



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 20 OF 2011

MOMBASA MAIZE MILLERSAPPELLANT
VERSUS
MUSEVENI NGANGA MBOGORESPONDENT

RULING

Mombasa Maize Millers Limited, herein after referred to as **“the applicants”** filed this Notice of Motion dated 21st March, 2011. The same is brought under order 51 Rule 1, order 42 Rule 6 of the Civil Procedure Rules 2010. Order 1A and 1B of the Civil Procedure Act and all the enabling provisions of the Law.

The application seeks for prayers that:

- **That there be a stay of Execution pending the hearing and, determination of the Application.**
- **That there be a stay of execution pending the hearing and determination of the intended appeal in the Judgment delivered on 7th February, 2010.**
- **That the Costs of the application be in the Appeal.**

The application is supported by the grounds on the face of it and the affidavit in support sworn by one Ann Aluku, an Assistant manager at Fidelity shield Insurance Company.

The application is opposed through a replying affidavit sworn by Michael Maundu an advocate of the High Court of Kenya, practicing as an Associate Advocate with the firm of M/s Kanyi and Company Advocates.

At the hearing of the application, the parties agreed to dispose off the application by filing of written submission. That has been done.

From the documents filed by the applicant I note the applicant is submitting:

1. That the applicant has filed an appeal against the Judgment delivered on 28th February, 2011.
2. That the said appeal has very good chances of success.
3. That the applicant is prepared to give an appropriate security until the appeal has been heard.

4. That no prejudice shall be occasioned to the Respondent if the application is allowed.
5. That it is in the interest of Justice that the application be allowed.

In the affidavit sworn to support the application, the deponent states that the Respondent herein filled a civil suit No. 1445 of 2009 seeking for general and special damages. That, the Respondent sued on the allegation that he was injured at the Appellant's premises while loading Maize flour aboard motor vehicle registration No. KAK 011 U. That Judgment was delivered in favour of the Respondent, and he has commenced execution. That as a result, the applicant seeks for the stay of execution pending the hearing of the appeal.

In reply, the Respondent depones that, the

1. The affidavit sworn in support of the application has been sworn by one Ann Aluku who is the wrong person. That, the said Ann is an employee of Fidelity Shield Insurance Company, who is a stranger to the proceeding (as that Insurance Company has no connection to the Applicant.)
2. That the application herein for stay ought to have been made in the Court that delivered the Judgment and that, the High Court can only stay proceedings pending appeal, in the second instance.
3. That, there are no instructions from the applicant to appeal from the Judgment.
4. That the applicant has not demonstrated the appeal has merit.
5. The right to stay the proceedings pending appeal ought to be balanced against the respondents' right to enjoy the fruits of the Judgment.

I have now considered the application, the grounds on the face thereon, the affidavit in support, all the documents filed and reply thereto, the submissions by the parties and the authorities cited.

I find that, the first issue to determine is whether the applicant has the Locus Standi to bring the application herein. I find that in deed, whereas, the applicant/Appellant is stated as Mombasa Maize millers Limited, and rightly so, application herein, the Notice of Motion, is supported by grounds, and affidavit sworn by one **Ann Aluku**. She describes herself as the Assistant manager at Fidelity Shield Insurance Company. She does not state, the legal capacity in which she has sworn the said affidavit on behalf of the Appellant/Applicant. All she states therein is that:

"I am fully conversant with the facts of this case and duly authorized by Fidelity Shield Insurance Company and the Appellant to swear this Affidavit on their behalf".

She does not show any evidence that she was duly authorised by the Appellant to swear the affidavit. The interest the insurance company has in the matter is not explained at all. In paragraph 6, she depones that, they are aggrieved with the Judgment, **but** the insurance company was not a party to the said suit. In deed most of the matters she has deponed to which includes: the fact that, the Respondent is a casual worker with no fixed abode, cannot be within her knowledge. In that respect, I agree with the submissions of the Respondent, that she is a stranger to the proceeding and on that ground alone, the application cannot stand. If that is so then the other issues raised therein and the response thereof becomes unnecessary for consideration. Locus Standi is everything in Litigation. I don't really have to go into them. In fact most of the issues therein have been overtaken by orders granted herein on 23rd March 2011, and the parties should move to prosecute the main appeal.

In a nutshell I dismiss the application on the ground that, the same is supported by an affidavit of a party who has no locus standi in the matter. Costs awarded to the Respondents.

G.L. NZIOKA
JUDGE

Dated and delivered in an open Court at Mombasa

In the presence of:-

V.N. Okata for the applicant

Non appearance for the respondents

Cc Buoro

G.L. NZIOKA
JUDGE