



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 456 OF 2015

MORINE WAIRUMU CHURE. 1ST APPELLANT

DAVID MWAI. 2ND APPELLANT

VERSUS

VICTOR OCHIENG WASONGA. RESPONDENT

RULING

1. What falls for my determination is the application by way of Notice of Motion dated the 15th day of December, 2015. It is expressed to be brought under Order 42 Rule 6 (1 & 2) Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya. The application seeks the following orders: -
 - a. Spent
 - b. That there be a stay of execution in Milimani CMCC No. 3655 of 2011 pending the hearing and determination of this application.
 - c. There be a stay of execution in Milimani CMCC No. 3655 of 2011 pending the hearing and determination of the appeal filed herein.
 - d. Costs to abide the outcome of the appeal.

The application is premised on the grounds set out on the body of the same and on the annexed affidavit of **REGINA KITHEKA** sworn on the 15th day of December, 2015.

2. The facts leading to this application are that the Respondent herein obtained judgment against the Applicants which the applicants have already preferred an appeal against. This application seeks a stay of execution pending appeal. Prior to this application the applicants filed an application for stay of execution before the subordinate court whose ruling was delivered on the 10th day of December, 2015 dismissing the same with costs.
3. A copy of the said ruling was not annexed to the affidavit in support as the Applicants had not been able to obtain the same as the trial magistrate had proceeded on leave without the same being typed.
4. It is averred that the decretal sum awarded by the subordinate court in Milimani CMCC No. 3655 of 2011, Ksh.1,671,032/- is enormous. That Respondent has not disclosed his means of income and thus should the appeal be a success he will not be in a position to refund the same. It is averred that the applicant has extremely good appeal on merits with overwhelming chances of success as evidenced by Memorandum of Appeal.
5. The Applicants depones that they are ready and willing to give security to be deposited in court for the due realization of the orders for stay and it's in the interest of justice and fairness that the

- orders sought be granted to give him an opportunity to pursue his appeal to conclusion in a meaningful way.
6. The Respondent has opposed the application by way of a replying affidavit filed in court on 29th January, 2016. He avers that the Applicants did not give any evidence at the trial and that the appeal on liability can only be an academic exercise. That justice should be done to him by not denying him the fruits of his judgment. He avers that he has offered to furnish security to refund the money should damages be reduced by the court of appeal. He contends that no substantial loss is likely to occur.
 7. The Applicants filed a further affidavit on the 9th February, 2016 wherein the deponent avers that the appeal is against both quantum and liability and its only fair that the Applicants be given an opportunity for their appeal to be heard on merits. That the Applicants have demonstrated sufficient grounds in the supporting affidavit dated 15th December, 2015 for this court to grant a stay of execution pending appeal. The deponent further avers that the Respondent's replying affidavit and annexures thereto amount to canvassing the appeal which is not appropriate at this stage.
 8. Both parties filed their respective submissions in the matter and to a great extent, they mirror the contents of their respective affidavits in support of and in opposition to the application.
 9. I have carefully considered the material before me together with the submissions and the authorities cited. The Respondent in his submissions has raised a point of law and argued that the affidavit in support of the supporting affidavit is incompetent because the deponent is not a party to the case. He further argues that a non-party who seeks to depone facts in an affidavit in proceedings must be duly authorized by the party and where there is no such authority, such a deponent becomes a busy body or inter meddler whose depositions or affidavit is inadmissible or is incompetent and it cannot be relied upon by a court to grant any relief or as proof of any fact in issue. He has urged the court to reject the affidavit for the reasons above.
 10. With regard to the further affidavit the respondent submitted that, since the affidavit in support of the application is defective, it cannot be supported by a subsequent affidavit. It is noted that though the issue was also raised before the trial court, the applicants did not address it either in that court or before this court.
 11. In my view, there are two issues for determination by this honourable court.
 1. Whether the application is competent.
 2. And whether the applicant's have met the requirement of Order 42 Rule (6) of the Civil Procedure Rules.

I will first deal with the issue of the competence of the application. The affidavit in issue is by Regina Kitheka who described himself as the legal affairs officer of the Defendant/Applicant Company. The Defendant herein is not a company but an individual. She depones that she is duly authorized by the management and directors of the Defendant to take oath.

12. The Deponent is not a party to the suit and, therefore, she required the authority of the defendant to swear the affidavit in support of the application. Save for stating that she has the authority of the Defendant, the same is not annexed to the affidavit as required by the law and to that extent, the affidavit is defective in substance. In the case of **Microsoft Corporation Vs Mitsumi Computer Garage Limited and Another** NBI HCCC No. 810 of 2011 the learned judge when dealing with a similar issue observed.

“... to conclude the only merit I find in the first point of preliminary objection is that the deponent pearman does not state that she makes the affidavit with the authority of Microsoft. To my mind that is substantial defect which renders the said affidavit incompetent. I accordingly order it struck out for that reason....”

13. I would have no reason to deviate from that finding by the learned judge. The affidavit by Regina Kitheka in support of the application dated 15th December, 2015, and sworn on the same day is hereby struck out. As a consequence, the application has no feet on which to stand and the court has been left with no option but to strike it out as well.

The Respondent will have the costs of the application.

Dated, signed and delivered at Nairobi this 2nd day of June 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Appellant***

..... ***For the Respondent***