



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS,**  
**CIVIL APPEAL NO. 413 OF 2013**

**MASTERMIND TOBACCO (K) LTD..... APPELLANT**

**-VERSUS-**

**JANE MIYOGO AND JARED MORIASI ONYANCHA**

(Suing as the personal representatives and administrators of the estate of  
**JACKSON NYAKUNDI ONYANCHA).....RESPONDENT**

**RULING**

Mastermind the Tobacco (k) Ltd the appellant/ applicant has filed the notice of Motion dated the 4/9/13, it is brought under Order 42 Rule (6) orders 51 rule (1) of the Civil Procedure rule 2010 and section 1A, 1B & 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

The applicant seeks that the court makes an order for stay of execution of judgment issued by the Principal Magistrate Miss S. Atambo on the 19<sup>th</sup> July 2013 in Milimani CMCC 7914 of 2007, Jane Miyogo & Jared Moriasi Onyancha (suing as the personal representative and Administrators of the estate of Jackson Nyakundi Onyancha Vs. Mastermind Tobacco (k) Ltd pending the hearing and determination of the appeal. The applicant seeks that costs of the application be provided for.

The application is supported by the affidavit of Antony Muiro a Senior Legal counsel of the applicant plus five grounds stated on the face of the application.

The application was opposed.

The respondent filed grounds of opposition on the 29<sup>th</sup> of September 2013.

In his supporting affidavit the applicant states as follows; that it is dissatisfied with the judgment of the court delivered on the 19<sup>th</sup> July 2013 by Hon. P M. Miss Atambo and intends to appeal against the entire judgment; that they have applied for a certified copy of the judgment and proceedings in Milimani CMCC No. 7914/09 as evidenced in their letter dated 24<sup>th</sup> July 2013; that the court may to make an order of stay

of execution of the judgment against the applicant on such terms as the court may deem just to grant; that it is willing to furnish the court with such security as the court directs; that the applicant has an arguable appeal with a high probability of success as demonstrated in its memorandum of appeal dated 26<sup>th</sup> July 2013 filed in court on the 29<sup>th</sup> July 2013 and that if the stay of execution is not granted the intended appeal if successful will be rendered nugatory. That it will suffer immeasurable should the respondent execute the judgment against it.

In the grounds of opposition the respondent states that Hon. Principal Magistrate M/s Atambo made correct findings and holding in her judgment in CMCC No. 7914 of 2007 on 19<sup>th</sup> July 2013 and that the appellants memorandum of appeal does not disclose material facts to lay their appeal and therefore appeal is frivolous, vexatious and an abuse of the process of court.

At the inter partes hearing on the 29<sup>th</sup> of January 2014 Miss Kinyanjui reiterated what is deposed by the applicant and added that the decretal sum of Ksh.2,324,920/- is a substantial sum and if the stay is not granted and the respondent proceed to execute the applicant's operations will be interrupted as there is a high probability that their tools of trade will be attached. That the application was brought without delay as the 30days stay lapsed on the 19/8/13 and they filed their application on the 4/9/13. On security she argued that the applicant has deposited a sum of Kshs. 1.5 million which is sufficient as that it shows that the applicant is committed and has a good will. That the memorandum of appeal discloses numerous issues for determination at the appeal. That there is no evidence that the respondent if paid the decretal sum and the appeal succeeds that she will be able to refund the sum. On the grounds she stated that the first ground can only be determined at the appeal and that the memorandum of appeal discloses trial issues.

Ms. Swanya for the respondent argued that it was upon the applicant to explain the substantial loss. That it has failed to do so. That the applicant has a lot of money and that the argument that their activities will be disrupted is not true. That suit is of 2002 and the applicant seeks to further delay the matter. That if stay is granted the applicant should be granted a limited time and that the applicant has failed to show the stage of the proceedings in the lower court.

I have carefully considered the affidavits and the submission made in court. In determining this application am guided by the provisions of Order 42 rule 6(2) which provide that no order for stay of execution shall be made unless the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on her has been given by the applicant.

The judgment the applicant intends to appeal against was delivered on the 19/7/13. The memorandum of appeal was filed on the 29<sup>th</sup> July 2013. The application for stay was filed on the 4/9/13. The applicant has shown that there has been no inordinate delay. On the substantial loss my understanding of the appellant's submissions is that their tools could be attached and that the respondent may not be able to refund the sum. The decretal sum is to the tune of Kshs.2,324,920/-. There is no response from the respondent that if she is given the said sum which is quite substantial she will be able to refund it, the applicant is therefore likely to suffer a substantial loss. The applicant has also shown good will and commitment by depositing a sum of Ksh.1,500,000/- in court.

The applicant has also demonstrated that their memorandum of appeal has disclosed issues to be tried at the appeal. There are the issues raised on the award and failure to consider evidence adduced on where the deceased was working on the fateful day. These are just a few. I find that there is merit in the application and I grant prayer No. 3 of the application dated 4/9/13.

The applicant shall ensure that the appeal is heard within the year 2014. The money deposited in court shall be transferred to a joint earning interest account in a bank in Kenya to be opened in the incomes of counsels for the parties. The same to be done within 45 days from the date of this ruling. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 7<sup>th</sup> Day of February 2014.

**R. E OUGO**

**JUDGE**

.....FOR THE APPELLANT

.....FOR THE RESPONDENT

.....COURT CLERK