



## Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject of Subordinate Court case*

### Commercial Law

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- 3.1 *Partnership*
- 3.2 *Respondent controlled to partnership.*
- 3.3 *Sued for the return of the said funds controlled.*
- 3.4 *Court (SPM) on 19<sup>th</sup> August 2010 ordered that a sum of Ksh. 1,263,826/65 be awarded as judgment for respondent.*
- 3.5 *Hon. Magistrate granted stay of execution on application of 25<sup>th</sup> October 2010 seeking stay of execution by consent that the decretal sum be deposited to court within 45 days.*

- 3.6 *Appellant fails to raise and or deposit decretal sum to be deposited to court.*
- 3.7 *Appeal to High Court from 19<sup>th</sup> August 2010*
- 3.8 *Judgment on 17<sup>th</sup> September 2010 files application Seeking stay of execution dated 2<sup>nd</sup> February 2012.*

4. *Application for stay of execution*

*2<sup>nd</sup> February 2012*

- a) *Court had no jurisdiction to hear the same.*
- b) *The sum asked to deposit as security was not deposited to court.*
- c) *Prays for stay of execution.*

5. *Application opposed.*

- a) *Similar application made and granted.*
- b) *The application was granted but appellant failed to comply with the said orders.*
- c) *Prays application be dismissed.*

6. *Held:*

Court

- a) *Application or stay of execution if made in subordinate court and is refused, applicant permitted to file another application to High on refusal by subordinate court.*
- b) *The subordinate court granted stay of execution on condition.*
- c) *The applicant must go back to subordinate court to explain non-compliance and or vary the orders.*
- e) *Application declined.*

7. *Case Law:*

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8. *Advocates :*

i) *J O Nyaberi instructed by M/s Omwoyo Momanyi Gichubi & Co Advocates for appellants/original defendants*

ii) *O M Muli instructed by Musyoka Wambua & Katiku & Co Advocates for respondent/original plaintiff*

**REUBEN OMWENGA MARWANGA**

**FLORENCE MWANGO NYARANGA ..... APPELLANTS/ ORIGINAL DEFENDANTS**

**VERSUS**

**GWARO ONWONGA ..... RESPONDENT/ORIGINAL PLAINTIFF**

*(Being an appeal arising from the judgment of Hon. A.K. Ndungu Principal Magistrate in Civil Case No. 7177 of 2008 dated 19<sup>th</sup> August 2010 at*

*Milimani Commercial Courts)*

**RULING**

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Application for Stay Of Execution

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Dated 2<sup>nd</sup> February 2012

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**I. INTRODUCTION**

1. The appellant/original defendant Reuben Omwenga Marwanga and Florence Nyangara were jointly sued by the respondent Gwaro Onwonga in the subordinate courts, Milimani Commercial Courts, Nairobi.

2. The three had entered into a partnership business venture. This did not materialize to the satisfaction of the respondent. He sued the two appellants and the magistrate courts granted a judgment in his favour upon which the two appellants were to pay a refund of

Ksh. 1,263,826/65 to him (19<sup>th</sup> August 2010).

3. Being dissatisfied with this decision, the appellant one and two filed appeal to this High Court on 17<sup>th</sup> September 2010 well within the required time to appeal.

4. The appellants applied for stay of execution by their application dated 25<sup>th</sup> October 2010 pending the hearing of the appeal to the High Court.

5. The parties appeared before the Hon. Magistrate in the subordinate court and the parties entered into a consent that the application be allowed and a stay of execution order do issue but that this be subject to the said applicants depositing the decretal sum to court within 45 days.

6. The appellants were unable to comply with this order. Execution was imminent. They then filed a second application to this High Court seeking stay of execution.

**II APPLICATION 2<sup>ND</sup> FEBRUARY 2012**

7. In the said application, the appellants stated that there was a good chance of success in hearing the appeal. The reasons being that there was no jurisdiction by the subordinate court to hear the trial.

8. This of course appears to have been a new matter raised by them.
9. The appellants further admitted in the affidavit filed that they were unable to raise the security ordered by the subordinate courts.
10. The respondent opposed this application on grounds that the application had been applied for and granted in the subordinate courts. They cannot now come to this court and seek the same prayers.
11. An application for stay of execution if made in the subordinate court and is granted, the same stands till the finalization of an appeal. If the application is refused, party has a right to make the same identical application to the High Court and upon application, be granted the prayers or otherwise.
12. In this application the subordinate court did grant the prayers; stay of execution. This was on condition that has since not been met. The task of the appellants is to return to the subordinate and report to the court of their difficulties of not being able to comply with the terms issued by court. They are allowed to pray for vacation of the terms.
13. It is the courts priority not to shut out a litigant from being heard because they are poor. This fact must be brought out by the applicants before the subordinate court and not this High Court, on grounds that orders of stay of execution had already been granted.
14. I would therefore direct that the appellant must go back to the subordinate court by way of an application under Order 51 r 1 Civil Procedure Rules to explain the non compliance of the court's orders and seek for its narration.
15. This application is hereby declined and is accordingly dismissed.
16. There will be a stay of execution for 60 days to permit the application to be filed and heard in the subordinate court in default execution to be determined by the trial magistrate.
17. The costs be to the respondent/original plaintiff.

DATED THIS 20<sup>TH</sup> DAY OF MARCH 2012 AT NAIROBI

**M.A. ANG'AWA**

**JUDGE**

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*Advocates* :

- i) *J O Nyaberi instructed by M/s Omwoyo Momanyi Gichubi & Co Advocates for appellants/original defendants*
- ii) *O M Muli instructed by Musyoka Wambua & Katiku & Co Advocates for respondent/original plaintiff*