



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 149 OF 2014

SAID MAJID SAID.....PLAINTIFF/RESPONDENT

VERSUS

JAMES TITUS KISIA.....DEFENDANT/RESPONDENT

RULING

1. By its application dated 5/7/2016 the necessary party/applicant seeks orders that this court stays the orders granted by **Kasango J** on 5/3/2015 as well as those by **P.J.O Otieno J** on 9/10/2016 pending the hearing and determination of an intended appeal to the Court of Appeal and an alternative order that order no. 3 in the ruling of 5/3/2015 as well as order no. ii in the ruling dated 9/10/2015 be stayed pending the hearing and determination of an application for injunction and or stay to be filed in the Court of Appeal.
2. The grounds founding the application are that having not been a party before court, orders were granted by the court which have a bearing and effect on the applicant for which reason the application did file an application on dated 28/10/2015 seeking stay, setting aside, being joined to these proceedings and ultimate striking out of the suit for want of jurisdiction. That application was heard and a ruling delivered on the 7/7/2016 had it dismissed with costs.
3. The effect and ramifications of the orders of 7/7/2016 now sought to be stayed is that the earlier orders of 5/3/2015 and 9/10/2015 need be enforced if not complied with by the defendant. It is that enforcement the Applicant seeks to stall by an order of stay sought by the application of 5/7/2016. The application invokes the overriding objective of the court and inherent powers of the court under sections 1A, 1B & 3A of the Act and Order 42 Rule 6 of the Rules.
4. For this court to exercise its discretion to grant stay, the parameters are well set. There must be a pending appeal and challenging a decree or order capable of execution and which if executed will render the pending appeal of no value or just worthless of pursuit and therefore in the words of the 'statute substantial' loss to the appellant.
5. For purposes of an appeal to the court of appeal an appeal is instituted when a notice of appeal is filed. The applicant herein did lodge a notice of appeal on 20/6/2016. Therefore from that notice of Appeal the only decision that is sought to be appealed against is that of 7/6/2016. That decision did no more than refuse to grant to the applicant orders of stay, setting aside, joinder to the suit and striking out the suit on account of lack of jurisdiction. The applicant is indeed wholly entitled to challenge that order by an appeal to the court of Appeal what is however in dispute is whether the application as framed is capable of attracting orders of stay.

6. The question that the court has to pose and answer is whether that order is capable of enforcement or not. I entertain no doubt that it is a negative order not demanding any positive action nor restraining any such positive action. I see no part of it that is capable of enforcement and therefore meriting an order for stay. That is a fact that even the applicant seems to wholly and fully appreciate. I say the applicant appreciates that fact and the position of the law because, while it has sought to challenge the orders of 7/6/2016 it has not sought any stay against the same. Instead, it seeks to stay orders of 5/3/2015 and 9/10/2015 both of which it has not sought to appeal against.

7. That position would place this application outside the realm of Order 42 Rule 6 in that there is no appeal preferred against the orders sought to be stayed. If the court was therefore minded to grant stay, it could grant stay for any other reasons but not on an account of a pending appeal. That clearly leaves this court to consider the application for stay under any other provision of the law but not Order 42 Rule 6.

8. That further leaves the court to consider whether or not the court can invoking its overriding objectives and inherent jurisdiction to grant stay of orders that have not been challenged by an appeal and whether there are situations where the court can orders stay of execution against an order that demands no action by a party to the litigation.

9. Whether or not to grant stay is a matter of judicial discretion. That discretion must be exercised on facts and reasons founded on law or crystalized principles of law. It is equally true that the court of law can only determine a dispute between the parties as pleaded and only grant to them prayers sought and not otherwise.

10. For the application before me, to start with, I am not aware that the law allows this court or indeed any other court to grant stay pending the filing and determination of an application for injunction or stay in the appellate court. For that matter I take the view that prayer 5 is alien and misconceived and incapable of being granted.

11. Equally, having said that the application cannot be fitted within the dictates of Order 42 Rule 6, I find that even Prayer 4 lacks merit and the same is equally dismissed.

12. Noting that after the matter was heard interpartes only the two prayers (4 & 5) and the consequential prayer on costs were due for consideration by the court. Having found the two prayers to lack merit the entire application fails and is dismissed with costs to the plaintiff/respondent who opposed it.

Dated at Mombasa this **2nd** day of **December 2016**.

HON. P.J.O. OTIENO

JUDGE