



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 89 OF 2013

(An appeal arising from the ruling delivered in Kakamega

CMCC No. 251 of 2012 by Hon. KENDAGOR, RM)

PATEL PRABHAKAR APPELLANT/APPLICANT

VERSUS

RICHARD CHACHA IMBOSA..... RESPONDENT

RULING

Before me is an application by way of Notice of Motion dated 6th August 2013 filed by the appellant. No section of the law was cited on the application. The prayers sought are that the court be pleased to order a stay of execution in Kakamega CMCC No. 251 of 2012 pending the determination of the appeal. Secondly, that costs be provided for.

The application was filed with a supporting affidavit sworn by one Eliud Otieno Atita on 6/8/13, though in page one of the said affidavit the deponent was meant to be the appellant. This application was filed under Certificate of Urgency. On the same date, a Memorandum of Appeal was filed.

Another application dated 2/1/14 was filed on 3/1/14. That application prompted this court to grant stay of orders initially for 14 days. The interim orders were later extended.

On the hearing date of the present application, Mr. Munyendo, learned counsel for the appellant stated that the application for stay of execution be granted. He relied on the affidavits filed. Mr. Ondieki, learned counsel for the respondent also relied on the replying affidavit filed. He opposed the application. No case authority was cited to me by either side.

This is an application for stay of execution of a decree.

Order 42 rule 6 (2) and (3) of the Civil Procedure Rules provides for the conditions upon which this court may grant stay of execution of a decree or order. It states as follows -

“6 (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 for the due performance for such decree or order will be ultimately be binding by the applicant.

3. Notwithstanding anything the court will have power to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

The application by the appellant does not cite the law under which it was brought. However, in my view, that is a procedural defect which can be cured under **Article 159 (2) (d)** of the **Constitution of Kenya 2010** as well as **Section 1A** and **3A** of the Civil Procedure Act (Cap. 21).

The application however relies on an affidavit sworn by Eliud Otieno Atita, who is not the appellant. The said Eliud Otieno was not swearing the affidavit on behalf of the appellant. In my view, that affidavit sworn by a complete stranger, whose identity and connection with the appellant was not disclosed, is fatally defective. Being a fatally defective affidavit, it is hereby struck out. Since the affidavit has now been struck out, the application remains bare with no evidence or facts to support it. It cannot therefore stand. The defect cannot be cured by Article 159 (2) (d) of the Constitution or the Civil Procedure Act. The application will therefore have to be struck out.

Having decided to strike out the application, I find no necessity of considering the parameters set out under Order 42 rule 6 (2) of the Civil Procedure Rules, as the formal application has been struck out.

To conclude I strike out the application with costs to the respondent.

Dated and delivered at Kakamega this 3rd day of April, 2014

George Dulu

J U D G E