



**REPUBLIC OF KENYA**

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

Civil Case 75 of 2011

**ISAAC MAINA IHOMBA T/A FOSUNG TRADERS.....PLAINTIFF**

**- VERSUS -**

**THE PERMANENT SECRETARY, OFFICE OF THE VICE PRESIDENT  
& MINISTRY OF HOME AFFAIRS.....1<sup>ST</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

- 1.** Before the Court is a Notice of Motion dated **18<sup>th</sup> May, 2012**. The application is taken out under **Order 42 Rule 6(1), Order 51 Rule 1** of the **Civil Procedure Rules, Sections 1A and 3A** of the **Civil Procedure Act** and **Article 159** of the **Constitution**. The application is seeking for orders that, pending the hearing and determination of the intended appeal by the Defendants against the Ruling dated **24<sup>th</sup> April, 2012** by Justice Odunga, there be an order of stay of execution of the said Ruling and Orders made therein, and consequential proceedings.
- 2.** The application is supported by the affidavit of **NORBERT OKUMU**, State Counsel and is based on the following grounds:-
  - a.** By the ruling delivered on **24<sup>th</sup> April 2012**, the Defendants are in real danger of judgment in default of defence being entered against them pursuant to leave granted to the Plaintiff to apply for judgment in default.
  - b.** The Defendants risk suffering substantial loss if judgment in default is entered against them.
  - c.** By extension, the citizens who are tax payers risk losing as it is their taxes that will be used to liquidate the Plaintiff's claim.
- 3.** The brief background of the application is that, by a Plaint dated **3<sup>rd</sup> March 2011**, the Plaintiff brought a suit against the Defendants claiming an amount of **Kshs. 2, 239,750/=** against the **1<sup>st</sup>** Defendant being the purchase price for goods supplied and delivered to the Nairobi Remand prison and Kamiti Y.C.T.C. The Plaintiff further filed a Notice of Motion on **20<sup>th</sup> December, 2011** seeking for leave to enter judgment in default of defence against the Defendants, for reasons that the Defendants had failed to file their defence in time. The Defendants filed a Replying Affidavit dated **8<sup>th</sup> March, 2012** and filed on the same day in opposition of the Plaintiff's application. By a Ruling dated **24<sup>th</sup> April, 2012** the Honourable Justice Odunga allowed the Plaintiff's application. It is the said Ruling that the

Defendants/Applicant intend to appeal against.

4. The application was prosecuted by way of written submissions.

5. The Defendants submitted that they intended to appeal against the Ruling of Honourable Justice Odunga dated **24<sup>th</sup> April, 2012** and to that end, they had filed a Notice of Appeal on **8<sup>th</sup> May, 2012**. The Defendants also submitted that the Plaintiff's claim was for a huge sum of money and the Defendants stood a risk of losing the said amount if the stay order was not granted and the Plaintiff proceeded to execute his decree. The Defendants further submitted that, the Plaintiff, being a juristic person, it would be a toll order to locate him and recover any monies paid out to him in the event that the Defendant's appeal is successful.

6. It was also the Defendants' submission that their application was brought without unreasonable delay. The Defendants concluded by submitting that the provision of security was unnecessary for the reason that the Defendants were Government of Kenya offices and their availability was guaranteed.

7. The Plaintiff in opposing the application, submitted that the Plaintiff would suffer hardship and loss as the sum had been owed for quite some time and that the state wanted to repress and cause hardship to one of its citizens for no apparent good reason. The Plaintiff submitted that the Defendants/Applicant did not immediately and timely file the Notice to Appeal against the Court's decision. The Plaintiff further submitted that the Defendants/Applicant had not shown, by annexing the intended Memorandum of Appeal, the grounds upon which the appeal is founded. The Plaintiff finally urged the Court to dismiss the application with costs.

8. I have considered the application in light of the submissions by counsels for the respective parties. For the applicant to succeed on this application, it must fulfill the following conditions which are set out under **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010:-**

a) that the applicant may suffer substantial loss unless an order of stay is granted; and

b) that the application for stay must be brought without unreasonable delay; and

c) that the applicant must give an undertaking as to security.

9. On the first condition, the argument put forth by the Defendants is that the Plaintiff operates business under a business name and that the same may pose serious challenges when it comes to enforcing one's legal right against them. The Defendants' concern is that it may be a toll order to locate the Plaintiff and recover monies paid out to him in the event that their appeal is successful. The Defendants have not substantiated the aforesaid allegations. It is common ground that individuals who operate under business names can sue and be sued and therefore one can enforce their legal rights against them. The Defendants have also not demonstrated how it would be difficult to locate the Plaintiff.

10. Further, it is the Defendants' argument that the Plaintiff's claim is for a huge sum of money and they stand a risk of losing the said amount if the stay order is not granted and the Plaintiff proceeds to execute his decree. It must be noted that there is no decree yet in this matter. That notwithstanding, the Defendants have not given sufficient evidence as to how they are going to suffer substantial loss if stay is not granted. In any event where the decree or order is in monetary terms, any loss incurred can be compensated for by way of damages.

11. The second condition is that, the applicant must demonstrate that the application has been made without unreasonable delay. The Ruling from which the Defendants are seeking an appeal was delivered on **24<sup>th</sup> April, 2012**. The application herein was filed in Court on **22<sup>nd</sup> May, 2012** which is nineteen (19) working days from the date of the Ruling. I am satisfied that the instant application was thus made without unreasonable delay.

12. On the third and last condition, the applicant submitted that the provision of security was not

necessary as the Defendants were Government offices and their availability was guaranteed. The provisions of **Order 42 Rule 6(2)** as regards stay are clear. One of the requirements is that the applicant provides security and there are no exemptions to that. The fact that the Defendants are Government offices is not in any way a guarantee that the Plaintiff will be paid the money owed to him in the event that the Defendants' appeal does not succeed. Therefore, the issue of security cannot be undermined. In the circumstances, this Court finds that the Defendants have not satisfied the requirement of undertaking to furnish security as the Court may direct.

**13.** In granting an order for stay, the court should also pay regard to the overriding objective to do justice to the parties as captured at **Section 1A** and **1B** and as read together with **Section 3A** of the **Civil Procedure Act**. It is clear from the Court record that the Defendants have not been keen in defending this matter either deliberately or by its own omission. The Defendants have also not annexed the intended memorandum of appeal, indicating on what grounds the appeal is founded. Therefore, it is difficult to determine whether the Defendants deserve the orders they are seeking for.

**14.** In view of the foregoing, this court is not satisfied that it should grant the stay of execution orders pending appeal as prayed by the Defendants. In the upshot, the Notice of Motion dated **18<sup>th</sup> May, 2012** is hereby dismissed. The Defendants shall bear the costs of the application.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 2<sup>ND</sup> DAY OF OCTOBER 2012**

**E. K. O. OGOLA**

**JUDGE**  
**PRESENT:**

*Mugambi H/B Kanyi for the Plaintiff/Respondent*

*M/s Wamboi for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant*

*Teresia – Court Clerk*