



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

Civil Appeal 125 of 2006

NELIAH MAGOMA NYAKUNDI)

GEORGE NYANG'AU NYAKUNDI) APPELLANTS

VERSUS

BENINAH BARONGO NYAKUNDI RESPONDENT

RULING

The applicant/appellant's application seeks court to order stay of execution of its ruling and/or order given on 21st October 2006 pending the hearing and determination of the intended appeal in the Court of Appeal.

The respondent did not file any grounds of opposition or replying affidavit.

The appellant/applicants had been sued by the respondent in Kisii CMCC.NO. 69 of 2006. The respondent thereafter filed an application seeking court to stay the proceedings in the lower court until this appeal was heard and determined. The court heard the application and in its ruling of 2nd October 2006 dismissed the application. The applicant has now brought this application seeking the court to order a stay of execution of that order of dismissal as they intend to appeal against that ruling in the Court of Appeal.

As stated the application was not opposed. Nonetheless I have carefully considered the same and find it has no merit. The Order/ruling the applicants want stayed is the one dismissing their application for stay.

It is not clear therefore what the applicant really want or what effect would be there if I were to grant this application. Would it mean the order of dismissal has no effect and as such the application by the applicant dated 29th May 2006 would be unresolved? Of course what the applicant want is the court to stay the hearing of the main suit. Mr. Momanyi informs court that the hearing is set for tomorrow. That was the same prayer in the application dated 29th May 2006. In dismissing that application the court gave its reasons as to why it felt the application had no merit.

That reasoning still stands and have not been changed by the fact that the applicant intends to appeal against that ruling. The applicants are indeed entitled to ventilate their case before the highest court but this court still feels that the reasons it gave in dismissing the application were valid and as such there is no good reason to order that the proceedings be stopped.

I cannot be able to say that the intended appeal has high chances of success and thus the need for a stay.

Perhaps the applicant need to put that before The Court of Appeal for determination. On the other hand I don't think the applicant will suffer any prejudice if the hearing of the main suit proceeds.

They were given a chance to amend their defence. That was on 16th May 2006 which is a period of over 5 months ago. Their application for stay was dismissed on 2nd October 2006 which is almost a month ago.

I believe they had ample time to take any necessary steps and prepare for the hearing. If later it is found that the ruling was erroneous proper orders will be made notwithstanding how far the hearing had progressed.

From the above reasons therefore I disallow the application, with no orders to costs.

Dated 30th October 2006.

KABURU BAUNI

JUDGE

Delivered in Presence of

c.c. Mobisa

Mr. Momanyi for Respondent.

N/A for Respondent.

Mr. Momanyi: I apply for certified copy of the ruling.

KABURU BUANI

JUDGE

Court: Certified copies be given to counsel on payment of requisite fees.

KABURU BAUNI

JUDGE