



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

**AT MACHAKOS**

**CIVIL APPEAL NO. 30 OF 2016**

**AFRI PACK LIMITED.....APPLICANT**

**VERUS**

**ONESMUS NDAMBUKI NZAU.....RESPONDENT**

**RULING OF THE COURT**

**The Application**

1. The Notice of Motion application before the court is dated **19<sup>th</sup> August, 2016** and prays for the surviving order that there be stay of further proceedings in **Mavoko PMCC No. 394 of 2015**. **Onesmus Ndambuki Nzau vs Afri Pack Limited** pending the hearing and determination of the appeal herein, and that costs be in the cause.

2. The applicant's case is that on 12<sup>th</sup> May, 2015, **Onesmus Ndambuki Nzau**, the Respondent herein, filed this suit in the Lower Court to wit, **Mavoko PMCC No. 394 of 2015**, against the appellant seeking damages for injuries that he allegedly sustained on 21<sup>st</sup> July, 2014. The hearing of the suit proceeded in the Lower Court on 23<sup>rd</sup> March, 2016. At the hearing of the suit, the court, on its own motion, expunged the Statement by the Appellant's witness, **Mr. Peter Nyukundi**. The appellant is aggrieved by the Ruling/Order of the Court, and has lodged this appeal.

3. The applicant has applied to the Lower Court for certified copies of the typed transcript of proceedings. This matter has been scheduled for hearing in the Lower Court on 23<sup>rd</sup> August, 2016. The appellant is apprehensive that unless this application is heard urgently and the orders sought are granted, hearing of this matter will proceed on 23<sup>rd</sup> August, 2016 thereby rendering this application nugatory, and unless the proceedings in the Lower Court are stayed, the appellant's appeal will be rendered nugatory.

**Determination**

4. There are already interim orders in the matter staying the said proceedings. The application is not opposed. It was served together with a hearing notice upon the respondent's advocates. There is an affidavit of service filed herein on 8<sup>th</sup> November, 2016 to the effect. The application is therefore not opposed. It can only be inferred that the respondent has no objection to the application.

5. In my view, the High Court should be very slow to allowing applications whose intention is to stall proceedings in the Lower Courts, unless the necessity to do the same is established. In the instant case, even if the proceedings are not stayed, the appellant can still challenge the outcome of the suit in

substantive appeal to the High Court on the judgment. This is an application which the High Court should not grant, especially if it were to be opposed. What I perceive from the silence of the respondent is that the respondent also wants this application to succeed. Perhaps the respondent also feels that there may have been a miscarriage of justice. In my view, even if there was miscarriage of justice, the appellant still has a chance to appeal the outcome of the suit.

6. Despite the above views, and very reluctantly, I allow the application as prayed and stay the said proceedings pending the intended appeal.

Orders accordingly.

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**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2017**

.....

**DAVID KEMEI**

**JUDGE**

**In the presence of:**

Osindo – for Applicant