



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 70 OF 2014**

**BAYA CHARO TSOFA.....1<sup>ST</sup> APPELLANT**  
**N. A. SHAH.....2<sup>ND</sup> APPELLANT**

**-V E R S U S-**

**DAUDI DARA JARA.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Malindi Ag. Senior Principal Magistrate Hon. Nathan Shiundu*

*delivered on 29<sup>th</sup> April 2014 in the Chief Magistrate’s Court at Malindi Civil Suit No. 190 of 2010)*

**BETWEEN**

**DAUDI DARA JARA.....PLAINTIFF**

**V E R S U S**

**1. BAYA CHARO TSOFA.....1<sup>ST</sup> DEFENDANT**  
**2. N. A. SHAH.....2<sup>ND</sup> DEFENDANT**

**AND**

**CHARO KAZUNGU KARISA (legal representative of the**  
**Estate of BAYA CHARO KAZUNGU (DECEASED).....PLAINTIFF**

**V E R S U S**

**1. BAYA CHARO TSOFA..... 1<sup>ST</sup> DEFENDANT**  
**2. N.A. SHAH.....2<sup>ND</sup> DEFENDANT**

**CMCC NO. 188 OF 2010 – MALINDI**

(All consolidated by consent of parties on 14<sup>th</sup> September 2011 with a view to determining the issue of liability)

### RULING

1. The Appeal filed herein seeks to challenge the judgment of the decision in **Malindi Chief Magistrates Civil Case No. 190 of 2010**. By that judgment the Learned Trial Magistrate awarded Respondent Kshs. 402,000/- in general damages.

2. By Notice of Motion dated 3<sup>rd</sup> June 2014 Appellants seek stay of execution pending the hearing and determination of this appeal. Order 42 Rule 6(2) of the Civil Procedure Rules requires an Applicant for stay of execution pending appeal to meet three hurdles. Firstly the Applicant has to show that he will suffer substantial loss if stay of execution is not granted, secondly that the application for execution was made without undue delay, and thirdly that the Applicant will meet the order of the Court of security for the due performance of the Decree.

3. The Applicants deponed in the affidavit sworn by the 2<sup>nd</sup> Appellant thus-

- **THAT I aver that substantial loss will result to the appellants occasioning us irreparable loss and damage if stay of execution pending the hearing and determination of this application and appeal is not granted.**
- **THAT the amount of decree is quite substantial and if paid over to the Respondent it will not be easily recoverable if the appeal is successful. In this case the appeal will be rendered nugatory. The substantial loss and irreparable damage will also be occasioned by the fact that the amount will be out of reach of the Appellant.**
- **THAT the Plaintiff in the Subordinate Court didn't adduce any evidence to show that he is a man of means hence the applicants are reasonably apprehensive that they would not be able to get back the amount they will have paid to the Respondent if the appeal is successful hence its fair and reasonable that the amount be deposited in a joint interest earning account.**

4. In response to that deposition Respondent simply stated in his Replying Affidavit viz-

**“That my Advocate on record informs me which information I verily believe to be true that the Appellant has not proved substantial loss ....”**

5. My take on that is that once Appellant deponed that he was unaware of what assets Respondent has which he could use to repay the decretal sum if the appeal was successful the evidential burden shifted to Respondent to prove Appellant would not suffer substantial loss if stay was not granted. This was stated in by the Court of Appeal in the case **ABN AMROBANK, N.V. -Vs- LE MONDE FOODS LTD CIVIL APPLICATION NO. NAI 15 OF 2002** stated-

**“The Bank in this case is required to pay over to the Respondent over Kshs. 30 million. An Officer of the Bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an applicant in the position of the Bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy**

**for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”**

Respondent did not shift that evidentiary burden and this Court does make a finding that Appellant has shown he will suffer substantial loss if stay of execution is not granted.

6. The second hurdle is surmounted by Appellant. The Trial Court’s Judgment, the subject of this appeal was delivered on 29<sup>th</sup> April 2014. The Memorandum of Appeal was filed on 27<sup>th</sup> May 2014. The application for stay of execution was filed on 3<sup>rd</sup> June 2014. In my view the Appellant approached this Court with his application without unreasonable delay.

7. Whether or not security should be ordered, to be provided by Appellant, for the due performance of the decree is largely within the province of the Court. It is the Court in exercise of its discretion that will order for such security but it does assist the Court, as in this case, where a party clearly states that it is willing to provide security that may be ordered. In my view since this is a monetary decree the interest of justice would best be served by ordering the decretal sum be deposited in interest bearing account of the Advocates representing the parties herein.

8. In conclusion therefore I grant the following orders-

**a. Stay of execution of Malindi Chief Magistrates Civil Case No. 190 of 2010 is granted pending the hearing and determination of this appeal on condition that Appellants does provide within thirty (30) days from this date hereof the decretal sum which sum shall be deposited in an interest bearing account in the joint names of the Advocates in this matter.**

**b. For the avoidance of doubt stay of execution as provided in (a) above shall automatically be lifted if Appellants do not provide the decretal sum as set out in (a) above.**

**c. The Costs of Notice of Motion dated 3<sup>rd</sup> June 2014 shall abide with the outcome of the appeal.**

**d. Since the primary suit was before a Magistrate Court under the jurisdiction of the Malindi High Court, I hereby order this appeal to be transferred to Malindi High Court for determination.**

**DATED and DELIVERED at MOMBASA this 6<sup>TH</sup> day of NOVEMBER, 2014.**

**MARY KASANGO**

**JUDGE**