



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

**CIVIL APPEAL NO. 48 OF 2016**

*(An appeal from the Judgment and Decree of the Principal Magistrate, Embu in CMCC No. 296 of 2015 dated 17/08/2016)*

EMILIO MURIITHI MURIUKI

EPHANTUS NJAO THUO

EXECUTIVE CURTAINS & FURNISHINGS LTD.....APPELLANTS

VERSUS

GEOFFREY JUSTUS MWENDA.....RESPONDENT

**RULING**

1. This is a ruling on two applications dated 17/10/2016 and 1/11/2016 which were heard together. The first application was filed by the appellants in this appeal who will herein be referred to as the applicants while the 2<sup>nd</sup> application was filed by the respondent.
2. The two applications were argued by way of written submissions filed by the counsels for the parties. Mithega Kariuki was the advocate for the appellants and Mugendi Karigi for the respondent.
3. In their application dated 17/10/2016, the applicants pray for orders for stay of execution pending hearing and determination of the appeal. The court granted temporary orders on 31/10/2016 in which provoked the respondent to file his application to set aside the temporary orders.
4. The applicant's grounds in support of the application may be summarized as follows:-
  - (a) That judgment was delivered in CMCC No. 296 of 2015 in favour of the respondent for Kshs. 1,565,470/= as special and general damages.
  - (b) That the respondent was dissatisfied with the said judgment and lodged this appeal.
  - (c) That the respondent is likely to execute the said judgment which may occasion him great loss and render the appeal nugatory.
5. The grounds in support of the application dated 1/11/2016 are that:-
  - (a) the orders were obtained through material and willful disclosure and deceit.

- (b) That in a similar application before the Chief Magistrate court in CMCC No. 296 of 2015 the appellant was granted conditional stay orders on 12/10/2016.
- (c) That the applicant sought the said orders to avoid complying with the conditions of the stay in order to frustrate the respondent from enjoying the fruits of his judgment.
- (d) That the orders granted on 31/10/2016 should be set aside without delay to save the respondent from suffering substantial loss.

6. The respondent argues that the applicant failed to disclose that he had obtained similar orders whose conditions he had not fulfilled as directed by the court. The ruling of Hon. Oigara granting the conditional orders was annexed to the respondent's application. The following are the orders made on 12/10/2016:-

- (a) the applicant to release ½ of the decretal sum to the legal representative of the estate of Mark Munene Mwenda within a month from to date.
- (b) The balance of the decretal sum to be deposited into an interest joint account of the counsels for the parties two months from today.
- (c) Default of any of the above condition execution to issue.

7. I have perused the submissions of the parties. The respondent did not file a replying affidavit to the application of the applicant dated 17/10/2016. Instead he filed his own application seeking to set aside the orders of 31/10/2016. Since it was agreed that the applications be heard together, the court will take the respondent's application as a response to the applicant's application dated 17/10/2016. Indeed that is what it is by looking at its content.

8. The applicant having obtained the orders for stay before the magistrate, was required to comply with the said orders or appeal against them. It was dishonest of him to file a fresh application for stay in this court without disclosing what had transpired in the magistrate's court.

9. This was true “non-disclosure and deceit” as the respondent called it. The orders were so final that they dealt with the whole issue of execution of the decree.

10. It follows therefore that this court would not have given the temporary stay had the disclosure of the orders given by Hon. Oigara been made. The same fate befalls the application inter parties for stay pending appeal. It is an abuse of the due process of the court and a waste of judicial time and resources.

11. The only option open to the applicant was to appeal against the said orders. The counsel knows very well that he was not leading his client on the right path. This was wrong and should not have happened where a part is represented by a counsel.

12. Without further ado, I dismiss the application dated 17/10/2016 with costs to the respondent to be paid by Manasseh Kariuki Kavoki, the applicant's counsel. The orders for stay issued on 31/10/2016 are hereby vacated.

13. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF MARCH, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Njoroge for Mugendi for Respondent**

**Ms. Muriuki for Mithega Kariuki for Applicant**