



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 98 OF 2000**

SAMUEL AYIENDA MOKUA ..... PLAINTIFF

**VERSUS**

TINGA TRADING CO. LTD .....DEFENDANT

**RULING**

1. What is before me is the plaintiff's application dated 10<sup>th</sup> February 2014 in which the plaintiff has sought an order for stay of all proceedings in this suit pending the hearing and determination of Kisumu Court of Appeal Civil Appeal No. 160 of 2010. The application has been brought on the ground that there is a pending appeal at the Court of Appeal at Kisumu awaiting hearing and determination which appeal arose from the decision made in these proceedings. The plaintiff has contended that it will be imprudent to allow any further proceedings in this suit while the said appeal is pending because there is real danger of this court making a determination in this matter which may contradict the decision that may later be made in the pending appeal.
2. In his affidavit sworn on 10<sup>th</sup> February 2014 in support of the application, the plaintiff has stated that, on 25<sup>th</sup> June 2010 he filed an appeal in the Court of appeal at Kisumu against the decision of Musinga J. made on 22<sup>nd</sup> April 2010 and that the said appeal is pending hearing and determination. The plaintiff has stated further that since that appeal is pending hearing and determination, these proceedings should be stayed so as to avoid a situation whereby this court makes a decision which may conflict with the decision that would be made in the pending appeal. The plaintiff's application was opposed by the defendant through grounds of opposition dated 19<sup>th</sup> February 2014. The defendant contended that the plaintiff's application is vexatious and an abuse of the court process. The defendant contended further that the application lacks merit, is *res judicata* and bad in law.
3. On 19<sup>th</sup> February 2014, I directed that the plaintiff's application be heard by way of written submissions. The plaintiff filed his written submissions on 4<sup>th</sup> March 2014 while the defendant filed its written submissions in reply on 15<sup>th</sup> May 2014. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered grounds of opposition filed by the defendant in opposition to the application. Finally I have considered the written submissions by the plaintiff and the defendant's advocate. The plaintiff's appeal which is pending in the Court of Appeal at Kisumu is against the decision of Musinga J. (as he then was) that was made herein on 22<sup>nd</sup> April 2010 in which he declined to set aside, vary and/or vacate the interlocutory judgment that was entered herein by the deputy registrar against the plaintiff on 8<sup>th</sup> January 2001 and the consent order dated 28<sup>th</sup> June 2001.
4. The plaintiff's contention is that since he has filed an appeal against the said decision, it is only prudent that any further proceedings herein be stayed pending the hearing and determination of that appeal. The plaintiff's contention is that there is real danger of this court making orders in this suit which may be in conflict with the ultimate decision that would be made by the court of appeal. It is on account of the foregoing that the plaintiff has sought the stay of any further proceedings herein. The principles applicable to applications for stay of proceedings are those that apply to applications for stay of execution. Under Order 42 rule 6 (2) of the Civil Procedure Rules, the court is barred from making an order for stay of execution unless it is satisfied that substantial loss may result to the applicant if the order is not made and that the application has been made without unreasonable delay. The onus was upon the plaintiff to satisfy this court that unless the proceedings herein are stayed the plaintiff will suffer substantial loss. I must say that the plaintiff

- has not come out clearly in this respect. The plaintiff has not told the court what proceedings are pending herein and how the hearing and determination thereof may impact on the outcome of the pending appeal.
5. The present application was filed by the plaintiff when he was served by the defendant's advocate with a hearing notice dated 21<sup>st</sup> November 2013 for the hearing of the plaintiff's application dated 22<sup>nd</sup> August 2008 pending herein. I have perused the said application dated 22<sup>nd</sup> August 2008. In my view the orders sought in the said application seems to be on the same terms as the orders that were sought in the plaintiff's application dated 29<sup>th</sup> April 2009 that was disposed of by Musinga J. on 22<sup>nd</sup> April 2010. Infact, in his application dated 29<sup>th</sup> April 2009, the plaintiff had sought to have the said application either heard concurrently with the application dated 29<sup>th</sup> April 2009 or consolidated with the said application an order which the court declined to grant. Apart from that application, the only other application which is pending herein is also by the plaintiff. The same is dated 24<sup>th</sup> June 2013. In the application, the plaintiff has sought orders *inter alia* that Moco Auctioneers do tender accounts and for the discharge of some orders that were issued in respect of LR Lietego Settlement Scheme/83. The plaintiff has not explained to this court how the plaintiff would be prejudiced if the plaintiff was to proceed with his two applications pending herein. In the circumstances, I am not persuaded that the plaintiff will suffer substantial loss unless the proceedings herein are stayed. Again, I am of the opinion that the plaintiff's application has not been brought timeously. The plaintiff's appeal was filed in the year 2010 soon after the decision of Musinga J. The application herein seeking stay of proceedings has been made more than three (3) years after the said appeal was lodged. I am of the view that the delay in bringing the present application is unreasonable and the same has not been explained.
  6. Due to the foregoing, I am not satisfied that the plaintiff has satisfied the conditions for granting the orders of stay of proceedings sought herein. That being my finding, I find no merit in the plaintiff's application dated 10<sup>th</sup> February 2014. The same is hereby dismissed with costs to the defendant.

**Delivered, signed and dated at KISII this 11<sup>th</sup> day of July, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Plaintiff present in person

Mr. Nyatundo h/b for Bosire for the defendant

Mr. Ombasa

Court Clerk.

**S. OKONG'O**

**JUDGE**