



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 638 OF 2017**

**SAMUEL MUREITHI MURIOKI.....1<sup>ST</sup> APPELLANT**

**UNCLE SAM'S GITHURAI LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOHN MURIU NG'ANG'A.....RESPONDENT**

**RULING**

1. The Appellants filed two applications one dated 29<sup>th</sup> November, 2017 and the other dated 4<sup>th</sup> December, 2017. Both applications were filed under the provisions of section 79 (g) of the Civil Procedure Act and Orders 42 and 51 of the Civil Procedure Rules seeking stay of execution of the judgment and orders issued by Hon. D.A Ocharo (Mr.) in CMCC No. 443 of 2013 pending the hearing and determination of the Appeal. The application dated the 4<sup>th</sup> December 2017 has since been overtaken by events.

2. The Application dated 29<sup>th</sup> November 2017 is premised on the grounds on the body of the same and on the Supporting Affidavit of **SAMUEL MUREITHI MURIOKI**. As deponed in the Affidavit, the ruling appealed against concerned an application by the Respondent to have the Applicants' Defence struck out and judgement entered in the Respondent's favour. It is deponed that the trial magistrate ignored the Appellants' Replying Affidavit dated 3<sup>rd</sup> June, 2017 and declared that the Application was unopposed and hence allowed the same as prayed. The Applicants are apprehensive that the Respondent might execute the orders to their detriment and the appeal is arguable with a high chance of success. It is further deponed that the applicants are ready to abide by any terms the court may impose and in any case they propose to deposit Kshs. 325,000/= within 10 days from the date of the ruling and a further Kshs. 325,000/= within 45 days thereafter.

3. The application is opposed by the Respondent who filed a Replying Affidavit dated 8<sup>th</sup> December, 2017 sworn by **PHYLS MUTHONI**, the Respondent's Advocate, in conduct of this matter. She depones that the said Replying Affidavit of the Appellant was never served upon the Respondent and that the Appellant ought to have placed the same in the court file, if at all it was filed, that the Application does not conform to the requirements of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and that the trial magistrate perused the Plaintiff and Defence and found the Statement of Defence raising no triable issues and proceeded to strike it out. It is further deponed that the Appellant has not demonstrated how the Appeal will be rendered nugatory as no substantial loss has been demonstrated, that the application is premature and the applicant has not provided security for the decretal sum of Kshs. 1,300,000/=. The Respondent further depones that the Appeal does not disclose arguable grounds and has no probability of success and prays that the same be dismissed.

4. The application was canvassed orally in court on 15<sup>th</sup> March, 2018 which arguments I have considered.

5. **Order 42 Rule 6 of the Civil Procedure Rules** provides the conditions for granting an order of stay of execution which are;

- a. That the application has been made without unreasonable delay;
- b. That security for the decree or order has been given; and
- c. That substantial loss may result to the Applicant unless the order for stay is made.

6. What constitutes unreasonable delay varies with the circumstances of each case. The application was filed on 4<sup>th</sup> December, 2017 whereas the orders sought to be stayed were issued on 3<sup>rd</sup> November, 2017. I find that the delay of 31 days was not unreasonable.

7. On substantial loss, it has been deponed that the Applicants will suffer loss in the event the Respondent executes the orders as the ruling was delivered without the trial magistrate having considered his Replying Affidavit. Some of the issues raised in the application like the failure by the trial magistrate to consider the Applicants' Replying Affidavit would be better considered during the substantive hearing of the appeal. At this stage I am not considering the merits of the Appeal. The Applicants are expected to demonstrate what loss they would

suffer if the status quo is not maintained. The Respondent has argued that the Applicants have not shown that he is not capable of reimbursing the decretal sum in case the appeal succeeds. It was also averred by the Respondents that, no security terms were offered by the Applicants.

8. On security the Applicants propose to deposit Kshs. 325,000/= within 10 days from the date of the ruling and a further Kshs. 325,000/= within 45 days thereafter. On the other hand, the Respondent avers that half of the decretal sum be paid to him and the other half be deposited as security.

9. Both the Applicants and the Respondent have conflicting interests which the court should consider. The Respondent has a decree which he would like to execute and on the other hand, the Applicants have a right of appeal against the decree. In dealing with the two conflicting interest, the Court of Appeal in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** stated that, *“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruits of judgment in their favour and their rights are safeguarded.”*

10. I have considered the Conflicting arguments of the parties. The Applicants have established a case for the orders sought, however, it is my finding that the security terms offered by them are not sufficient in the circumstances. Therefore, I will grant the Applicants a conditional stay on the terms that they deposit one half of the decretal sum in a joint interest earning account to be operated by the parties’ Advocates. Such amount is to be deposited within 30 days from the date of this ruling failure to which the stay orders shall lapse.

**Dated, Signed and Delivered at Nairobi this 10<sup>th</sup> Day of May, 2018.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....For the Applicant

.....For the Respondent