



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 172 OF 2015**

**WADIA CONSTRUCTION LIMITED. .... APPLICANT**

**VERSUS**

**SYLVESTER LAZALIA AMALEMBA. .... RESPONDENT**

**R U L I N G**

The Appellant/Applicant has moved this court by way of Notice Motion dated 29<sup>th</sup> April, 2015 under Order 42 Rule 6, Order 54 Rule 1 and under Sections 1A, 1B and 3A of the Civil Procedure Act seeking the following Orders.

1. That this application be certified urgent and service thereof be dispensed with in the first instance.
2. That pending the inter parties hearing of this Application, this Honourable Court be pleased to order stay of proceedings, judgment issued on 11<sup>th</sup> July, 2014 and any other consequential execution process, proceedings and orders issued by the subordinate court in CMCC No. 3323 of 2014.
3. That, this Honourable Court be pleased to order stay of execution of the decree, judgment issued on 11<sup>th</sup> July, 2014 and any other consequential execution process, proceedings and orders issued by the subordinate court in CMCC No. 3323 of 2014 pending the hearing and final determination of this appeal.
4. That costs of this application be provided for.

The application is supported by the affidavit of Sharon Mukania annexed to the supporting affidavit and is premised on the grounds set out on the body of the application.

It has been deponed that on the 26<sup>th</sup> March, 2015, the Honourable M. Chesang dismissed the Applicant's application dated 19<sup>th</sup> August, 2014 seeking to set aside an ex parte judgment. The Appellant has filed an appeal against the order dismissing the application which he avers is arguable and has excellent chances of success. The Applicant has deponed that though the Appellant was served with the summons to enter appearance on the 15<sup>th</sup> June, 2014, the summons were misplaced in its offices due to ongoing change of offices and the resultant transfer of file. That by the time the GA Insurance Company Ltd instructed an advocate to enter appearance and file a defence, default judgment had already been entered in the matter.

The Applicant is apprehensive that in view of the automatic discharging of the interim stay of proceedings orders, the Respondent has an opportunity for fixing the suit for formal proof which will

occasion substantial loss to the Applicant.

A replying affidavit was filed on the 26<sup>th</sup> October, 2015 in opposition to the application wherein it is deponed that the ruling was delivered on 17<sup>th</sup> March, 2015 and not on 26<sup>th</sup> March 2016. He avers that the Applicant has not preferred an appeal since no Memorandum of Appeal has been filed, served or exhibited by the Applicant herein. That the Application herein was filed 44 days after the dismissal of the application by the lower court and therefore, there was inordinate delay in filing the same and further that the application is a delaying tactic by the Applicant to deny the Respondent an opportunity to pursue justice before the lower court. He has urged the court to dismiss the application.

In addition to the replying affidavit, the Respondent filed a preliminary objection on the 26<sup>th</sup> October, 2015 based on the ground that the supporting affidavit by One Sharon Mukania is undated and it thus offends the provision of Section 5 of the Oaths and statutory Declarations act Cap 15 Laws of Kenya.

Parties filed written submission to both applications and the preliminary objection. I have considered all the materials filed in court in support of and in opposition to the application.

I will start by considering the preliminary objection which is a fairly straight forward one. The preliminary objection states: -

1. That this honourable court be pleased to dismiss the Appellant's present application dated 29<sup>th</sup> April, 2015 with costs as it is supported by undated supporting affidavit by one Sharon Mukania which offend the provision of Section 5 of the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya.

I have perused the affidavit in respect of which the preliminary objection is based and it is noted that the copy of the said affidavit which is on record in the court file is duly dated. The relevant part of the same reads: -

***“Sworn by the said Sharon Mukania at Nairobi on this 29<sup>th</sup> day of April, 2015 before me.***

***The objection is therefore not merited and the same is dismissed.”***

On the merits of the application, the Applicant has sought for an order of stay of execution of the decree issued on the 11<sup>th</sup> July, 2014, in CMCC No. 3323 of 2015 pending the hearing and determination of the appeal. Let me start by pointing out that it is not clear to the court whether the applicant is seeking stay of execution pending appeal or stay of proceedings pending appeal.

The Respondent did not submit on the merits or otherwise of the application save for the preliminary objection. I have carefully perused the affidavit in support of the application and the submissions by the applicants. The contents of both are in support of an application for stay of proceedings. The application seeks for stay of execution of the decree issued on 11<sup>th</sup> July, 2014 pending the hearing and determination of the appeal yet it is deponed that the matter is pending formal proof. The orders sought in prayer 3 of the application are not clear and the court is not able to make any findings on the application. The affidavit and the submissions do not support the others sought.

In the premises, the application dated 29<sup>th</sup> April, 2015 is hereby struck out with costs to the Respondent.

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of October, 2016.

.....

**L NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Appellant*

..... *for the Respondent*