REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

MISCELLANEOUS CIVIL SUIT NO. 25 OF 2014

MARIAM GUYATO AWADHI ….....1ST PLAINTIFF

GULLU HUSSIEN MASOUD ….....2ND PLAINTIFF

VERSUS

MAIMUNA ALI OMAR ….....DEFENDANT

RULING

The application dated 22nd August, 2014 seeks the following orders:

> **" 1. THAT this court be pleased to order a temporary stay of execution of the decree herein as well as all other subsequent orders and direct that the applicants be released from custody (civil jail) at Hola Government Prison pending the inter partes hearing of this application;**
>
> **2. THAT the applicants be granted leave to file an appeal out of time against the judgment and ruling delivered on 16th May, 2013 and 16th January, 2014 respectively in SRMCC No. 14 of 2012 (Hola) Maimuna Ali Omar -vs- Awadhi Guyato, Gullu Hussein Masono;**
>
> **3. THAT the Memorandum of Appeal annexed hereto be deemed to have been filed within time upon payment of the requisite filing fees;"**

The grounds in brief are that:

> **"1. THAT there is judgment and ruling on record against the applicants delivered on 16th May, 2013 and 16th January 2014 respectively in the absence of the applicants and/or their advocates;**

2. **THAT the applicants have been arrested and committed to civil jail at Hola G. K. Prison in relation to SRMCC No. 14 of 2012, proceedings in which they never participated;**

3. **THAT time for lodging an appeal has since lapsed;**

4. **THAT the applicants sought stay of execution in the subordinate court but the same was declined at the first instance;**

5. **THAT the intended appeal is arguable and has overwhelming chances of success;**

6. **THAT it is only in the interests of justice, fairness and equity that this application be allowed as prayed.**

7. **THAT no prejudice shall be suffered should this application be allowed as prayed;**

8. **THAT the balance of convenience tilts heavily towards allowing this application as prayed:"**

It is the Applicant's main contention that they never participated in the proceedings in the Lower Court and that the affidavits of service in regard to the summons and the notice to show cause (hereafter 'the N.T.S.C'), bore fallacious information, they were never served with the same. Mr. Obaga, Cousnel for the Applicant submitted that the threat of civil jail suffices as substantial loss, that the intended appeal has an overwhelming chance of success one ground being that the suit was unknown to them as hey had not been served with summons. That had they been served with summons, they would have put a proper defence.

The Respondent's Counsel, Mr. Wambua Kilonzo submitted that the application was not aimed at setting aside judgment but one for filing an appeal out of time. Further, as service of summonses and the N.T.S.C was not the issue, the Applicants in seeking to file an appeal out of time are contended with the judgment in question. The application for filing out of time was made in August, 2014.

Mr. Kilonzo contends that the Applicants made part-payment of Kshs. 200,000.00. it is therefore his contention that the appeal was an afterthought. He further stated that Order 42 only came into force upon there being a filed appeal which was not the case here. In addition, that Order 42 makes it a requirement to demonstrate substantial loss that would be suffered if a stay of execution was to be denied. Furthermore, the applicant was not insured as the insurance company has denied liability and repudiated the claim. There is a letter annexed to the replying affidavit to this effect. He submitted that the Applicants did not deserve the orders prayed for. He finally emphasized that the release from civil jail was a conditional discharge and the Applicants were expected to attend court however on the day the submissions were being rendered, they were absent.

Mr. Kilonzo further contends that the application does not seek setting aside of the judgment but one to appeal out of time hence the issue of service of summons was a non-issue. That the judgment in issue was delivered on 19th December, 2013 while the prayer for committal to civil jail was granted on 4th August, 2014. That none of the grounds or averments support the prayers sought.

The issues to be determined are whether or not the stay should be granted and whether or not the time to file an appeal should be enlarged. A party seeking stay of execution should satisfy the following conditions:

"1. The intended appeal is arguable.

2. **The Applicant should be in danger of suffering substantial loss if the say is denied.**

3. **The Applicant must furnish security.**

4. **The application should be made without unreasonable delay."**

Gicheru, JA (as he then was) held in **Halai & Another -vs- Thornton & Turpin (1963) Ltd. [1990] KLR 365 at p.367** that:

> ***"The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the Applicant must furnish security. The application must of course be made without unreasonable delay."***

These then are the conditions that the Applicant must fulfill. Is there sufficient cause? Having

considered the draft memorandum of appeal, which raises the issue of non-service of court processes, the alleged substitution of the court's judgment with a ruling, amongst other grounds, it reveals that the intended appeal is arguable. There is therefore sufficient cause.

The intended appeal is yet to be filed hence the application for enlargement of time in which to file the appeal. Mr. Obaga explained the delay being as a result of the Applicants being unable to issue proper instructions as they had been committed to civil jail for two months. The Applicants have also submitted that they were never served with the court processes and the N.T.S.C. It is my view that, without delving into the merits or demerits of the intended appeal, this alleged non-service offers credence to the delay in not filing the appeal on time. The Applicants having only been made aware of the existence of a decree against them at the point of arrest, filing the application within two months of being behind bars is not undue delay.

The Court of Appeal has established that 'substantial loss' is the cornerstone for granting stay. It is also held that substantial loss comes in various forms. See the finding of Platt, Ag. JA (as he then was) in **Kenya Shell Limited -vs- Kibiru [1986] KLR 410 page 416.** The Applicant must establish that the lack of stay of execution would lead to their enduring substantial loss. Ojwang, Ag. J (as he then was) in **Suleiman -vs- Amboseli Resort Limited [2004]2 KLR 589** adopted the finding in **Films Rover International ltd. & Others -vs- Cannon Film Sales Ltd. [1986]3 ALL ER 772** for the view that "*A fundamental principle is therefore that the court should take whichever course appears to carry the lowest risk of injustice if it should turn out to have been 'wrong...'*" One mode of executing a decree includes committal to civil jail. The Applicants herein are husband and wife and in the circumstances their incarceration would, as they await the hearing and determination of the intended appeal, be substantial loss in the event the appeal is successful.

On furnishing of security, the Order made by Judge Angote was for the deposit in court of Kshs. 100,000.00 so as to secure their release from civil jail. There is proof of this deposit. Further, the applicants upon assurance of the Respondent's Counsel to secure their release paid kshs. 200,000.00 Mr. Kilonzo pointed out that this was part-payment of the decretal sum. In my view, the total amount of Kshs. 300,000.00, which is almost half of the decretal sum suffices as security.

In the end, the application dated 22nd August, 2014 is granted as prayed. The memorandum of appeal to be filed within fourteen (14) days hereof. On costs, each party to bear its own costs.

Delivered and dated at Malindi this **16th** day of **December, 2014** in the presence of:

Said J. Chitembwe

JUDGE