



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 154 of 2009

PROF JOSEPH KAMUYA MAITHA.....PLAINTIFF

VERSUS

1. ELIZABETH KAMENE NDOLO
(sued as Executrix of the Last Will of Joseph Musyimi Lele Ndolo, Deceased)
2. JUSTINE KASIMU NDOLO
3. SILA MUSYIMI NDOLO
4. MWAANI ENTERPRISES LIMITED.....DEFENDANTS

RULING

1. By a ruling dated and delivered on 9th November 2009 the court (Lenaola, J) dismissed the 2nd Defendant's application by chamber summons dated 30th July 2007 which had sought an order to strike out the plaint and to dismiss with costs the Plaintiff's suit upon various grounds.
2. The 2nd Defendant then appealed against that order vide **Court of Appeal at Nairobi, Civil Appeal No. 29 of 2010**. He also applied by **notice of motion dated 1st March, 2010** for an order to stay proceedings in this case pending hearing and final determination of the appeal before the Court of Appeal. That application is the subject of this ruling.
3. The application was brought essentially under **Order XLV, rule 4(1) & (2)** of the **Civil Procedure Rules** (the **Rules**) then in place.
4. The grounds for the application on the face thereof can be summarized as follows-
 - (i) That the 2nd Defendant has a good and arguable appeal which will be rendered nugatory unless stay of proceedings is granted.
 - (ii) That the application has been made without delay.
 - (iii) That the 2nd Defendant is prepared to abide by any conditions that the court might impose.
 - (iv) That in the circumstances of this case it is just that the order sought be granted.
5. The Respondent has filed a replying affidavit opposing the application upon grounds, *inter alia* -
 - (i) That the application has been overtaken by events, the 2nd Defendant having filed an appeal in the Court of Appeal.
 - (ii) That this court cannot issue a stay of proceedings as the same is available under Rule 5(2) (b) of

the Court of Appeal Rules.

(iii) That the procedure available under Order XLI, rule 4(1) & (2) of the Rules is in respect of appeals and second appeals filed in the High Court and not in the Court of Appeal.

(iv) That the 2nd Defendant has not satisfied the provisions of Order XLI, rule 4(2) of the Rules.

6. I have considered the submissions of the learned counsels appearing, including the cases cited. This application is premised on the provisions of rule XLI, rule 4 (1) aforesaid which vested in the High Court power to grant stay of proceedings, *inter alia*. Subrule (2) of rule 4 had no application in respect to stay of proceedings as it applied only to an application for stay of execution. The submission that the filing of an appeal to the Court of Appeal divests of this court jurisdiction to deal with an application for stay of proceedings before it pending determination of such appeal is, with respect, erroneous.

7. It seems to me that this court had, under rule 4 (1) aforesaid, an unfettered discretion to grant or refuse an order to stay proceedings before it pending determination of an appeal before the Court of Appeal. Such discretion must of course be exercised judicially and in the interests of justice.

9. In the present case the main consideration must be this: If the case before this court is allowed to proceed to hearing before the appeal before the Court of Appeal is determined, are the parties likely to suffer prejudice?

10. To determine this issue it is useful to remember that the appeal is against an order of this court that refused an application to strike out the plaint and dismiss the Plaintiff's suit. Had the application been allowed, that would have been the end of the matter as far as this court is concerned as the plaint would have been struck out and the suit dismissed. So, there would not have been any hearing of the action in this court.

11. If the appeal now pending before the Court of Appeal were to be allowed, the result would be the same, and the plaint would stand struck out and the Plaintiff's suit dismissed. If in the meantime the suit will have proceeded to full hearing, the parties will have been put to unnecessary expense in terms of time and money. So, is it not more prudent to await the decision of the Court of Appeal before embarking on a trial of the action here? It obviously is!

12. I therefore hold that the balance of convenience for all the parties is that before the suit is heard fully in this court the Court of Appeal should first render its decision on whether or not the plaint should have been struck out and the Plaintiff's suit dismissed.

13. In the circumstances, I will allow this application and order stay of proceedings herein pending determination of the appeal now before the Court of Appeal. But parties shall have liberty to apply. Costs of the application shall be in the cause. It is so ordered.

14. The delay in preparation of the ruling deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

DATED AT NAIROBI THIS 6TH DAY OF SEPTEMBER 2012

H. P. G. WAWERU

JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA

.....
JUDGE