



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 468 OF 2010**

**STANLEY OMBEVA.....1<sup>ST</sup> PLAINTIFF**

**JOYCE MAPENZI OMBEVA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DR. NATHAN M. MURUGU .....1<sup>ST</sup> DEFENDANT**

**DR. LUCY MUCHIRI ..... 2<sup>ND</sup> DEFENDANT**

**DR. BESSIE BYAKIKA .....3<sup>RD</sup> DEFENDANT**

**THE NAIROBI HOSPITAL .....4<sup>TH</sup> DEFENANT**

**AAR HEALTH SERVICES .....6<sup>TH</sup> DEFENDANT**

**MEDICAL PRACTITIONERS & DENTIST BOARD ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiffs' suit was dismissed on 22<sup>nd</sup> July, 2015 with costs. Dissatisfied with that order they filed an appeal. This is civil appeal No. 252 of 2015 lodged in the Court of Appeal on 29<sup>th</sup> July, 2015. I am told that all the defendants have been served with a record of appeal.

Following the ruling on 22<sup>nd</sup> July, 2015 the 3<sup>rd</sup> and 5<sup>th</sup> defendants filed a bill of costs against the plaintiffs on 27<sup>th</sup> August, 2015. If the record is correct, the bill of costs was subjected to taxation and a sum of Kshs. 562,536/= approved.

There is now before me an application by way of Notice of Motion under Orders 22, 42 rule 6 and 51 rule 1 of the Civil Procedure Rules, Sections 1A,1B and 3A of the Civil Procedure Act, to enlarge the time for the plaintiffs to file an objection to the certificate of costs, and also stay of execution pending the determination of the appeal. The application is opposed and the 3<sup>rd</sup> and 5<sup>th</sup> defendants have filed grounds of opposition alongside a replying affidavit to that effect. Parties have also filed submissions and cited some authorities which I have noted.

The substratum of this cause is a botched medical procedure said to have been carried out on the 1<sup>st</sup> plaintiff, following which the plaintiffs blamed the defendants for negligence. Apart from it being an emotive matter, the threat of financial burden may have added adverse consequences. I know matters are decided on the facts, evidence and the law. At the same time, any aggrieved party has the right, subject to the perimeters of law, to pursue all available legal avenues. These include the appeal filed by the plaintiffs.

Whereas the appeal was field timeously following the dismissal of the suit, there was some delay in filing the present application. That delay has not been explained. That delay notwithstanding, looking at the provisions of Order 42 Rule 6 of the Civil Procedure Rules, I believe going by decided cases, the main issue is whether or not substantial loss may occur if the order of stay is not granted. There is a warrant and notice to show cause why the plaintiffs should not be committed to civil jail. Committal into civil jail entails deprivation of personal liberty and this may be substantial loss within the meaning of the cited provisions. In the circumstances of this case, the appeal is yet to be heard and there is a legitimate expectation that the plaintiffs should be heard before any further orders are made in this matter.

I know there is the requirement of posting security pending the determination of any appeal under those provisions. The granting of the orders sought is at the discretion of the court after weighing the interests of all parties involved, bearing in mind their competing positions.

The 3<sup>rd</sup> and 5<sup>th</sup> Defendants have a judgment in their favour which they desire to execute. On the other hand, the plaintiffs have an appeal pending hearing to challenge that judgment.

I consider that, having filed the appeal the only step remaining is the hearing thereof and therefore the conclusion of this matter, in whatever way is not far.

There is no prejudice that has been alleged shall be visited upon the 3<sup>rd</sup> and 5<sup>th</sup> defendants in the event the orders sought are granted to the plaintiffs. There is also no serious allegation against the plaintiffs that they may not eventually be in a position to settle any costs that may be awarded against them if they lose the appeal. I bear in mind the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act. The interest of justice tilts in favour of the plaintiffs at this stage.

Therefore, I am persuaded to allow the application in terms of prayers 2 and 4 of the Notice of Motion dated 6<sup>th</sup> March, 2018. The time to raise objection to the certificate of cost is enlarged by 14 days from the date of this ruling. There shall be unconditional stay of execution until the hearing of the appeal filed in this matter. The plaintiffs shall however pay the costs occasioned by this application.

**Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of November, 2018.**

**A. MBOGHOLI MSAGHA**

**JUDGE**