the application stated in her affidavit that the application to reopen the case made by the Appellant before the Kwale Court was made without unreasonable delay and the same would not have occasioned any prejudice to the Respondent.
4. The learned Counsel for the Appellant Mr. Kiarie submitted that Appellant closed its case but when Appellant sought to reopen it in order to call other witnesses the Kwale Court rejected that prayer. He submitted that it was a principle of justice that matters should not only be expeditiously be heard but should also be heard and determined on merit.
5. Respondent's learned Counsel Ms Osino opposed the application by relying on the replying affidavit sworn by her on 14th February 2014. She deponed that the Appellant's application to reopen the Kwale case was a delaying tactic because the supposed witness who was to be recalled

when the case was re-opened had never attended Kwale Court and because the documents Appellant intended to produce if the Kwale case was re-opened were not listed in the list of documents. The other issues raised by the Respondent in the Replying Affidavit, ought in my view, to be raised at the hearing of the appeal and not at this stage.

6. The guiding provision for an application such as the one under consideration is Order 42 Rule 6(1) of the Civil Procedure Rules. That Rule provides-

“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, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

7. In my view the appeal having been premised on the Kwale Court’s refusal to re-open the case, if this Court declines the prayer of the Appellant for stay of those proceedings pending the determination of the appeal, the Appellant’s appeal will indeed be rendered nugatory. In this regard I am well persuaded by the case **ANASTACIA AGORO (T/A SAOLO HEALTH CLINIC) V JOSEPHAT NJUGUNA & 2 OTHERS [2014]eKLR** where Justice H. P. G. Waweru was faced with similar circumstances. In that case the Appellant was appealing against the Business Premises Rent Tribunal’s refusal to allow her an adjournment to enable her call her call her valuer. Justice Waweru granted her a stay of the Tribunal proceedings pending appeal. The said Judge stated-

“10. As far as this application is concerned, the Appellant fears that shutting out of her valuer from testifying before the Tribunal will be highly prejudicial to her case there and her appeal to this court will in any event be rendered nugatory.

12. I am satisfied that the testimony of her valuer was crucial to the Appellant’s case before the Tribunal. It is therefore meet and just that her appeal to this court should be heard and determined first so that she may know whether she will be able to call the valuer to testify; otherwise her appeal will be rendered nugatory.”

8. In this matter it was submitted that the witness who the Appellant wished to call before Kwale Court was the driver of the vehicle which was involved in the accident which accident is the subject of the suit before Kwale Court. That witness would seem to be a vital witness. In my view the Appellant has shown a just reason why stay should be granted.

9. The orders of the Court are as follows-

- a. **There shall be a stay of proceedings in the case Kwale RMCC No. 297 of 2010 pending the hearing and determination of this appeal.**
- b. **The costs of the Notice of Motion dated 12th November 2013 shall abide with the outcome of this appeal.**

DATED and DELIVERED at MOMBASA this 3RD day of APRIL, 2014.

MARY KASANGO

JUDGE