



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUSIA**

**CIVIL APPEAL NO.E014 OF 2021**

**1. SANGANY AGENCIES LIMITED.....1<sup>ST</sup> APPELLANT/APPLICANT**

**2. AUSTINE OWINO OTIENO.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**JOSEPH OTIENO AKETCH suing as legal representative of the estate of**

**FRANCIS ODHIAMBO OKOTH.....RESPONDENT**

**RULING**

**COURT**

The application dated 18<sup>th</sup> June 2021 is brought under Order 42 Rule 6 (1) of the CPR as well as Order 50 Rule (1) and (13) of the CPR, Sections 1A, 3A of the Civil Procedure Act and Article 159 of the Constitution.

The main prayers for consideration at this juncture are prayers (3) and (5). Thus, the application seeks an order to arrest judgment in Busia CMCC No.19 of 2017 pending hearing and determination of appeal and an order to stay further proceedings of Busia CMCC No.19 of 2017.

The grounds in support of the application are set out in the appropriate notice of motion and fortified by the supporting affidavit deponed on 18<sup>th</sup> June 2021 by the advocate, **Janeth Bii**. The application on the basis of the grounds and averments contained in a replying affidavit dated 3<sup>rd</sup> July 2021 deponed by their advocate, **Elizaphan Mokaya Bogonko**.

Upon due consideration of the application on the basis of the supporting grounds and those in opposition thereto, it became clear that the basic issue for determination is whether the applicants have provided good and sufficient grounds for exercise of this court's discretion in their favour.

**Order 42 Rule 6 (1)** of the **Civil Procedure Rules**, which is the actual enabling provision for this application provides for stay where an appeal is lodged against a decision or order of the lower court. Here, the appeal is against an interlocutory order made by the trial court in a matter that is still in progress and awaiting judgment on 13<sup>th</sup> July 2021, hence prayer (3) of the application which is essentially akin to putting a cart before a horse or to predicting the outcome of a judgement prior to its delivery. In order to expedite the conclusion of the case it would be prudent for the applicants to await the delivery of the judgement and then appeal against it to a higher court if they are dissatisfied with it. In any event, a prediction may have no effect at all and it would be farfetched for the applicants to think that they can read the mind of the trial court and know for sure that it shall render a judgement unfavourable to them. That would merely be suspicion and suspicion has never been known to be proof of any fact without evidential support. Clearly, prayer three (3) of the application is a misconception and cannot in any event be made under order 42 of the Civil Procedure Rules.

As for stay of proceedings, Rule 6 (1) of order 42 is clear that no appeal shall operate as a stay of proceedings under a decree or order appealed from unless sufficient case is shown by an applicant.

None of the grounds in support of this application are satisfactory for staying the impugned proceedings. At most, they are based on speculation rather than providing sufficient cause for this court to exercise discretion in favour of the applicants. Here again, the applicants are purporting to read the mind of the trial court that it shall not consider their evidence in its totality and rule in favour of the respondents without much ado.

The arguability of the appeal is not an issue for consideration at this point given that the impugned proceedings are ongoing and will

eventually result in a decision which may be appealed by any of the disputants.

The merits or demerits of the present appeal are better left for determination at the hearing thereof.

In sum, the present application is lacking in merit and is hereby dismissed with costs to the respondents.

Ordered accordingly.

**J.R. KARANJAH**

**J U D G E**

**8/7/2021**