



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CIVIL APPEAL NO.54 OF 2012**

**ENOCK ABOK OLOO KISIA .....APPELLANT**

**VERSUS**

**NAOMI ODHIAMBO .....RESPONDENT**

**R U L I N G ( 2 )**

1) The Notice of Motion dated 24<sup>th</sup> September 2012 seeks to stay the proceedings in Busia SRMCC 100/2010 and also seeks the following other main prayers;

**“3. THAT this Honourable Court be pleased to order a stay of proceedings in in this matter, as the lead suit, pending the hearing and determination of this application and of CMCC 102 OF 2010, CMCC 99 OF 2010, CMCC 103 OF 2010, CMCC 98 OF 2010, CMCC 101 OF 2010, CMCC 117 OF 2010, CMCC 152 OF 2010, CMCC 148 OF 2010 and DMCC 117 OF 2010.**

**4. THAT this Honourable Court be pleased re-open the Defendants case in Busia SRM CC 100 of 2010 and the Defendant/Appellant be allowed to call evidence so as to form part of the evidence in this matter to enable the court reach a justifiable conclusion.”**

2) That stay is sought pending the hearing and determination of this Appeal which is a grievance against the ruling of the Trial Court delivered on 21<sup>st</sup> September 2012. In that ruling the Learned Magistrate declined to grant an adjournment requested by the Appellant for purposes of hearing of the Defence case.

3) It is apposite to deal with prayer 4 of the Motion right away as it is obviously not grantable. Let me reproduce it again:-

**“4. THAT this Honourable Court be pleased re-open the Defendants case in Busia SRM CC 100 of 2010 and the Defendant/Appellant be allowed to call evidence so as to form part of the evidence in this matter to enable the court reach a justifiable conclusion.”**

The Appellant Court will have to determine whether or not the Trial Magistrate correctly exercised her discretion in refusing the prayer for adjournment. If the Court agrees with the Trial magistrate then it brings an end to that matter. If the result is to the converse then a natural consequence is that the Appellant will have an opportunity of pursuing the Defence case. Clearly therefore the question as to whether or not to allow the re-opening of the Appellants case in the Subordinate Court is matter that must

await the outcome of the Appeal. That prayer must abide the result of the Appeal.

4) The provisions of Order 42 Rule 6(2) of The Civil Procedure Rules are explicit on when a Court can grant a stay of execution order pending the hearing of an Appeal. The Application must be brought without unreasonable delay. The Court must be satisfied that substantial loss may result to the applicant unless the order is granted. Lastly, The Applicant must be ready and able to give such security as the Court orders for the due performance of the decree or order that may ultimately be binding on the Applicant.

5) It is common ground that the application was brought without delay, coming as it did, 3 days after the ruling sought to be stayed. And if I were to decline to grant the order then the Applicant will have no opportunity of presenting its case and the Court will proceed to prepare and deliver judgment without considering the Defence case. That, no doubt, is likely to prejudice the Appellant and that may cause a substantial loss to him. Up to there, my inclination is to grant the stay and order for suitable security.

6) However, there is something that must be mentioned. In the course of resisting the Application, Counsel for the Respondent pointed out to Court that judgments in the matters which are the subject hereof have been delivered. In essence, I am told, the Application has been overtaken by events and the grant of the orders would be ineffective. In fact useless. Counsel was reiterating a position he had taken in his affidavit of 2<sup>nd</sup> April 2013 filed herein in response to another application. Counsel for the Applicant did not react to this. I am afraid I am unable to make any finding on this because I was not shown any evidence of the judgments said to have been already handed down or decrees therefrom.

7) Back to the Application. I am also asked to grant prayer 3. The Court record shows that this matter was the lead file in respect to the other suits named on the face of the application. Any orders in Busia CMCC 100/2010 applied to the proceedings in those other matters. For that reason, the stay order I grant herein will naturally bind those other proceedings.

8) Ultimately I grant prayers 2 and 3 of the application dated 24<sup>th</sup> September 2012. But this is on condition that The Appellant deposits a sum of ksh.100,000/= in Court or in an interest earning account jointly held by Counsels of the parties therein within 30 days hereof. Costs of the Application to the Appellant.

**DATED, DELIVERED AND SIGNED AT BUSIA THIS 19<sup>TH</sup> DAY OF DECEMBER 2013.**

**IN THE PRESENCE OF:**

**KADENYI .....COURT CLERK**

**.....FOR APPELLANT**

**.....FOR RESPONDENT**

**F. TUIYOTT**

**J U D G E**