



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 18 OF 2013

SAKINA NJERI GIKUBU ADNANA &

JACQUELINE WAMBUI GIKUBU (Suing as

the Administrators of the estate of ADNANA

ABDULREHEMAN (deceased).....PLAINTIFFS/RESPONDENTS

VERSUS

PETER GITAU MBAE..... 1ST DEFENDANT/APPLICANT

BUZEKI ENTERPRISES LTD..... 2ND DEFENDANT/APPLICANT

RULING

1) The defendants/applicants herein, took out the motion dated 9th June 2021 whereof they sought for the following orders:

i. THAT this application be certified urgent, service be dispensed with and heard ex-parte in the first instance.

ii. THAT the court be pleased to adopt the consent dated 7th June 2021 as the order of this honourable court and allow the firm of KISULU WANDATI & COMPANY ADVOCATES to come on record for the defendants after judgment in place of the firm of NYAUNDI TUIYOTT & COMPANY ADVOCATES.

iii. THAT pending the inter-partes hearing and determination of this application, this honourable court do issue an order of stay of execution of the decree herein passed on the 12th July 2018, warrants of attachment and warrants of sale of property dated 20th May 2021 pending the hearing and determination application dated 8th June 2021 at the Nairobi Court of Appeal.

iv. THAT costs be in the cause.

2) The defendants filed the affidavit sworn by Andrew Kimeli in support of the motion. The plaintiffs/respondents filed the replying affidavit sworn by Sakina Njeri Gikubu Adnan to oppose the application.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits. I have also considered the oral submissions made by learned counsel.

4) In the first prayer the applicants are seeking for leave to have the firm of Kisilu Wandati & Co. Advocates to come on record in place of the firm of Nyaundi Tuiyott & Co. Advocates to appear for the defendants/applicants. The applicants filed a consent order duly executed by the later firm of advocates authorizing the former firm of advocates to come on record in its place.

5) Under Order 9 rule 9 of the Civil Procedure Rules leave must be obtained by an incoming advocate to take over a matter from the outgoing advocate where judgement has been pronounced. In this case the outgoing firm of advocates has already executed a consent with the incoming firm of advocates to come on record.

6) I am convinced that the firm of Kisilu Wandati & Co. Advocates is entitled to the order sought. Consequently, prayer 1 of the motion is given.

7) In the second prayer the applicants are seeking for an order for stay of execution of the decree issued on 12th July 2018 pending the

hearing and determination of the application dated 8th June 2021 pending in Court of Appeal. It is the submission of the applicants that unless the order for stay is granted they may suffer grave injustice and miscarriage of justice.

8) They argued that the advocates who appeared in this suit as representing them had been appointed by their insurer by virtue of the doctrine of subrogation. They aver that those advocates did inform them of the judgment hence their failure to file an appeal within the time fixed by law. They stated that they have now filed the application dated 8th June 2021 whereof they seek for leave to appeal out of time. The aforesaid application is pending interpartes hearing before the Court of Appeal.

9) The plaintiffs/respondents opposed the application stating that The defendants and the firm of Nyaundi Tuiyott & Co. Advocates acted at their behest and not at the behest of Amaco Insurance Ltd. The plaintiffs further pointed out that the obligations owed by the 2nd defendant to third parties like them cannot be limited, stayed or tampered upon for those obligations due to them have no nexus to the insurance contract between the 2nd defendant and Amaco Insurance Co. Ltd. The plaintiffs urged this court to dismiss the defendants motion.

10) The main prayer sought in the motion is for stay of execution of the decree pending the hearing and determination of the application dated 8th June 2021 in the Court of Appeal. In the aforesaid application the defendants are seeking for leave to appeal out of time against the judgment of this court which was delivered on 12th July 2018.

11) The defendants have argued that they were not informed of the judgment of this court by the advocates who represented them. The record shows that the 2nd defendant was served with court process and it forwarded the same to its insurer which in turn appointed the firm of Nyaundi Tuiyott & Co. Advocates to defend the defendants by virtue of the doctrine of subrogation. That firm of advocates proceeded to prepare witness statements from the 2nd defendants witness namely James Onyonya. The defendants advocates recorded a consent order on liability on 7/10/2014 and even recorded a consent file written submissions on quantum.

12) With respect, I am persuaded by the arguments of the plaintiffs/respondents that the contractual relationship between the defendants and their insurer cannot be used to affect the plaintiffs' judgment. The fact that the advocate appointed by the insurer to defend the insured failed to notify the insured about the judgment cannot be a ground which can be used to grant an order for stay.

13) In the end, I find no merit in the defendants motion dated 9th June 2021. The same is dismissed with costs to the plaintiffs/ respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 9TH DAY OF SEPTEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Respondent

.....for the defendant/applicant