REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA T BUSIA

CIVIL APPEAL NO.16 OF 2014

LEONARD ONYANGO OSAO &……………APPELLANTS/APPLICANTS

JACTON ODINGA

VERSUS

CHRISTANTUS KENNETH ODUOR ……………………………RESPONDENT

R U L I N G

1) The Application before Court is the Notice of Motion dated 3rd November 2014 in which the Applicants seek the following substantive order;

> **"THAT the execution and the proceedings to enforce the Judgment and Decree herein be stayed pending the hearing and determination of this appeal being BUSIA HCCA NO.16 and BUSIA HCCA NO.15 & 17 OF 2014."**

This is a second application by the Applicants having first sought stay orders before the Trial Court. That Application was dismissed on 30th of October 2014.

2) In the Affidavit in support of the Application, Faith Malimu swore an Affidavit on 30th November 2014. She is the Advocate in conduct of the matter on behalf of the Applicants. She depones that the Applicants were Defendants in Busia CMCC 207, 208, and 212 all of 2010. The Applicants being aggrieved by the decision of the trial Court have appealed against those decisions. In paragraph 8 of the affidavit she states:-

> **"THAT I honestly believe that the execution will render this appeal and application nugatory in that the respondents are men of straw incapable of effecting a refund in case of the appeal succeeding and the applicant shall suffer irreparable loss and damage."**

3) In opposing the Application, the Respondent through his advocate Mr. Omondi filed an affidavit sworn on 7th of November 2014. In a nutshell the position of the Respondent is that the judgments of the Lower Court were reached by consent of the parties on the question of liability so that the only contentious question is that of quantum. Counsel also took the position that the instant Application is *res judicata* that dismissed by the Subordinate Court on 30th October 2014. In addition it was argued that the Application is supported by incompetent affidavits as they were sworn by Counsel and not the Applicants.

4) As a preliminary issue this Court was asked by the Respondent to find that this Application is

res judicata. Counsel made the point that the principle of *res judicata* applies to Applications as it does to suits. It was the view of Counsel that although Order 42 Rule 6 purports to confer a right to a party whose Application is dismissed by the Lower Court to move to the High Court for fresh orders of stay that Rule would be in direct conflict with Section 7 of the Act and since Order 42 Rule 6 is subsidiary legislation it must give way to substantive legislation (Section 31 of the Interpretation and General Provisions Act).

5) The argument by the Respondent is not new and has been held to be incorrect. (see for example, the Decision of Muchelule J in Surjit Singh Transporters –vs- Luke Nahashon Kutayi [2012] eKLR.) Order 42 Rule 6(1) reads,

> **"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and <u>any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside".</u>** (My emphasis)

The wording of that Rule suggests that the second Application contemplated by the Rule is really in the nature of an Appeal. The word used is "aggrieved". The High Court is in the second Application invited to review the correctness of the order of the Lower Court and to either affirm it or set it aside. In so far as the second Application is in the nature of an Appeal, it cannot be said to be *res judicata* the first Application.

6) I must however accept the argument that the Application before Court is without merit. Under Order 42 Rule 6 an Applicant is enjoined to establish the following:

1. THAT substantial loss may result to the Applicant unless the Application is granted.
2. THAT the Application has been made without unreasonable delay.
3. THAT the Applicant has furnished such security as the Court orders for the due performance of such decree or order as may ultimately bind the Applicant.

7) In an attempt to demonstrated that the Applicants shall suffer substantial loss, Counsel for Applicants deponed as follows:-

> **"8 THAT I honestly believe that the execution will render this Appeal and Application nugatory in that the respondents are men of straw incapable of effecting a refund in case of the Appeal succeeding, and the Applicant shall suffer irreparable loss and damage".**

The Applicants submitted that once an Applicant in an Application of this nature expresses doubt on the Respondents' ability to refund the Decretal sum, the evidential burden shifts to the Respondent to rebut that assertion. And that argument is correct save that it must be emphasized that the apprehension by the Applicant must be well grounded. In other words, the evidential burden can only be placed on a Respondent once the Applicant has set out a reasonable basis for doubting the Respondents' ability to refund the ultimate Decree.

8) In the Application before me the person expressing the doubt on the Respondents' ability to refund the Decretal sum is the Applicants Counsel. On what basis does she express that doubt? Regard

has to be made to the provisions of Order 19 Rule 3(1) of The Civil Procedure Rules which provides:-

> **"Affidavits shall be confined to such facts as the deponent is able of his knowledge to prove;**
>
> **Provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof".**

Does she have actual knowledge that the Plaintiff in the three suits may be men of straw? No, she does not. If as Counsel depones she believes her statement then what is the source and grounds for that belief? This she does not show. It is not sufficient for the Applicants Advocate to simply invoke the proverbial line that "the Appeal will be rendered nugatory because the Respondents are men of straw incapable of refunding the Decretal sum in case of a successful Appeal". I am afraid the Applicants have not laid a basis to require the Respondent to prove their fortunes. The corollary is that the Applicants have failed to prove that they may suffer substantial loss if stay is not granted. The result is that the Application of 3rd November 2014 fails and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 4TH DAY OF MARCH, 2015

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

KADENYI………………………………………………COURT CLERK

…………………………………………………..FOR THE APPELLANT

……………..……………………..……………FOR THE RESPONDENT