



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Civil Appeal 142 of 2008**

**HASSAN FARID .....1<sup>ST</sup> APPELLANT/APPLICANT**

**HUSSEIN SHARIFF ..... 2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**SITAIYIA ENE MEPUKORI ..... 1<sup>ST</sup> RESPONDENT**

**SINGIYIAN ENE LEEPA & 14 OTHERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Application dated 6/8/2008 seeks orders under Order XLI Rules 4 and 5 of the Civil Procedure Rules, Section 10 of the Insurance 3<sup>rd</sup> Party Act, Cap 405 Laws of Kenya and Section 3A of the Civil Procedure Rules. The prayers sought are;

1. “That this application be certified urgent and be heard and determined at this courts earliest available opportunity.

2. That execution of the judgment and decrees given on various dates in Makueni SRMCC NO:15 OF 2007 (Consolidated with Nos: 16, 17, 18, 19, 20 AND 21 OF 2007) and Makueni SRMCC NO: 110 of 2007 (Consolidated with Number 111, 112, 113, 115, 116, 117, 119 & 123 of 2007) be stayed pending the hearing and determination of this appeal.

3. That this Honourable court make such other or alternative orders as would serve the interest of justice in this case.

4. That the applicant be awarded costs of this application.”

2. The grounds in support are that:-

a. “The respondent irregularly obtained exparte interlocutory judgments and did formal proofs that resulted in judgments given for a cumulative amount in excess of kshs.6.7 million.

b. The appellants applied to set aside the judgments so as to have an opportunity to defend the suits but the application was on 23<sup>rd</sup> July 2008 dismissed by the trial court.

c. The applicants are aggrieved by the dismissal of the application and have herein exercised their

undoubted right of Appeal and their appeal is quite arguable as shown in the Memorandum of Appeal.

- d. The respondent has already embarked on proceedings to enforce payment of the decretal sums.
- e. The applicant are apprehensive that if execution is levied or they are compelled to pay the decretal sums there will be no way of recovering the monies on successful completion of the appeal hence they will suffer substantial loss.
- f. That this Honourable court has discretion to grant the orders sought.”

3. In the Supporting Affidavit of Jane Nyamuringa Ruigu and in submissions by Mr Mbigi, advocate for the Applicants the Applicants’ case is as follows:-

That the Applicants are the Defendants in all the suits in the prayer 2 above. That the suits were heard without the participation of the Defendants and judgments totaling Kshs.6.7 million were passed against them. When they sought to set aside the ex-parte judgments, their Application was dismissed on 23/7/2008. They appealed against that order but are apprehensive that if the decrees are executed, they will suffer substantial loss without the chance of being heard.

It is the Applicants’ other argument that the Respondents are not people of means and the possibility of refund of the decretal sum may not exist if the stay order is not granted.

4. In a Replying Affidavit sworn on 30/9/2007 and in submissions, Mr Kilonzo, advocate for the Respondents sets out their case as follows:-

That the Application is brought in bad faith and the Applicants are intent on misleading the court. That judgments in all the 14 suits were properly obtained and later, the Applicants’ Insurance Company, M/S Kenya Orient Insurance Co. Ltd intimated that the decretal sums would be paid only to turn back and challenge the same. Their advocates similarly intimated settlement only to backtrack and pursue multiple applications in the subordinate court and now in this court with a clear view to elongating the litigation.

5. For my part, I have taken into account the numerous authorities cited by the two advocates and it is not out of disrespect that I have chosen not to quote all of them. It is only because the law on the issue before me is more than settled. A party invoking Order XLI Rule 4 of the Civil Procedure Rules must always remember that the discretion given to court is fettered by the words: “no order of stay of execution shall be made unless” a party so applying is able to show that:-

- a. substantial loss may result unless the order is granted;
- b. such security as the court may order is granted;
- c. the Application was filed without undue delay.

6. In Diamond Trust (K) Ltd vs Peter Mailanyi H.C.C.C 177/2002 (Milimani), Ochieng J and I agree, stated that substantial loss must be properly proved if the orders are granted. In this case, I wholly agree that where in all 14 but related decrees, a sum of Kshs.6.7 Million is in issue, even if the individual sums due to each Respondent are themselves minor, there is no assurance that if the intended Appeal succeeds, the Applicants will recover that sum. The prejudice is even more compounded when I note that in neither of the 14 suits were they heard and the Appeal itself relates to the issue whether the ex-parte judgments were properly obtained. Ordinarily, I would want proof of what the Respondents do to determine this question but in this case, neither the Applicant nor the Respondents have said anything serious about the latter’s’ means and so the issue is moot. The decision in Standard Assurance Co. Ltd vs Alfred Mumea Komu H.C.C.A 186/2007 (Machakos) is in this case clearly distinguishable.

7. On the issue of security to be offered, the Applicants through their advocates have said that they are prepared to deposit such security as this court may order. I will return to the issue shortly but on the last

point, the Application before me was filed within reasonable time and I have seen no delay in bringing it forth.

8. It is quite clear that inspite of all that the Respondents have said, I am inclined to grant the Application dated 6/8/2008 for reasons given. However, I shall only do so on condition that the Applicants deposit Kshs.100,000/= into court in each of the 14 files making a total of Kshs.1.4 million as security until the Appeal is heard and determined. The security shall be deposited within 30 days of this order failure to which the stay order will be vacated.

9. Costs thereof shall abide the Appeal.

10. Orders accordingly.

Dated and delivered at Machakos this 3<sup>rd</sup> day of December 2008.

**ISAAC LENAOLA**

**JUDGE**

In presence of: **Mr Mung'atta h/b for Mr Kilonzo for Respondent**

**N/A for Applicant**

**ISAAC LENAOLA**

**JUDGE**