



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 239 OF 2013**

**KAINTH DAVINDER.....APPELLANT/APPLICANT**

**VERSUS**

**TESSOTH VINCENT & JOYCE CHERONO SANG (Suing as**

**personal representatives to the Estate of Graham Kipkorir**

**Tessoth (Deceased)..... RESPONDENT**

**RULING**

The application dated 3/4/2013 seeks to stay the proceedings in Nakuru CMCC NO. 751 of 2013; **Tessoth Vincent & another** v. **Kainth Davinder**, pending the hearing and determination of the appeal herein.

The application is supported by the affidavit of the applicant's advocate, Dilipsinh Prabhatsinh Mahida, and is premised on the grounds that the applicant has filed an appeal against the decision of the lower court dismissing his application for leave to enjoin the plaintiffs as third parties to the suit; that the applicant has applied for certified copies of the proceedings and the ruling; that the applicant has good and reasonable grounds of appeal against the ruling; that the application for stay of proceedings was dismissed by the lower court. Further that the application has been made without delay.

There was no response filed despite an order given by the court on 23<sup>rd</sup> April, 2014 allowing the respondent's advocate, Mr. Wehombe, to file a response within seven days. That being the case and the date of hearing having been given in court in the presence of the advocates for the parties, the application was heard *ex parte*.

Counsel for applicant, Mr. Mahida, reiterated the grounds on the face of the application and urged the court to allow the application as it was unopposed.

The sole issue for determination is whether the application meets the conditions for granting stay of hearing pending an appeal.

**The law applicable to the application**

The guiding provision for an application such as the one herein is Order 42 Rule 6(1) of the Civil Procedure Rules which 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."**

The principles that guide a court in determining an application for stay of proceeding pending appeal were stated by Ringera J, (as he then was) in *GLOBAL TOURS TRAVELS LIMITED, WINDING UP CAUSE NO.43 OF 2000* thus:-

**"...Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion, it should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice to order stay of proceedings and, if it is, on what terms it should be granted. In deciding whether to order a stay the Court should essentially weigh the pros and cons of granting or not granting the Order. And in considering matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."**

Applying the foregoing principles to the instant application, I find as a fact that the application was brought expeditiously, barely a week after the impugned decision of the lower court was pronounced.

On whether the appeal herein is arguable, I gather from the memorandum of appeal filed herein that the appeal raises a single question of law to wit, whether persons suing as legal administrators and/or legal representatives of the estate of a deceased minor can be joined as third parties in the same proceedings?

Although the pleading in the lower court have not been annexed to this application to enable this court appreciate the nature of proceedings before the lower court, it is clear from the impugned ruling of the lower court and the memorandum of appeal filed herein that the intended third parties are parties to this suit. That is the position which is challenged on appeal.

Since in the instant suit the appellant faces liability by virtue of the pleadings. I am persuaded that the appellant's appeal is arguable.

The upshot of the foregoing is that the application has merit and is allowed, costs shall be borne by respondents.

**Dated, Signed and Delivered at Nakuru this 26<sup>th</sup> day June, 2014**

**H. A OMONDI**

**JUDGE**