



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL APPEAL NO 456 OF 2012**

**THEOPHILUS MUTINDA MUTUA.....APPELLANT**

**V E R S U S**

**ONESMUS MUTINDA KIMINZA.....RESPONDENT**

**R U L I N G**

1. The Appellant in this appeal is acting in person. Apparently he was also acting in person before the lower court. The Appeal is against an interlocutory order of the requiring him to sign and approve some audited financial statements for the years 1997 to 6<sup>th</sup> March, 2006 placed before the lower court. It is not yet apparent if the audited financial statements were taken upon order of the court.
2. The Appellant's case appears to be that his signing and approval of the audited financial statements as he is required to do by the lower court would radically prejudice his case before that court where he is the defendant. The case there appears to be a partnership dispute between him and the Respondent (plaintiff). There are also some two interested parties.
3. The Appellant has now applied by **notice of motion dated 26<sup>th</sup> March, 2014** for stay of the proceedings before the lower court pending hearing and determination of his appeal. His main ground is that if the suit before the lower court is allowed to proceed to conclusion before his appeal is heard and determined, the appeal will be rendered nugatory.
4. The Respondent has opposed the application by his **replying affidavit filed on 3<sup>rd</sup> April, 2014**. I have read that affidavit. The main grounds of opposition emerging therefrom and also from the submissions of his learned counsel are that the appeal is incompetent for want of leave to appeal; that the formal order appealed against is not before this court; and that there will be no prejudice if the suit before the lower court proceeds as the Appellant will have an opportunity to cross-examine; and that the appeal will not be rendered nugatory.
5. The issue of whether or not the appeal is competent will be better canvassed and argued upon a formal application in that regard or upon a proper preliminary objection being taken. It is only then that the Court can properly examine the application before the lower court, its ruling thereon against which the present appeal was lodged, and the relevant rules of procedure, to see if leave to appeal was required. In short that is an issue for another day.
6. The complaint that the formal order appealed against is not annexed to the application is a technically that cannot defeat the Appellant's application, particularly when the Appellant has complained that the lower court has persistently refused to supply him with copies of its proceedings and ruling.
7. The Court has not had an opportunity to see the audited financial statements in contention. So the Court has no way of gauging their import to the partnership between the parties. It is my considered view however that the Appellant should be allowed first to prosecute his appeal against the order requiring him to sign and approve them before the suit before the lower court is allowed to be concluded. From the material now before the Court the possibility cannot be excluded that if the suit before that court is permitted to proceed to conclusion the Appellant's appeal would be rendered nugatory.

**8.** In the event I will allow the application. Proceedings pending before the lower court are hereby stayed pending disposal of this appeal.

**9.** To enable the expedient disposal of the appeal, the lower court is hereby directed to supply to the Appellant, and indeed the other parties, typed copies of its proceedings and ruling without any further delay. The original lower court record should also be forwarded to this Court for the same purpose without delay. Costs of this application shall be in the appeal. Those will be the orders of the Court.

**DATED AND SIGNED AT NAIROBI THIS 9<sup>th</sup> DAY OF JULY 2014**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 11<sup>TH</sup> JULY DAY OF JULY 2014**