



**ALI MOHAMED MSUO.....APPLICANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**RULING**

The Applicant filed a Notice of Motion dated 7<sup>th</sup> September 2009 invoking the provisions of Order L, Rule, Order XLI Rule 4 and section 3A of the Civil Procedure Act. It sought the following orders:

“1) .....

**2) that this Honourable Court be pleased to grant an order of stay of proceedings in CMCC No. 2371 of 2005 (Mombasa) pending the hearing and determination of the Appeal herein and on any other consequential orders of this Honourable Court.**

**3) That costs of this application be in the cause”.**

The application was founded on the grounds that the Applicant will suffer substantial loss if the proceedings in CMCC No. 2371 of 2009 were allowed to continue while the Applicant’s Civil Appeal No. 147 of 2009 was pending determination. That the appeal would be rendered nugatory if the stay of proceedings was not granted. That the Applicant will not in any way prejudice the Respondent’s case. That the court has powers to grant the orders sought.

On 8<sup>th</sup> September 2009 when the Applicant appeared *ex parte* this Court granted an order of stay of proceedings pending *inter partes* hearing on a date to be fixed on priority. Upon been served the Responded filed a Replying Affidavit sworn by one Alice Munyao. The gist of the Reply is that the Applicant was trying to introduce a new cause of action after closing his case. That the Special Damages sought to be introduced had not been pleaded. That it was duty for the Magistrate to find that the application was an afterthought.

On 18<sup>th</sup> February 2011 the parties confirmed that they had filed written submissions and they requested for a ruling date. I fixed the ruling date to be 22<sup>nd</sup> April 2011. I regret the delay in delivering this ruling. The delay has been occasioned by factors beyond my control.

I have considered the rival written submissions filed by the parties in this matter. I have perused the Affidavit of the Applicant and it is clear that the Applicant concealed the fact that he had closed his case and that the application to amend the plaint was brought during the Respondent’s case. I have no problem with the proposition of the law that an application for amendment can be made at any stage but there is a caveat that it should only be allowed if it can be done without injustice to the other side. There can be no injustice if the other side can be compensated in costs. An amendment would not be allowed where a vested legal right has accrued.

The Applicant had an opportunity to present the whole of his case before closing it. The particulars of special damages sought to be added were within his knowledge. It is trite law that special damages must

be pleaded and strictly proved. Order VII Rule 2(1) enjoins a plaintiff to plead the amount of money sought to be recovered in a money suit. The plaintiff had an opportunity to do so for seven years since he filed his suit. Upon closing his case the Respondent acquired a vested right on the nature of the case that he was to meet.

The test as to whether a stay of proceedings is necessary is whether it would be prejudicial to the appeal if the case proceeded while the appeal is pending. The plaintiff closed his case. What prejudice will he suffer after closing his case? The person likely to suffer prejudice if the stay is granted is the Respondent because it has the effect of prolonging the litigation to the prejudice of the witness who had already testified in-chief. The trial magistrate is also entitled to conclude the matter while the evidence and demeanor of witnesses is still fresh in her mind. I concur with the decision in the case of **Benjamin Kimani Romoka & 2 Others vs Eveready Batteries (K) Ltd [2006] eKLR** relied upon by the Respondent. Where an applicant has not shown sufficient cause an order of stay of proceedings will not be granted.

From the facts of this application, I am not satisfied that the Applicant because of his procedural oversight has established sufficient cause to warrant an order of stay of proceedings. I hereby dismiss the Notice of motion dated 7<sup>th</sup> September 2009 with costs to the Respondent. It is so ordered. Interim order of stay is discharged.

Dated AND Signed At Nairobi ON This 2<sup>nd</sup> Day Of AUGUST 2012.

**M.K IBRAHIM**  
**JUDGE**

DATED AND Delivered At Mombasa on this 28<sup>TH</sup> Day OF AUGUST 2012.

**J.W. MWERA**  
**JUDGE**

Delivered in the presence of: Both sides represented